

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.12 OF 2010

BETWEEN

10 **OLARA OTUNNU..... PETITIONER**

VERSUS

ATTORNEY GENERAL RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ

Hon. Mr. Justice Kenneth Kakuru, JA/ JCC

15 **Hon. Mr. Justice Egonda-Ntende, JA/ JCC**

Hon. Mr. Justice Cheborion Barishaki, JA/ JCC

Hon. Mr. Justice Ezekiel Muhanguzi, JA/ JCC

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA/ JCC

20 The Petition is brought under *Article 137* of the 1995 Constitution of Uganda and the Constitutional Court (Petitions and References) Rules 2005 Statutory Instrument No. 91 of 2005.

Background

25 In 2010, the petitioner was the president of the Uganda Peoples Congress (UPC) a registered Political Party. He was engaged in country-wide political mobilization tour and as part of his political engagement, he together with other UPC leaders on



5 the 12th day of April, 2010 discussed a wide range of public issues on *Radio Lango* a local Radio station, in Lira Town. Following that radio program the petitioner, was served with Police summons on the 15th day of April, 2010 requiring him to appear at the Police Criminal Investigation Department Headquarters on 16th April, 2010 for questioning and to make statements on the allegation that he had uttered
10 defamatory words contrary to *Section 179* of the Penal Code Act Cap 120.

On 22nd April, 2010 the petitioner was served with another summons alleging that the statements referred to in the earlier summons constituted the offence of promoting sectarianism contrary to *Section 41* of the Penal Code Act (Cap 120) and he was required to appear before the CID Headquarters on 23rd April, 2010 for
15 questioning and to make statements on the allegations. He was further notified by the Police that if he failed to appear, he would be prosecuted under *Section 27A* of the Police Act (as amended).

Being aggrieved with the above stated acts of the Police, he petitioned this Court seeking the following declarations and orders:-

- 20 a) *A declaration that Section 179 of the Penal Code Act (Cap 120) is inconsistent with and in contravention of Articles 29(1)(a)(d)(e) and 38 of the Constitution.*
- b) *A declaration that Section 41 of the Penal Code Act (Cap 120) is inconsistent with and in contravention of Articles 29(1)(a)(d) and (e) 37, 17(1)(i) and 38 of the Constitution.*
- 25 c) *A declaration that Section 27A of the Police Act (as amended) is inconsistent with and in contravention of Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a) and (b) and 38 of the Constitution.*
- d) *A declaration that the act of the Assistant Inspector General of Police /CID requiring your Petitioner, who is suspected of committing the offence of*



5 criminal libel, to appear before the CID for questioning and to record statements on the allegations is inconsistent with and in contravention of Articles 23(1), 28(1) (7) and (11), 29(1)(a)(b)(c)(d) and (e), 29(2)(a) and (b) and 38 of the Constitution.

10 e) A declaration that the act of the Assistant Inspector General of Police /CID requiring your Petitioner, who is suspected of committing the offence of promoting sectarianism, to appear before the CID for questioning and to record statements on the allegations is inconsistent with and in contravention of Articles 23(1), 28(1) (7) and (11), 29(1)(a)(b)(c)(d) and (e), 29(2)(a) and (b) and 38 of the Constitution.

15 f) A permanent injunction restraining the Police/ CID from compelling persons suspected of committing offences from being required to answer questions and being required to make statements on the allegations levelled against them.

g) An order that the respondent do pay the costs of this Petition to your Petitioner.


The petition is accompanied by an affidavit sworn by the petitioner and filed in this
20 Court on 23rd April 2010, the relevant parts are as follows:-

25 3. That on 15th April, 2010 I was served with a summons from the Assistant Inspector General of Police/ CID requiring me to appear at the CID Headquarters on 16th April, 2010 for questioning and to make statements on the allegations that I had uttered defamatory words contrary to Section 179 of the Penal Code Act Cap 120 at the said Radio Station. A copy of the summons is attached hereto and marked annexure "A".

4. That I did not utter any defamatory words at the said Radio Station.



- 5 5. *That I instructed Lukwago & Co. Advocates to respond to the summons and in his letter to the CID, the said lawyers pointed out that the offence of criminal libel could not be committed by oral statements that I allegedly uttered at the Radio Station and that in any event, I could not under the law be compelled to make a statement incriminating myself but the CID have still insisted that I must appear before them to be questioned and to make a statement. A copy of the said letter is attached hereto and marked annexure "B".*
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- 15 6. *That on 22nd April, 2010 I was served with another summons alleging that the statements referred to in earlier summons constituted the offence of promoting sectarianism contrary to Section 41 of the Penal Code Act Cap 120 and requiring me to appear before the CID Headquarters on Friday 23rd April, 2010 for questioning and to make statements on the allegations. A copy of the said summons is attached and marked annexure "C".*
- 20 7. *That I did not utter any words that promote sectarianism.*
8. *That the Police threatened that if I don't appear as summoned for questioning and to record statements on the allegations, I shall be prosecuted under Sections 27A of the Police Act (as amended).*
- 25 10. *That the actions of the CID are politically motivated to harass and intimidate me and to prevent me and other opposition political leaders from criticizing the wrong policies and programmes of the Government and to stop me and other opposition political leaders and members from freely traversing Uganda and carrying out their legitimate political campaign.*



5 The respondent filed an answer to the petition in which he denied the allegations in the petition and described it as misconceived. It reads, interalia:-

"Save as hereinafter expressly admitted, the respondent denies each and every allegation of fact contained in the petition as though the same were set forth verbatim and traversed seriatim."

10 In specific reply to paragraphs 7 and 8 of the petition, the respondents shall contend and aver as follows:-

(a) That *Section 179* of the Penal Code Act is not inconsistent with the provisions of *Articles 29(1)(a)(d)(e) and 38 of the Constitution*.

15 (b) That *Section 411* of the Penal Code Act is not in contravention of the provisions of *Articles 29(1)(a)(d) and (e) 37, 17(1)(i) and 38 of the Constitution*.

(c) That *Section 27A* of the Police Act (as amended) is not inconsistent with *Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a) and (b) and 38 of the Constitution*.

20 (d) That the act of the Assistant Inspector General of Police/ CID requiring the petitioner who is suspected of committing a criminal offence of Libel, to appear before the CID for questioning and to record a statement is consistent with and not in contravention of the provisions of *Articles 23(1), 28(1) (7) and (11), 29(1)(a)(b)(c)(d) and (e), 29(2)(a) and (b) and 38*

25 *of the Constitution*.


(e) That the act of the Assistant Inspector General of Police/ CID requiring the petitioner who is suspected of committing a criminal offence of promoting sectarianism, to appear before the CID for questioning and to record a



5 *statement is consistent with and not in contravention of the provisions of
Articles 23(1), 28(1) (7) and (11), 29(1)(a)(b)(c)(d) and (e), 29(2)(a) and
10 (b) and 38 of the Constitution.”*

The answer to the petition is also accompanied by affidavit sworn by Moses Sakira Senior Commissioner of Police and Deputy Director of CID in charge of Investigation in which he denies every allegation and prays that the petition be dismissed. The relevant parts are as follows:-

- 15 3. *That I know that on the 14th April 2010, I received reports to the effect
that Mr. Olara Otunnu, the petitioner herein, while on Radio Lango,
uttered statements intended to promote sectarianism, which is a criminal
offence under the laws of Uganda.*
4. *That as part of my role of preventing and detecting crime in Uganda, I
dispatched a team of defectives to Lira to carry out investigations, which
included, inter alia recording statements from witnesses.*
- 20 5. *That in order to complete the investigations over the statements of
promoting sectarianism allegedly uttered by Olara Otunnu, I issued
summons to the petitioner herein, requiring him to appear on 16th April
2010 at CID headquarters to record statements on the said allegations.*
- 25 6. *That I know that on 16th April 2010, Mr. Olara Otunnu did not appear at
CID headquarters as indicated in the summons but instead sent Hon.
Erias Lukwago who informed me that Olara Otunnu is busy and
requested for more time.*
7. *That in order to afford Olara Otunnu more time and with the dire need to
complete the investigations, I issued another set of summons to Olara
Otunnu to appear at the CID headquarters on 23rd April 2010 to record a*



5 *statement on allegations that he uttered statements promoting
sectarianism.*

8. *That I know on the 23rd April 201, Olara Otunnu further refused to
appear at the CID headquarters, and instead sent Hon. Lukwago who
informed me that Olara Otunnu would not appear because the summons
10 did not disclose any criminal offence committed and therefore defective.*

9. *That I have been advised by my lawyer Mr. Bafirawala Elisha, a State
Attorney in the Attorney General's chambers, which advice I verily believe
to be true, that the summons need indeed did not disclose any criminal
offence to be effective.*

15 10. *That I know that the requirement that Olara Otunnu appears at CID
headquarters to record a statement relating to allegations that he
uttered statements that were intended to promote sectarianism, is a well
established practice all over the world in the area of investigations.*

20 11. *That I know that the requirement by police to any person suspected of
having committed a criminal offence to appear at a police post/station to
record a statement, is a standard procedure, irrespective of the person's
standing in society, to help the police to investigate a criminal offence,
and also to accord a suspect a right to fair hearing.*

25 12. *That I know the summons issued to Olara Otunnu is not politically
intended and / or motived to intimidate or harass the petitioner at all.*

13. *That I know that the institution of this petition on 23rd April 2010 in this
Court by Olara Otunnu is intended and/ or actuated by the desire to
derail the Uganda Police Force from performing its Constitutional
mandate of preventing and detecting crime in Uganda.*



5 14. *That I have carefully read and understood the provisions of Article 28(7) and (11) of the Constitution and established that Olara Otunnu, the Petitioner herein, has never been charged and / or of any criminal offence.*

Representations

10 At the hearing of this petition, *Mr. Peter Walubiri* represented the petitioner, whilst *Ms. Gorretti Arinaitwe*, represented the Attorney General.

Mr. Walubiri Counsel for the petitioner with leave of Court abandoned Paragraph 7(a) and (b) and the related prayers since this Court pronounced itself on *Sections 179 and 41* of the Penal Code Act (Cap 120). In respect of *Section 179* of the Penal
15 Code Act, Counsel cited *Jackie Mbuwembo and 3 others vs Attorney General Constitutional Reference No. 01 of 2008* in which this Court held that criminal libel is not unconstitutional. Then in *Andrew Muwenda and another vs Attorney General Constitutional Petition 4 of 2005* and *Constitutional Petition of 13 of 2006*, this Court held that *Section 41* of the Penal Code Act, which criminalizes sectarianism, is not
20 unconstitutional.

Issues

1. Whether the Petition discloses a cause of action.
 2. Whether *Section 27A* of the Police Act (as amended) is inconsistent with and/or in contravention of *Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a) and (b) and 38* of the Constitution.
- 25

I have carefully listened and considered the submissions of both Counsel on the constitutionality of *Section 27A* of the Police Act (as amended). I have also carefully



5 perused the affidavits as well as the relative provisions of the law and authorities cited by the parties.

In matters involving interpretation of the Constitution or determination of the Constitutionality of the Acts of Parliament, Courts are guided by well settled principles, which have been consistently set out in a number of decisions of this Court and the Supreme Court. For emphasis only, I have chosen to reproduce only the following:-

1. In the interpretation of constitutional provisions and Acts of Parliament is that the entire Constitution must be read as an integrated whole and no particular provision should destroy the other but sustain the other. See: *David Tinyefuza Vs Attorney General Constitutional Petition No. 1 of 1996*.
2. In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. Court should consider the purpose and effect of an Act of Parliament to determine its constitutionality. See: *The Queen v. Big M. Drug Mart Ltd. (1996) LRC (Const.) 332*. In *Attorney General vs Salvatori Abuki Constitutional Appeal No. 1 of 1998*, it was held that:- "A Statutory provision can be declared unconstitutional where its purpose and or effect violates a right guaranteed by an Article of the Constitution." See also: *South Dakota vs North Carolina 192, US 268 1940 LED 448*.
3. Provisions relating to the fundamental human rights and freedoms should be given purposive and generous interpretation in such a way as to secure maximum enjoyment of the rights and freedoms guaranteed. See: *The*



5 *Attorney General vs Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997.*

4. In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017*

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See also: *Male Mabrizi and others, Constitutional Court Consolidated Constitutional Petitions Nos. 49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018, and 13 of 2018*

Issue 1

Whether the Petition discloses a cause of action, the answer to this issue is provided for under *Article 137* of the Constitution, which provides as follows:-

20

“(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

(3) A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

25

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.



5 (4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—

(a) grant an order of redress; or

10 (b) refer the matter to the High Court to investigate and determine the appropriate redress.”

The Supreme Court has interpreted this Article in several decisions. In *Ismail Serugo vs Kampala City Council*, Supreme Court Constitutional Appeal No. 2 of 1998, the Court held as follows:-

15 “Generally, the main elements required to establish a cause of action in a plaint apply to a Constitutional petition. But specifically, I agree with the opinion of Mulenga, JSC in that case that a petition brought under Article 127 (3) of the Constitutional sufficiently discloses a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been
20 contravened by the act or omission and pray for a declaration to that effect.”

In *Raphael Baku Obudra vs Attorney General*, Supreme Court Constitutional Appeal No. 1 of 2003, Odoki CJ observed as follows:-

25 “In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a Constitutional petition than a plaint when determining whether a cause of action has been established.”



5 In view of the above decisions and those I have not cited, I am satisfied that in
alleging that the acts of the Assistant Inspector General of Police /CID set out in this
petition contravened the specified provisions of the Constitution and infringed his
constitutional rights, the petitioner has established that his petition raises issues for
constitutional interpretation. The petition is not frivolous nor is it vexatious. I
10 therefore answer the 1st issue in the affirmative.

Issue 2

Whether *Section 27A* of the Police Act (as amended) is inconsistent with and/ or in
contravention of *Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a) and*
(b) and 38 of the Constitution.

15 *Section 27A* of the Police Act (as amended) provides as follows:-

“27A Procurement of information and attendance of witness.

*(1) A police officer not below the rank of assistant inspector of police making an
investigation into an offence may, in writing—*

20 *(a) require the attendance before him or her of any person whom he or she has
reason to believe has any knowledge which will assist in the investigation; and*

*(b) require the production of any document, matter or thing relevant to the
offence under investigation.*

25 *(2) The attendance required under subsection (1) may be required at the
nearest police station or police office situated within the area in which that
person resides or, for the time being, is found.*

*(3) Subject to subsection (4), where a person requested to attend or to produce
a document or other matter or thing under subsection (1) without reasonable
excuse—*

5 (a) fails to attend as required;

(b) refuses, having so attended, to give his or her correct name and address;

(c) refuses to produce any relevant document, matter or thing which may be in his or her possession or under his or her authority;

10 (d) refuses to answer truly any question that may be lawfully put to him or her, that person commits an offence and is liable, on conviction, to a fine not exceeding forty thousand shillings or to imprisonment for a term not exceeding three months, or both.

15 (4) A person shall not be required to answer any question under this section which might tend to expose him or her to any criminal charge, penalty or forfeiture.

(5) A police officer may record any statement made to him or her under this section and take possession of any relevant document, matter or thing produced by the person making the statement, whether or not that person is suspected of having committed an offence.

20 (6) Where a police officer decides to charge a person with an offence, he or she shall, before recording a statement from that person under subsection (5), administer the caution required to be administered under the Evidence (Statements to Police Officer) Rules

25 (7) For any charge under subsection (3), consent from the Director of Public Prosecutions shall be sought before the matter is taken to court."

Article 23(1) of the Constitution provides as follows:-

(1) No person shall be deprived of personal liberty except in any of the following cases—



- 5 *(a) in execution of the sentence or order of a Court, whether established for Uganda or another Country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted, or of an order of a court punishing the person for contempt of court;*
- 10 *(b) in execution of the order of a court made to secure the fulfillment of any obligation imposed on that person by law;*
- (c) for the purpose of bringing that person before a court 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*
15 *laws of Uganda;*
- (d) for the purpose of preventing the spread of an infectious or contagious disease;*
- (e) in the case of a person who has not attained the age of eighteen years, for the purpose of the education or welfare of that person;*
- 20 *(f) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol, for the purpose of the care or treatment of that person or the protection of the community;*
- (g) for the purpose of preventing the unlawful entry of that person*
25 *into Uganda, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Uganda or for the purpose of restricting that person while being conveyed through Uganda in the course of the extradition or removal of that person as a convicted prisoner from one country to another; or*
- 30 *(h) as may be authorised*

5 (2) by law, in any other circumstances similar to any of the cases specified in paragraphs (a) to (g) of this clause.

Article 28(I) and (II) of the Constitution stipulate as follows:-

10 “(I) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law.

(II) Where a person is being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person.”

15 Article 29(1) (a)(b)(d) and (e), 29(2)(a) and (b) of the Constitution stipulate as follows:-

“(1) Every person shall have the right to—

(a) freedom of speech and expression which shall include freedom of the press and other media;

20 (b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

(d) freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition; and

25 (e) freedom of association which shall include the freedom to form and join associations or unions, including trade unions and political and other civic organisations.

(3) Every Ugandan shall have the right—

(a) to move freely throughout Uganda and to reside and settle in any part of Uganda;

(b) to enter, leave and return to, Uganda”



5 Article 38 of the Constitution stipulates as follows:-

"(1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law

10 *(2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations".*

The freedom and rights in Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a) and (b) and 38 are among several fundamental human rights and freedoms guaranteed in Chapter Four of our Constitution. Article 20 of the Constitution provides as follows:-

15 *"(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.*

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."

20 The fundamental rights and freedoms in Chapter Four however are not absolute. They can be restricted in accordance with the provisions of Article 43 of the Constitution which provides:-

25 *"(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.*

(2) Public interest under this article shall not permit:-

(a) political prosecution;

5 (b) *detention without trial;*

(c) *any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this constitution."*

10 Any act or provision of law which restricts the fundamental rights and freedoms can only be allowed to stand if they pass the test set up by *Article 43* of the Constitution.

The impugned Section of the Police Act (as amended) has now been incorporated immediately after *Section 27* of the Police Act Cap 303, it essentially relates to procurement of information and attendance of witness for questioning by a Police Officer. It lays down the procedure to be used by the Police for purposes of
15 investigations.

It was contended by Mr. Walubiri that, the aforesaid provision negates the right to liberty, freedom of expression, speech, movement and the right to a fair hearing as prescribed under *Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a) and (b) and 38* of the Constitution. He argued that, *Section 27A* of the Police Act (as
20 amended) compels a person to appear for questioning and to make a statement, produce documents which are believed to be in possession of the person summoned for questioning. It further lays down a penalty for non-compliance which violates all the above Articles of the Constitution. He submitted that, *Section 27A* of the Police Act (as amended) is unconstitutional and unlawful. He asked Court to nullify it.

25 Ms. Arinaitwe on the other hand opposed the petition and submitted that, *Section 27A* of the Police Act (as amended) is not in contravention of any provisions of the Constitution. She contended that, the impugned Section basically helps Police to carry out investigations while executing its duties. She argued that, when a person a summoned to appear for questioning it doesn't in anyway infringe the right to

5 liberty, freedom of expression, speech, movement and the right to a fair hearing as provided for under the 1995 Constitution of Uganda. She asked Court to dismiss the petition.

In determination of the Constitutionality of the impugned the Section, I shall begin with *Section 27A subsection (1) and (2) of the Police Act (as amended)*. To
10 paraphrase the same, "*A Police Officer may summon attendance of any person to the nearest police station and may require production of any document relevant for purposes of investigations*". The meaning of this is mainly for purposes of investigations, as well as assisting the Police in execution of its duties. The question I would pose is "Does summoning of a person for investigation amount to a limitation
15 of the enjoyment of the rights and freedom and is it acceptable and demonstrably justifiable in a free and democratic society?"

The meaning of the phrase "what is acceptable and demonstrably justifiable in a free and democratic society" as used in *Article 43 (2) (c) of the Constitution* was discussed in depth in *Charles Onyango Obbo and Another vs Attorney General*
20 *Constitutional Petition No. 15 of 1997*. I am constrained to reproduce in *extenso* the pertinent parts of the Judgment as follows:-

"FREE AND DEMOCRATIC SOCIETY

*This phrase now appears in the human rights provisions of many constitutions of the countries of the Commonwealth. Canada, Papua New Guinea, Namibia, Zimbabwe, Nigeria and Zambia to mention but a few. The phrase is not defined
25 in any of the Constitutions but the Courts of those Countries have developed and assigned definite meanings to the phrase. The meaning assigned to it is remarkably similar despite differences in social, cultural and political systems prevailing in each of the jurisdictions I have mentioned above. The most prominent authority on the meaning of the phrase "Free and democratic
30*



5 *society" can be found in the decision of the Supreme Court of Canada in the case
of Regina Vs Oakes (supra) which has been followed by many commonwealth
jurisdictions with similar Constitutional provisions as Canada. In the Canadian
Constitution, the phrase "free and democratic society" is used in section 1 which
is almost similar to our article 43 (2) where the same phrase is used. The
10 Supreme Court of Canada stated:-*

*"A second contextual element of interpretation of S.1 is provided by the
words "free and democratic society." Inclusion of these words as the final
standard of justification for limits of the rights and freedoms refers the
Court to the purpose for which the Charter was originally entrenched in
15 the Constitution. Canadian Society is to be free and democratic. The
Court must be guided by the values and principles essential to a free and
democratic society, which I believe embody, to name but a few, respect
for the inherent dignity of the human person, commitment to social
justice and equality, accommodation of a wide variety of beliefs, respect
20 for culture and group identity, and faith in social and political
institutions which enhance the participation of individuals and groups in
society. The underlying values and principles of a free and democratic
society are the genesis of the rights and freedoms guaranteed by the
Charter and the ultimate standard against which a limit on a right or
25 freedom must be shown, despite its effect, to be reasonable and
demonstrably justified."*

ACCEPTABLE AND DEMOSTRABLY JUSTIFIABLE

*"This is the phrase used in article 43 (2) of our Constitution. In the Canadian
Constitution they use "reasonable and demonstrably justified." In my view there*



5 is no significant difference between the two phrases. In the Canadian case of
Regina Vs Oakes 26 DLR (4th) 201 the phrase was given meaning as follows :-

10 "To establish that a limit (to rights and freedoms) is reasonable and
demonstrably justified in a free and democratic society, two central
criteria must be satisfied. First, the objective that the measures
responsible for the limit on a charter right or freedom are designed to
serve must be of sufficient importance to warrant overriding a
Constitutionally protected right or freedom...

15 The standard must be high in order to ensure that objectives which are
trivial or discordant with the principles integral to a free and democratic
society do not gain s.l (Our article 43 (2)) protection. It is necessary at a
minimum, that an objective related to concerns which are pressing and
substantial in a free and democratic society before it can be
characterised as sufficiently important.

20 Secondly, once a sufficiently significant objective is recognised, then the
party invoking s.l must show that the means chosen are reasonably and
demonstrably justified. This involves a form of PROPORTIONALITY
TEST.... Although the nature of the proportionality test will vary
depending on the circumstances, in each case the Court will be required
to balance the interest of society with those of individuals and groups.
25 There are in my view three important components of the proportionality
test. First, the measures adopted must be carefully designed to achieve
the objective in question. They must not be arbitrary, unfair or based on
irrational considerations. In short they must be rationally connected to
the objective. Secondly, the means, even if rationally connected to the
30 objective in the first sense, should impair "as little as possible" the right



5 or freedom in question: *R Vs Big M Drug Mart Ltd Supra*. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom and the objective which has been identified as of "sufficient importance."

10 With respect to the third component, it is clear that the general effect of any measures impugned under s.1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s.1 is necessary. Inquiry into the effects must, however, go further. A wide range of rights and freedoms are guaranteed by Charter, and an almost infinite number of factual situations may arise in respect of these. Some
15 limits on the rights and freedoms protected by the charter will be more serious than others in terms of nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and
20 the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects of the measure, the more important the objective must be if the measure is
25 to be reasonable and demonstrably justified in a free and democratic society,"

From the above excerpt, I find that summoning a person for purposes of investigations limits the right to liberty, but such a limitation is justifiable in a free and democratic society. Therefore when a person is summoned for questioning
30 under the impugned subsections, it does not in any way violate their rights as provided for under *Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a)*



5 and (b) and 38 of the Constitution. I don't accept the arguments of the petitioner that
summoning a person to the Police station for questioning curtails their personal
liberty, beyond what is justifiable under a free and democratic society, summoning
for questioning does not amount to an arrest. Therefore the above subsections are
not inconsistent with and or in contravention of the aforementioned provisions of
10 the Constitution.

The second limb of the impugned provision is *Section 27A subsection 3(a) (b) (c) and (d)*, under this subsection a penalty is prescribed for failure to attend, refusal to provide the correct name or address and refusal to produce any relevant material in possession of the person being summoned.

15 The principle applicable is that in determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realised through the impact produced by the operation
20 and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked if not indivisible. Intended and actual effects have been looked to for guidance in assessing legislation's object and thus, its validity. See: *The Queen v. Big Mart Ltd. (1996) LRC (supra)*.

25 The impugned provision imposes a penalty upon a person summoned for failure to comply. Such a person could be prosecuted. Clearly this would defeat the purpose and intention of the Act. Compelling a person who is not yet suspected to have committed any criminal offence to appear before a Police Officer at a Police Station, to answer questions and produce documents would be inconsistent with and in
30 contravention of Article 23 (1) of the Constitution. The limitation is out of



5 proportion to the objective intended to be attained. The limitation is not necessary to protect the rights of others or to protect the public interest. It is therefore, not acceptable or demonstrably justifiable in a free and democratic society.

I find that, the above subsection clearly contravenes *Article 23(1)* of the Constitution. However, it is not inconsistent with and or in contravention of *Articles*
10 *28(1) and (11), 29(1) (a)(b)(d) and (e), 29(2)(a) and (b) and 38* of the Constitution.

Having found that, the above impugned provision contravenes *Article 23(1)* of the Constitution. I now consider whether Section 27A (2)(a),(b),(c) and (d) contravenes other provisions of the Constitution namely *Article 28(12)* which provides that:-

15 *"Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."*

In *Iguatius Lanzetta vs The State of New Jersey 306 US 888 at 893* it was held that:

20 *"...Criminal Statute which defines the offence in such uncertain terms that persons of ordinally intelligence cannot in advance tell whether a certain action or cause of conduct would be within its prohibition is subject to attack of unconstitutionality as violative of the provisions as to due process and the Clause which requires that the accused be informed of the nature and cause of the offence with which he is charge."*

25 In *Pumbun vs The Attorney General [1993] 2 LRC 317 at p.323*, the Court of Appeal approved the holding in *DPP Vs Pete [1991] LRC (Const) 553* that:

"A law which seeks to limit or derogate from the basic rights of the individual on grounds of public interest will be saved by Article 30 (2) of the Constitution (our Article 43) only if it satisfies two essential requirements: First, such a law must

5 *be lawful in a sense that it is not arbitrary. It should make adequate safeguards*
against arbitrary decisions and provide effective controls against abuse by
those in authority by those using the law. Secondly the limitation imposed by
such a law must not be more than is reasonably necessary to achieve the
legitimate objective. This is what is also known as the principle of
10 *proportionality. The principle requires that such a law must not be drafted too*
widely so as to net everyone including even the untargeted members of society.
If a law which infringes a basic right does not meet both requirements, such a
law is not saved by Article 30 (2) of the Constitution, it is null and void."


See:- *Charles Onyango Obbo and Another vs Attorney General(Supra)*

15 The impugned provision does not define the offence committed and is ambiguous
thus it is in contravention of *Article 28(12)* of the Constitution. I therefore find that,
the above provision is unconstitutional. *Article 79(1)* of the Constitution gives
Parliament wide power to make laws on any matter for peace, order, development
and good governance. This includes prescribing the offence and penalty for every
20 criminal offence.

Section 27A subsection 4 of the impugned law provides that:-

"A person shall not be required to answer any question under this section which
might tend to expose him or her to any criminal charge, penalty or forfeiture."

25 The above provision is not in harmony with *subsection 3 of Section 27A* of the
impugned law, while the former penalizes a person for refusing to answer questions
the latter requires a person not to answer questions which might expose him or her
to any criminal charge. This makes the impugned provision ambiguous. The effect of
Section 27A (3) is to permit Police in practice to act in violation of *Article 28(3) (a)*
of the Constitution which provides for the presumption of innocence. The person



5 required to report to Police may have a good reason for failure to attend to Police, to
produce documents or information. The person may not have any documents to
produce or useful information to provide. The police has a duty to investigate crime,
coming up with evidence that points to suspects and not just suspect persons and
proceed to extract information from them in hope that they will incriminate
10 themselves. The law is arbitrary, oppressive and can only be applied subjectively by
the Police. The assumption by Police that a person summoned may have any
documents or information maybe baseless, false or unjustified.

Failure to produce the documents on account that the person in fact does not
possess it may lead to prosecution. Where one is indeed in possession of such
15 documents or information may require it for his or her defence. Secondly producing
it to Police may deprive him or her defence or he or she may incriminate him or
herself. It must be noted that the offence comes into effect before a person is
charged with any offence.

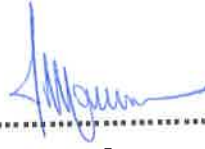
The remaining subsections of the impugned provision are not inconsistent with and
20 or in contravention *Articles 23(1), 28(1) and (11), 29(1)(a)(b)(d) and (e), 29(2)(a)*
and (b) and 38 of the Constitution as alleged by the petitioner. Article 29(1)(a)(b)(d)
and (e), 29(2)(a) and (b) of the Constitution. This article guarantees the right to
freedom of speech and expression and freedom to assemble and to demonstrate
together with others peacefully and unarmed and to petition. I do not find this
25 *relevant to the provisions of the impugned provision.*

In conclusion I find the *Section 27A Subsection 3 and 4* are unconstitutional and
declare them null and void.

The petition partially succeeds and I order each party to bear their costs.



5 Dated at Kampala this 18th day of April, 2019.



10 **Kenneth Kakuru**

JUSTICE OF APPEAL/JUSTICE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION No. 12 OF 2010

5 **OLARA OTUNNU } PETITIONER**

VERSUS

ATTORNEY GENERAL } RESPONDENT

10

CORAM:

Owiny - Dollo, D.C.J.; Kakuru, Egonda-Ntende, Cheborion Barishaki, & Muhanguzi (JJ.A./JJ.CC)

JUDGMENT OF OWINY - DOLLO, D.C.J.

15 I have had the benefit of perusing the judgment of my learned brother, Kakuru JA/JCC, in draft. I am in full agreement with his reasoning; and the conclusions he has reached. Since Egonda-Ntende, Cheborion Barishaki, & Muhanguzi, JJ.A./JJCC, also agree, orders are accordingly made in the terms proposed by Kakuru J.A./JCC in his judgment.

20 Dated at Kampala; this ^{18th} day of ^{April} 2019


Alfonse C. Owiny - Dollo,

DEPUTY CHIEF JUSTICE/HEAD OF CONSTITUTINAL COURT

25

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Cheborion Barishaki,
Muhanguzi, JJA & JJCC]

CONSTITUTIONAL PETITION NO. 12 OF 2010

BETWEEN

OLARA OTUNNU=====PETITIONER

AND

ATTORNEY GENERAL=====RESPONDENT

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA / JCC

1. I have had the benefit of reading in draft the judgment of my brother, Kakuru, JA / JCC. I agree with it and having nothing useful to add.

Signed, dated and delivered at Kampala this 18th day of April 2019



Fredrick Egonda-Ntende

Justice of Appeal / Justice of the Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.12 OF 2010

BETWEEN

OLARA OTUNNU.....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DJC

Hon. Mr. Justice Kenneth Kakuru, JA/JCC

Hon. Mr. Justice Egonda-Ntende, JA/JCC

Hon. Mr. Justice Cheborion Barishaki, JA/JCC

Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC

JUDGMENT OF HON. JUSTICE CHEBORION BARISHAKI JA/JCC

I have had the benefit to read in draft the judgment of my learned brother Justice Kenneth Kakuru JA/JCC and I agree with him that this Constitutional Petition should succeed partially. I also agree with the declarations and order he has proposed.

Dated at Kampala thisday of March 2019

18/4/19



Hon. Mr. Justice Barishaki Cheborion
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 12 OF 2010

OLARA OTUNNU.....APPELLANT

VERSUS


ATTORNEY GENERAL.....RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ
Hon. Mr. Justice Kenneth Kakuru, JA/JCC
Hon. Mr. Justice Fredrick Egonda-Ntende, JA/JCC
Hon. Mr. Justice Cheborion Barishaki, JA/JCC
Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC

JUDGMENT OF EZEKIEL MUHANGUZI, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Kenneth Kakuru, JA/ JCC and do agree with it and I have nothing more useful to add.

Dated at Kampala this.....18th day of.....April.....2019.

.....

Ezekiel Muhanguzi

Justice of Appeal/ Justice of the Constitutional Court.