THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL REFERENCE NO. 11 OF 2014

KAITALE JULIUS & 3 OTHERS :: PETITIONERS

VERSUS

UGANDA :: RESPONDENT

CORAM:

Hon. Mr. Justice S B K Kavuma, DCJ (E)
Hon. Lady Justice Solomy Balungi Bossa, JA
Hon. Lady Justice Elizabeth Musoke, JA
Hon. Mr. Justice Cheborion Barishaki, JA
Hon. Lady Justice Catherine Bamugemereire, JA

JUDGMENT

The petitioners in this case are accused persons in a Criminal Case pending in the Chief Magistrates Court of Mpigi namely; Kaitale Julius A3, Kato Angelo Bisobye A4 and Namusisi Jane A4. They were charged jointly with other accused including Serugo Simon (A1) and Wassaja Eddy (A2) and Juuko Moses (A5). The last three are not petitioners in this case.

On 12 December 2013, all the said accused were charged with the Murder of one Joseph Lwanga on 27 September 2011 and remanded to Kigo Prison. On 3rd September 2013, the Chief Magistrate's Court committed them to the High Court for trial.

On 17 May 2013, the High Court Nakawa (*Mwondha J.*) admitted Namusisi Jane A6 to bail vide Nakawa Criminal Application No. 27 of 2013. In November 2013, the High Court (*Masalu Musene J.*) admitted Juuko Moses A5 to bail. The criminal case was scheduled for hearing in March 2014 as Criminal Session Case No. 120 of 2014. On the date of the scheduled hearing before *Nahamya J.*, A1 and A2 pleaded guilty to the offence. Both were convicted and sentenced to 12 years' imprisonment each. According to their guilty plea, one Kamya hired them to kill the deceased. They apparently exonerated all the petitioners in their charge and caution statements.

The petitioners pleaded not guilty to the indictment. Counsel for the prosecution indicated that in light of the guilty plea of A1 and A2 and what had transpired in the High Court, it could not proceed with the prosecution of the petitioners without seeking a second opinion from the Director of Public Prosecutions (DPP). Given this development, the learned trial Judge admitted Kaitale A3 to bail and adjourned the case to 3 April 2014 to await the decision of the DPP on whether he intended to proceed with the case against the petitioners.

At the adjourned hearing, Ms. Carol Nabasa appeared for the DPP and complained about the way the Court and the State Attorneys had conducted the hearing, conviction and sentencing. She prayed for an adjournment to 11 April 2014 to consult. The adjournment was granted.

On 11 April 2014, yet another State Attorney, one Richard Kamuli appeared for the prosecution. He informed the High Court that

the DPP had decided to discontinue proceedings and filed a *nolle prosequi* dated 10 April 2014 against all the petitioners. The learned trial Judge therefore ordered that all the petitioners be released unless held on other lawful charges.

The Petitioners were re-arrested and charged afresh with Murder. A4 Kato Bisobye Angelo who was on remand was committed for trial afresh on the same charges on 3 February 2015. Kaitale Julius A3, Juuko Moses A5 and Namusisi Jane alias Nalongo were not yet committed because of this pending Constitutional Reference. They were re-arrested and remanded.

In accordance with **Article 137(1)** of the Constitution, the trial court, at the request and instance of counsel for the petitioners, referred this matter to this Court. According to counsel for the petitioners, the conduct of the Police and its agencies in the proceedings of the High Court and in the Chief Magistrate's Court of Mpigi constituted questions of law, which required constitutional interpretation and involved grave human rights violations. The trial court therefore framed the following issues for this Court's interpretation:

(1) Whether the conduct of the police in re-arresting the petitioners after their release by the High Court of Uganda on 11/04/2014, upon an application for *nolle prosequi* entered by DPP contravenes Articles 20(1) and (2), Articles 23 (1), (3), (6); Articles 44 (c); Article 126 and 128 (1) and (3) of the Constitution of Uganda.

(2) Whether the charging of the would be petitioners with a fresh charge of murder after a discontinuation of a similar charge on similar facts by the DPP amounts to persecution thereby contravening articles 20 (1), (2), 23 (1), (3) and (6); 28 (i) and 44(c).

(3) Whether the actions of the security operatives and the State towards the Court, the Judiciary and the Petitioners contravene Article 28 (1), (3), 44 (c); 126 and 128 of the Constitution.

(4) Whether the discontinuation of the charges by the DPP and the subsequent re-instatement of the same charges would automatically lead to the lapse of bail for A1 Kaitale Julius, Juuko Moses and Namusisi Jane, thereby contravening articles 20 (1) and (2); 23 (1), (3) and (6); 24; 44 (c) 126 and 128 of the Constitution.

(5)Whether the subsequent proceedings now before court amount to abuse of court process, the rule of law, natural justice, thereby contravening articles 20 (1), (2); 126 an 128 of the Constitution. (SIC)

(6)Whether the court in proceeding to entertain the matter contravenes Articles 20 (1), (2); 123 (6) and 128 of the Constitution.

Counsel Andrew Sebugwawo appeared for the petitioners while Ms. Jackline Amusugut appeared for the respondent at the hearing of this Reference. The Court ordered the parties to file written submissions.

In interpreting the Constitution, this Court is guided by various principles that have been enunciated in various cases. They include generous and purposive interpretation and that the constitution should be looked at as a whole and none of its provisions should destroy another but each should support the other (***Constitutional Reference No. 7 of 2007 Dr. Kizza Besigye & Others Versus Attorney General).***

Also for this Court to have jurisdiction, the Petition or Reference 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).***

Furthermore, the established jurisprudence of this Court is that this Court has jurisdiction under **Article 137** of the Constitution only to interpret the constitution and that it is not concerned with and has no jurisdiction to entertain matters relating to violation of rights under the Constitution **(See the case of Attorney General V. Major General David Tinyefunza Constitutional Appeal No. 1 of 1987)**. All the remaining issues are closely interlinked.

We have borne the above principles in mind in resolving the issues framed in this reference.

We have found that the entire Reference rests on resolving the issue of whether the DPP acted lawfully when he re-instated the charges against the petitioners and caused their re-arrest after their release on 11 April 2014 upon an application for a *nolle prosequi*. We have therefore opted to resolve this issue first. Its resolution would, in our

view, answer issues 1, 2, 4 and 5. We have therefore not followed completely the order in which the parties argued the issues.

Counsel for the petitioners contended that the action of charging the petitioners' with a fresh charge of Murder, moments after a discontinuation of a similar charge on similar facts by the DPP contravenes the right to a fair, speedy and public hearing of the petitioners case. According to Counsel, the petitioners had spent over 2 years on remand and when their case was fixed for hearing, the DPP, for reasons that were not disclosed at the time, discontinued the case against them. He also challenged the manner in which the subsequent proceedings were initiated and conducted by the DPP and submitted that it amounted to a violation of the petitioners' rights in that the DPP re-started the entire pre-trial procedure. This had the effect of depriving the petitioners their right to liberty, fair hearing, bail, speedy trial and the presumption of innocence and even amounted to persecution.

He prayed that this Court finds that the conduct of the Police in re-arresting the petitioners in the court hall and court premises immediately after their release upon entry of a *nolle prosequi* by the DPP contravened **Articles 20(1)** and **(2), 23(1), (3) and (6) Article 24, 28(1) 44(c) 126 and 128(1)** and **(3)** of the Constitution.

Counsel for the petitioners also submitted that the DPP and Police's conduct of violently re-arresting the petitioners immediately after their release upon entry of a *nolle prosequi* by the DPP violated the petitioners' right to personal liberty and bail contrary to **Article 23 (1), (3)** and **(6)** of the Constitution of the Republic of Uganda and undermined judicial power and authority in breach of the said

Constitution. Counsel submitted that during the re-arrest and subsequent detention, the petitioners were not informed of the reasons for their arrest and detention and were denied access to their lawyers, next of kin, relatives or doctor. The petitioners were subsequently taken back to Mpigi court and charged with the same offence that had been discontinued by the DPP. The charge sheet was the same as the previous one, including the facts. The petitioners were then sent to Kigo Prison on remand.

Counsel relied on various articles of the Constitution, including **Articles 28(i), 44(c), 126, and 128.** He also relied on ***Constitutional Reference No. 18 of 2005 Uganda Law Society v. Attorney General,*** where, according to him, this Court considered a similar issue. He also relied on ***Constitutional Petition No. 7 of 2007 Dr. Kiiza Besigye and Others v. AG.***

He prayed that this Court finds that the conduct of the Police in re-arresting the petitioners in the court hall and court premises, immediately after their release upon entry of a *nolle prosequi* by the DPP, contravened **Articles 20(1)** and **(2), 23(1), (3)** and **(6) Article 24, 28(1) 44(c) 126 and 128(1)** and **(3)** of the Constitution.

In response, counsel for the respondent submitted that the Uganda Police has a duty to, among other things, conduct criminal investigations, arrest and charge any person who is suspected of having committed an offence under the laws of Uganda in accordance with **Articles 211** and **212** of the Constitution and Sections 32, 23 and 31 of the Police Act 2006.

Counsel also submitted that under **Article 120 (2)** of the Constitution, the DPP has powers to institute criminal proceedings against any person or authority and the power to withdraw and reinstate charges against any accused person or authority at any point under Section 134 of the Trial on Indictments Act. She described the Police actions of re-arresting the petitioners in the instant case as being necessary for purposes of producing them before the Chief Magistrate's Court to answer to fresh charges of Murder. She finally submitted that the actions were consistent with **Article 23 (1)** of the Constitution.

According to counsel, once Police arrested the petitioners to produce them before a court of law to be formally charged and for them to take a plea, all the provisions of **Article 28** of the Constitution came into play among which is the presumption of the accused person's innocence until proved guilty or he/she pleads guilty. Therefore, the petitioners failed to show that the Police and the DPP acted unconstitutionally or ultra vires their mandate in arresting, arraigning and prosecuting them. The petitioners have failed to adduce any evidence to back up the allegations that they were violently re-arrested or and their personal liberty was violated. Court should therefore disregard these allegations, as no evidence supports them.

Counsel also submitted that the facts of this case are clearly distinguishable from those in the ***Constitutional Reference No. 7 of 2007 Dr. Kizza Besigye & Others Versus Attorney General,*** where there was clear evidence of violation of the petitioners' rights by a group of about 20 to 30 plain clothed security personnel who pounced on the petitioners and their lawyers and beat them up mercilessly in a scene that was described as reminiscent to mob justice. No such evidence

exists in the instant case. The facts in the two cases are therefore clearly distinguishable.

We listened carefully to the submissions of Counsel and have carefully considered the jurisprudence cited to us. On whether the DPP charged the Petitioners afresh unlawfully and whether his conduct amounted to persecution, we recognize that based on **Article 120** of the Constitution, the DPP has power to direct the Police to investigate any matter of a criminal nature, to institute criminal proceedings against any person or authority in a court of competent jurisdiction apart from the Court Martial, and to take over and continue any criminal proceedings. **Article 120(5)** of the Constitution mandates that in the exercise of his/her powers under this Article, the DPP shall have regard to public interest, the interest of the administration of justice and the need to prevent an abuse of the legal process. Under **Article 120(6)**, in the exercise of his functions, the DPP "shall not be subject to the direction or control of any person or authority".

We also consider the provisions of Section 134 of the Trial on Indictments Act relevant. That section gives the DPP the power to enter a *nolle prosequi*.

It provides as follows:

"In any case committed for trial to the High Court, and at any stage thereof before the verdict, the Director of Public Prosecutions may enter a *nolle prosequi*, either stating in court or by informing court in writing that the state intends that the proceedings shall not continue, **and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he or she has been committed to prison shall be released or if on bail his or her recogisances shall be discharged;** but such discharge of an accused person

shall not operate as a bar to any subsequent proceedings against him or her on account of the same facts."

This provision makes it clear that the discharge of the accused following a *nolle prosequi* is not a bar to subsequent proceedings against the accused on the same facts.

It is also clear that under Section 134 of the Trial on Indictments Act (supra), the DPP has power to withdraw any criminal proceedings before the verdict. This entails withdrawal of the charges and the discharge of the accused person. Such discharge does not operate as a bar to any subsequent proceedings on the same facts against the accused. The legal position is that the DPP has the power to institute, withdraw and re-instate any charge against anyone anytime before verdict and without assigning any reasons.

We also recall the established practice in this Court laid down in the case of ***Dr. Tiberius Muhebwa v. Uganda Constitutional Petition No. 09 of 2012*** and in ***Constitutional Petition No. 10 of 2008 Jim Muhwezi & 3 Others v. Attorney General and Inspector General of Government*** where this Court has cautioned against the stopping of criminal trials on allegations that the trial would not be free and fair. In the latter case, this Court (Twinomujuni JA) stated as follows:

"...The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would rush to the Constitutional Court with a request to stop the prosecution pending hearing his challenge against the prosecution. In due course, this court would find itself engaged in Petitions to stop criminal prosecutions and nothing else. This could result into a breakdown of the administration of the criminal justice system and

affect the smooth operation of the Constitutional Court. It is for this reason that I decline to grant this remedy..."

We consider this established practice to still hold in a proper case. We therefore conclude in respect of the instant Reference that when the DPP exercised his right to enter a *nolle prosequi,* he was within his powers to do so. Similarly, when he re-instated the charges against the petitioners, he was doing so within his powers. We therefore find no violation of **Articles 20(1)** and **(2)**, **Articles 23(1), (3), (6)**; **Articles 44(c)**, **Article 126**, and **Article 128(1)** and **(3)** of the Constitution. We also consider that the above exposition resolves issues 1, 2, and 5, which we proceed to answer in the negative and find no violation of **Articles 20(1)** and **(2), 23(1), (3)** and **(6), 28(i), 44(c), 126** and **128** of the Constitution.

However, we consider that it is not good practice for the DPP to withdraw charges and reinstate them within the same breath; otherwise his intentions may become questionable. In this case, the explanation given is that the DPP was not satisfied with the manner in which the case was unfolding with respect to the remaining accused persons, after A1 and A2 in their charge and caution statement pleaded guilty and exonerated the petitioners. The DPP claimed that he had a second set of charge and caution statements in which A1 and A2 implicated all the petitioners.

Our view is the DPP was exercising his powers within the law and the exercise of his powers did not amount to persecution. Whether or not the DPP acted in good faith will only be established when the case is fully heard and determined.

Concerning violations allegedly committed against the petitioners, when the DPP and the Police re-arrested the petitioners immediately after their release, within the court precincts, the petitioners' complain that they were arrested and deprived of their personal liberty and their right to bail. This, according to them, contravenes Articles 20(1) and **(2), Articles 23 (1), (3), (6)**; **Articles 44 (c)** of the Constitution of Uganda. The complaint is about rights, which are alleged to have been violated by the respondents. These rights are enforceable under **Article 50** of the Constitution by any competent court including the court that is trying the accused persons.

Where a complaint concerns alleged violation of rights, the proper procedure is to proceed under **Article 50** of the Constitution and seek for redress in any Court that has jurisdiction. Proof of alleged violations does not require interpretation of the Constitution. This is the jurisprudence established by this Court as already indicated. However, that does not prevent this Court from pronouncing itself on whether any of the petitioners' rights were violated as alleged, in the interests of justice and judicial economy, as the alleged violations are pleaded within the same document pleading constitutional interpretation. This Court recalls that it has already established that it has jurisdiction in this matter. **(See Attorney General Vs Tinyefunza** (supra)

We note that there is scanty evidence on record regarding the alleged violations. All that the petitioners have said in submission is that they were beaten and re-arrested within the Court precincts. The burden of proof falls on the person who asserts (he who asserts must prove). We consider that the petitioners have not discharged this burden. There is no affidavit or any other evidence to prove the assertion that the petitioners were violently arrested and beaten. Moreover, once the

charges against the petitioners were reinstated, they had to be re-arrested and produced before court. The petitioners' prayers in this regard are therefore dismissed. We find that no violation was committed with respect to **Article 20(1)** and **(2), 23(1), (3)** and **(6), 28(1)** and **(3), 44(c), 126** and **128** of the Constitution.

On the issue whether the sanctity of the High Court in Mpigi was violated, it is clear from the evidence on record that the petitioners were re-arrested within the precincts of the High Court and charged afresh for the same offence, soon after the DPP had entered a *nolle prosequi* and the previous charges against them had been withdrawn. We also note that the respondent did not respond to this allegation. This Court is therefore entitled to draw an adverse inference against the respondent and infer that what the petitioners stated is true.

As a Constitutional Court, this Court deplores the conduct and practice of the Police and DPP in arresting suspects within the precincts of any court. It is disrespectful of courts and may amount to contempt of court. This type of behavior by the security agents has been condemned by this Court in ***Constitutional Reference No. 18 of 2005 Uganda Law Society v. Attorney General and Constitutional Petition No. 7 of 2007 Dr. Kiiza Besigye and Others v. Attorney General*** where such conduct has been declared as contravening Article 23(1) and **(6)** of the Constitution.

We however agree with counsel for the respondent that the facts in ***Constitutional Reference No. 18 of 2005 Uganda Law Society v. Attorney General and Constitutional Petition No. 7 of 2007 Dr. Kiiza Besigye and Others v. Attorney General*** are distinguishable, more aggravated and are not comparable to the present case. ***Constitutional***

Reference No. 18 of 2005, Uganda Law Society v. Attorney General is also distinguishable from the present case for two reasons. We will deal with each Petition in turn. In the latter case, Col. Kiiza Besigye, a leader of one of the opposition political parties known as the Forum for Democratic Change (FDC) and twenty-two others, were jointly charged with treason and misprision of treason under the Penal Code Act. Dr. Kiiza Besigye was separately charged with rape allegedly committed in 1997. All the accused were subsequently committed to the High Court for trial. On 16 November 2005, the accused were taken to the High Court for bail applications before a Judge. They were each granted bail but because of certain alleged acts of the security personnel at the High Court premises, bail papers could not be processed. The security personnel were in uniform armed.

They besieged the High Court, beat up the accused prisoners and their lawyers, fostered fear and anxiety especially as they went beyond their security intentioned limits and entered the Criminal Registry and the cells, where they interrupted the course of the High Court's normal duty of processing bail for the accused persons. They eventually drove the prisoners back to detention centers, despite the fact that they had been released on bail. The following day, all the accused were taken to Makindye and jointly charged in the General Court Martial with the offence of terrorism and in the alternative with being in unlawful possession of firearms. All the offences arose from the same facts as the treason and misprision of treason charges preferred against them in the High Court. In these circumstances, this Court found that the conduct of the security forces contravened **Articles 23(1)** and **(6)**, **28(1)**, and violated the Judiciary's independence enshrined in Article 128(1), **(2),** and **(3)** of the Constitution. These facts are clearly distinguishable from the present case.

In ***Constitutional Petition No. 7 of 2007 Dr. Kiiza Besigye and Others v. Attorney General***, the petitioners sought bail to enforce their release following the decision of this Court in **Constitutional Reference No. 18 of 2005 Uganda Law Society v. Attorney General**. The state disobeyed a production warrant of this Court dated 11 January 2007. Counsel for the petitioners therefore sought and obtained production warrants from the High Court. They were also disregarded. The state then sought to review the orders of the High Court dated 16 November 2005 granting petitioners bail.

The High Court directed on March 1, 2007 that the bailed petitioners should be released on bail. Thereupon, the security forces carried out another armed siege of the High Court, to re-arrest the petitioners, they beat them up together with their lawyer and a journalist, held judicial officers hostage in their chambers and re-arrested the petitioners who had been freed by the Court. The security agencies also carried out a number of outrageous and bizarre acts to prevent the courts from granting bail to the petitioners. All the above were carried out on the Court premises. The security forces further detained the bailed petitioners in Luzira Maximum Security Prison and continued the first General Court Martial Proceedings in disregard of a declaration of the Constitutional Court in ***Constitutional Petition No. 18 of 2005 The Uganda Law Society v. Attorney General***. The petitioners were subsequently driven upcountry and the 2nd and 11th Petitioners were charged afresh with Murder.

In these circumstances, this Court held that such actions denied the petitioners the right to the presumption of innocence in violation of **Article 23(6) and 44 (c)**, the constitutional right to bail, the right to a fair hearing contrary to **Articles 28 and 44(c)** of the Constitution, the

right of protection from torture or cruel, inhuman and degrading treatment or punishment and their constitutional rights to be tried by an independent and impartial tribunal in violation of Article 28(1), among other violations.

In both cases, we note that the security forces disobeyed the Constitutional Court order stopping the proceedings and the High Court order to release the suspects on bail, in addition to besieging the court.

The petitioners in the present case had been released following the entering of a *nolle prosequi* by the DPP. They were re-arrested within the Court precincts following re-instatement of the charges of murder that had earlier been withdrawn. There is clearly no comparison between the cases cited and this case with regard to the facts.

However, we consider that in exercising his power to re-instate charges and re-arrest suspects, the DPP should know and respect the boundaries of proper conduct and etiquette expected of him as an Officer of Court. The High Court had just released the suspects following entry of the *nolle prosequi* by the DPP and before they could even leave the court precincts, they were re-arrested. We therefore find that the respondent violated the sanctity of the High Court in Mpigi when it re-arrested the petitioners within the Court precincts in violation of **Article 128(2)** of the Constitution. We accordingly answer issue number 3 in the positive.

On the issue of whether bail should have been extended to the fresh proceedings now pending before the Chief Magistrate's Court, Counsel for the petitioners argued that **Article 23(6)** of the Constitution provides for the right of persons arrested in respect of a criminal offence to apply to court to be released on bail. If the DPP institutes subsequent proceedings in relation to a criminal offence based on the

same previous facts, the bail of such accused person should not lapse automatically.

According to counsel, S.134 (1) of the TIA does not expressly or by implication provide for the lapse of bail in such circumstances. Besides Section 134(1) of the TIA is an existing law subject to interpretation or enforceability with such modification, adaptation, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution under Article 274 (1).

Counsel relied on ***Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 OF 2011 Hon. Sam Kuteesa, Hon. John Nasasira and Hon. Mwesigwa Rukutana v. Attorney General***, where this Court considered the effect of **Article 274(1)** of the Constitution on existing laws like Section 168(4) of the Magistrates Courts Act (MCA) in relation to its effect on the accused person's bail granted by a competent court.

Counsel invited the Court to apply the same reasoning and find in the instant case that upon institution of subsequent proceedings by the DPP on an accused person who was previously granted bail by a competent court, his/her bail does not lapse by reason only of the fact that the person is being subjected to subsequent proceedings. He submitted that in the event of such subsequent proceedings, the accused person should be restored to his/her position and/or status that he held at the time of his last appearance in court.

According to counsel, where the DPP wishes that the bail of the petitioner or accused person be cancelled, he should make a formal application in Court stating clearly the grounds upon which the bail of the accused/petitioner is sought to be cancelled and the petitioner or

accused person must be served for purposes of according him/her a fair hearing.

Our view is that the set of facts in the present case are completely distinguishable from those in ***Constitutional Petition No. 46 of 2011 Hon. Sam Kuteesa, Hon. John Nasasira & Hon. Mwesigwa Rukutana Versus Attorney General***. In the latter case this Court was dealing with Section 168 (4) of Magistrates Courts Act which provided for the automatic lapse of bail of a person on being committed to the High Court for trial *vis a vis* **Article 23 (6) (a)** of the Constitution. In that case, this Court held that bail granted by a court of competent jurisdiction to a person arrested in connection with a criminal offence does not automatically lapse by reason only of the fact that such person is being committed to the High Court for trial.

Furthermore, the charges against the accused persons in that case were still subsisting at the time they were committed to the High Court and bail would have been cancelled by their committal under S. 168(4) of the Magistrates Courts Act.

In our view, there is a distinction between the position of a person who is being committed for trial and one who is being re-arrested after re-instatement of charges previously withdrawn through a *nolle prosequi* by the DPP. In the latter scenario, the proceedings begin afresh, the previous proceedings having been brought to an end by discharge through a *nolle prosequi*. In such circumstances, bail previously granted lapses with the termination of proceedings by a *nolle prosequi* as the provisions of Section 134 of the Trial on Indictments Act cited below demonstrate.

We also consider the provisions of **Article 23(1)** and **Section 134** of the Trial on Indictments Act relevant. **Article 23 (1)** of the Constitution states that:

> (1) No person shall be deprived of personal liberty except in any of the following cases
>
> (c) For purposes of bringing that person before a court or in execution of the order of a court or upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda.

Section 134 (Supra) gives the DPP the power to enter a *nolle prosequi*.

It is evident from that provision that the bail lapses on entering a *nolle prosequi* and the recognizances are discharged forthwith. It is also clear that the discharge of the accused following a *nolle prosequi* is not an acquittal and therefore, it is not a bar to subsequent proceedings against the accused based on the same facts.

The process of applying for bail must therefore be started afresh, when the charges are reinstated. This is what happened in the present case. It is therefore erroneous for counsel for the petitioners to assume that bail previously granted to the petitioners before the DPP entered a nolle *prosequi* was still valid when the High Court actually discharged and released the petitioners. There was no subsisting bail. It lapsed with the termination of the proceedings through a *nolle prosequi*. We therefore find that no violation of the petitioners' right to bail enshrined in **Articles 23(6) (b)** and **(c)** of the Constitution.

On whether the Magistrate's Court contravened the Constitution by entertaining the re-instated proceedings, we consider that the Chief Magistrates Court was only performing its duty in arraigning the

petitioners. Moreover, there is no evidence on record, which indicates that the Magistrate's Court was aware of what transpired after the petitioners' release in the High Court. We are therefore unable to find fault with its conduct in entertaining the proceedings. In the circumstances, we find that no violation has been committed in respect of **Articles 20(1), (2), 123 (6)** and **128** of the Constitution.

Counsel for the petitioners prays that we find the subsequent proceedings in the Chief Magistrate's Court an abuse of the court process, the rule of law and natural justice. We wish to recall this Court's established jurisprudence in the case of **Dr. Tiberius Muhebwa Versus Uganda Constitutional Reference No. 09 of 2012** that this Court should not interfere with criminal prosecutions without just cause. This Court stated in that case that interfering with criminal prosecutions without any reasonable grounds would be placing the bar for judicial discretion too low and would not also be in full conformity with the exercise of judicial power under **Article 126** of the Constitution.

From the foregoing, we find that the subsequent proceedings do not amount to abuse of court process and do not contravene **Articles 20(1)** and **(2), 126** and **128** of the Constitution.

Declarations sought

The petitioners sought that this Honorable Court be pleased to issue the following declarations in favour of the petitioners:

1) That the conduct of the Uganda Police towards re-arresting the petitioners in the court hall and within the court premises after their release by the High Court of Uganda on 11/04/2014, upon an application for a Noll Prosequi entered by DPP contravenes

Articles 20 (1) and **(2), article 23 (1), (3)** and **(6)**; **Article 24, 28 (1), Article 44 (c), Article 126** and **128 (i)** and **(3)** of the Constitution.

2) That the charging of the petitioners with a fresh charge of murder moments after a discontinuation of a similar charge on similar facts by the DPP does amount to persecution there by contravening **Articles 20 (1), (2); 23 (1) (3)** and **(6)**; **28 (i)**; and **44 (c)** of the Constitution.

3) The actions of the security operations and the state towards the court and judiciary and the petitioners contravenes **Articles 28 (1) (3)**; **44 (c)**; **20**, **(1)** and **(2)**, **126**, and **128** of the Constitution.

4) That institution of subsequent proceedings does not lead to automatic lapse of bail on the petitioners Kaitale Julius, Juuko, Moses, and Namusisi Jane, as it contravenes **Articles 23 (1) (3)** and **(6); 24, 44 (c)**; **20 (1)** and **(2)**, **126** and **128** of the Constitution.

5) That while instituting subsequent proceedings the state should restore the petitioners to the position/status they held at the time of their last appearance in court and that the subsequent proceedings now before the Chief Magistrate's Court Mpigi amount to abuse of court process and the rule of law, natural justice, thereby contravening **Articles 20(1), 120, 126** and **128** of the constitution.

6) That a competent court as a custodian of justice having witnessed abuse of the court process, rule of law, contempt of court, or human rights violations or having judicial notice of the same, or being brought to is notice by any party to proceeding; proceeds to entertain such a matter, contravenes **Articles 20 (1)** and **(2)**; **126** and **128** of the constitution. (SIC)

For the reasons that we have articulated above in our judgment, we declare that:

1. The conduct of the Police in re-arresting the petitioners after their release by the High Court on 11 April 2014, upon an application for *nolle prosequi* entered by the DPP did not contravene **Articles 20(1)** and **(2), 23(1), (3)** and **(6), 44(c), 126** and **128(1)** and **(3)** of the Constitution.

2. The charging of the would be petitioners with a fresh charge of murder after a discontinuation of a similar charge on similar facts by the DPP did not amount to persecution and did not contravene **Articles 20(1)** and **(2), 23(1), (3)** and **(6), 28(1)** and **44(c).**

3. The DPP's actions, of the Police and the State towards the Court and the Judiciary and the petitioners contravened **Articles 128(2)** of the Constitution.

4. The discontinuation of the charges by the DPP following the entry of a *nolle prosequi* automatically led to the lapse of bail of the petitioner and did not contravene **Articles 20(1)** and **(2), 23(1) (3)** and **(6), 24, 44(c), 126** and **128** of the Constitution.

5. The subsequent proceedings now before the Chief Magistrate's Court do not amount to an abuse of court process, the rule of law and natural justice and do not contravene **Articles 20, (1), (2), 126** and **128** of the Constitution.

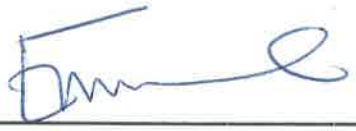
6. In proceeding to entertain the re-instated charges the Chief Magistrate's Court is not contravening and did not contravene **Articles 20(1), (2), 123 (6)** and **128** of the Constitution.

Dated this 18th Day of JAN. 2018

Signed

Hon. Mr. Justice S B K Kavuma, DCJ (E)

Hon. Lady Justice Solomy Balungi Bossa, JA



Hon. Lady Justice Elizabeth Musoke, JA

Hon. Cheborion Barishaki, JA

Hon. Lady Justice Catherine Bamugemereire, JA

(1)

CONSTITUTION REF. NO 11/14

KAIDALE JULIUS & 3 OTHERS

VS

UGANDA

Accused — ct clerk

– Mwanika Phillip for the [illegible]

– Sekyamanto Andrew for the petitioners

the case ready to receive the judgment

Court: judgment delivered in open court

[illegible signature]