THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMALA

CONSTITUTIONAL PETITION NO.6/99

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ,
HON. MR. JUSTICE G. M. OKELLO, JA;
HON. LADY JUSTICE A. E. N. MPAGI BAHIGEINE, JA.
HON. MR. JUSTICE J. P. BERKO, JA
HON. MR. JUSTICE A. TWINOMUJUNI

HON. ZACHARY OLUM & } .....PETITIONERS
HON. RAINER KAFIIRE }

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF MANYINDO, DCJ

The petitioners, both members of Parliament, brought this petition, jointly, under Article 137 of the Constitution seeking several declarations. One of the declarations would be to the effect that section 15 of the National Assembly (Powers and Privileges) Act cap 249 which prohibits members of Parliament and certain employees of Parliament from using evidence of

proceedings in the Assembly or its Committee elsewhere without the special leave of the Assembly having first been obtained is unconstitutional. At the hearing of the petition the Attorney General objected to its validity or competence on several grounds. In its considered Ruling this court overruled all the objections. The only question for decision is whether S.15 of cap 249 is inconsistent with Articles 41, 43, 28, 44 and 29 (1) (a) and (d) of the Constitution. At the hearing of the petition Prof. Sempebwa, Counsel for the petitioners, stated that he would rely only on Articles 41, 43, 28, 44 and 29(1)(a) and (d). However he made no submission at all in respect of Article 44.

The background to the petition is very briefly as follows. The first petitioner, Zachary Olum and one Paulo Kawanga Ssemogerere filed a petition(No. 3 of 1999) in this court in 1999, challenging the validity of an Act of Parliament. The second petitioner was a witness for the petitioner. Their Counsel sought leave from the Speaker of Parliament under section 15 of cap 249, for Olum, Kafiire and two other members of Parliament to give evidence in this court regarding proceedings in Parliament and to use a copy of the Hansard as evidence. The evidence would be in connection with the challenged Act of Parliament. Leave was refused. The petitioners now challenge the validity of S.15 of cap 249 which gives Parliament discretion in the matter when Article 41 of the constitution has guaranteed the people the right of access to information in possession of the state.

I find it necessary at this stage to set out section 15 cap 249 and the relevant parts of the Articles of the Constitution mentioned above.

S.15 states:

> *"15.(1) Save as provided in this Act, no member or officer of the Assembly and no person employed to take minutes of evidence before the Assembly or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or of the contents of any document laid before the Assembly or such committee, as the case may be, or in respect of any proceedings or examination held before the Assembly or such committee, as the case may be, without the special leave of the Assembly first had and obtained.*
>
> *(2) The special leave referred to in subsection (1) of this section may be given during a recess or adjournment by the speaker or, in his absence or other incapacity or during any dissolution of the Assembly, by the Clerk.*

The said articles of the Constitution state in part, as follows:

> *"28 (1) In the determination of civil rights and obligations or any criminal charge, a Right to a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*
>
> *(2) Nothing in clause (1) of this article shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society .*

29 (1) (a) freedom of speech and expression, which shall include freedom of the press and other media

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

(c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religions body or organisation in a manner consistent with this Constitution.

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

41. (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information in the is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

(2) *Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.*

43. *(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 persecution;*

(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.*

44. *Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedom -*

(a) *freedom from torture, cruel, inhuman or degrading treatment or punishment;*
(b) *freedom from slavery or servitude;*

(c) *the right to fair hearing;*

(d) *the right to an order of habeas corpus*

Section 15 of cap 249 has now been incorporated in section 171 of the Rules of Procedure of the Parliament of Uganda which came into force on 30th July, 1996. The only departure is that leave is to be sought not from the Speaker but from the Committee on Rules, Privileges and Discipline. Professor Sempebwa at first submitted that the right of access to information under Article 41 is not absolute as the Article contains restrictions. Therefore, he contended, under section 15 of cap 249 information could be rightly withheld by the state in a case where those restrictions obtain. In his view the instant case is not such a case as the security or sovereignity of the state is not affected by the information sought nor is any right of privacy of an individual involved.

However, the learned counsel later changed course and argued that any law that restricts the right of access to information by an individual is bad and cannot stand the test of Article 41. In his opinion section 15 of cap 249 cannot be maintained on grounds of public interest under Article 43 of the Constitution since the restriction in S.15 goes beyond what is justifiable in a free and democratic society. Learned counsel asked court to strike down S. 15 of cap 249 because of the unconstitutional restriction therein which is untenable under Article 43 of the Constitution.

Learned counsel also submitted that Section 15 above is unconstitutional in that it permits the withholding of information to a would be litigant with the result that such a person would not have a fair hearing which is guaranteed by Article 28 of the Constitution. He called in aid Constitutional petition No. 3 of 1999 supra, which failed in this court as the evidence that would have supported it was withheld by Parliament under section 15 of cap 249. He argued that in that case section 15 was misused and abused by Parliament with impunity and yet there is no right of appeal against withholding of information under that section.

Professor Sempebwa also contended that section 15 conflicts with Article 29 (1) (a) and (d) which guarantee freedom of speech and assembly. In his view a member of Parliament should be free to address a meeting in his or her constituency or elsewhere for that matter and refer to proceedings in Parliament except proceedings which were held in camera. He wrapped up

his arguments in a rather dramatic way when he submitted that section 15 is harmless and therefore serves no purpose since the Hansard which contains the record of proceedings is a public document which can be obtained freely from Book Shops and other places. It follows that a member of Parliament can use it in evidence albeit through another person who is not covered by S.15 of cap 249.

The Attorney General was represented by Mr. Barishaki Chebrion, Commissioner for Civil Litigation. His position was that section 15 cannot be bad law simply because it contains a restriction since the constitution itself imposes restrictions. He cited Articles 41, 43 as examples. In his view section 15 merely lays down the procedure to be followed by a person wishing to use records of parliamentary proceedings in court or elsewhere. Article 43 protects the rights of other persons and the public interest in the enjoyment, by an individual, of the rights and freedoms conferred in chapter 4 of the Constitution. Mr. Chebrion submitted that section 15 is meant to protect the dignity and immunity of Parliament.

I think it is not disputed that section 15 above contains a restriction. The question is: does the restriction or condition render the provision unconstitutional? I think not. In my opinion the total import of Articles 41 and 43 of the Constitution is that the fundamental rights and freedoms conferred on individuals in chapter 4 of the constitution have to be enjoyed subject to the law of Uganda, in so far as such law imposes reasonable restrictions.

The doctrine of access to information or "the right to know" as it is sometimes called, has of necessity constitutional and other limitations especially where it touches the question of national sovereignity and the protection of sensitive defence and classified information, among other things. This is exactly what Article 41 does. It carries with it the necessary restrictions. There are very few absolute rights, that is rights whose enjoyment can never be restricted. For example the European Convention for the Protection of Human Rights and Fundamental Freedoms recognises only two such rights, the right not to be tortured (Article 3) and the right not to be held in slavery (Article 4)

In Uganda Article 44 seems to provide for such rights. In my view Section 15 of cap 249 does not contain a bar to access and use of information. It only imposes a restriction, that is, the requirement of leave of Parliament by specified persons to use certain information emanating from Parliament. Both under Article 41 of the constitution and Section 15 of cap 249 the burden is on the state to show that the information is classified and thus restricted in the public and other interests. Individual rights are honourable but they can never override the public interest, state security and sovereignity in my view. I think it is generally accepted that laws may restrict actions, including actions which involve the exercise of constitutionally protected rights, which harm others.

It was argued by Professor Sempebwa that the withholding of information means that a litigant will not have a fair trial which is guaranteed by Article 28 of the Constitution. I take fair hearing to be the same as fair trial. A fair

trial includes, inter alia, public hearing, presumption of innocence in a criminal matter and the right of a litigant to have all the necessary evidence to enable him or her prosecute or defend the action properly. As for the evidence, it must be available and admissible in law. Clearly restricted evidence is neither available nor admissible in a trial.

It is quite remarkable that even under the Constitution the right to a fair hearing is restricted. For example, under Article 28 (2) a court or tribunal may exclude the press or public from proceedings before it. Also while under Article 28 (3) (a) a person on a criminal charge shall be presumed to be innocent until proved guilty or until he or she pleads guilty to the change, under Article 28(4) any law that imposes on the accused the burden of proving particular facts cannot be inconsistent with the constitution. These are necessary restrictions. It follows that the restriction under section 15 of cap 249 is not a derogation from a fair trial.

In my judgment the petitioners' complaint should be not that section 15 is a bad law but that Parliament wrongly withheld the information which was sought by the petitioners. This would be a matter of enforcement of the constitution, to be taken and argued in a competent court. There the petitioners would have to show that the restrictions did not apply to the case, that is, that the release of the information would not hurt the state or someone. This is what happened in *Phato v Attorney General [1994]3 LRC 506* which was cited by Professor Sempebwa. The case concerned the right of access to information which is guaranteed in the post apartheid Constitution of South Africa. Under Section 23 of that constitution every

person has a right of access to information if it is "required" for the exercise or protection of any of his rights. The provision is not quite the same as our Article 41. Phato was charged with criminal libel. In order to prepare his defence he sought from the police the relevant information to the charge. The police declined to release any information; they relied on the common law privilege of protecting information in Government hands.

Phato took the matter to the Supreme Court of South Africa (Eastern cape Division) for a declaration that the refusal to release the information was unconstitutional. The Supreme Court held that Phato required the information in the police docket, particularly the witnesses' statements, in order to prepare for his trial.

Tinyefuza v Attorney General, Constitutional Petition No. 1 of 1996 (Court of Appeal) was overruled by the Supreme Court on appeal. It is therefore doubtful whether this court would be in order to stick to its decision in that case. But the real question in that case was whether a head of a government department could withhold information under section 121 of the Evidence Act. This court made this observation:

> *"What must be protected under section 121 of the Evidence Act are official records relating to any affairs of state. In our opinion to invoke section 121, one must be satisfied that the document in question is an official record relating to affairs of state. If it is not an official record, section 121 cannot be invoked ... The constitution has determined that a citizen shall have a right of access to information in state hands. It has determined the exceptions in a manner that is inconsistent with the application of section 121 of the Evidence Act. It is no longer for the head of Department to decide as*

he thinks fit. That unfettered discretion has been overturned by Article 41 of the Constitution. And now, it is for the court to determine whether a matter falls under the exceptions in Article 41 or not. And to do this the State must produce evidence upon which the court can act. It has not done so in this instance."

The objection by the Attorney General on the admissiblity of the document in question was overruled. On appeal to the Supreme Court (Wambuzi, CJ) stated that he could not fault the above reasoning of this court and the decision to overrule the objection. The learned Chief Justice went on to say:

"I am unable to accept the Solicitor General's submission that as it was common ground that Exhibit P2 related to state security it was not necessary to go further and prove that release of the information would cause prejudice. The Constitutional Court found it was necessary so to prove and I agree."

And so, *Tinyefuza* (Supra) does not nullify section 121 of the Evidence Act. It merely holds that the section will be invoked only when the court is satisfied that the information in question is exempted under Articles 28, 41, 43 and 44. In my view the question of this court departing from its earlier decision does not arise.

For the reasons stated above I find no merit in the petition. Section 15 of cap 249 is not inconsistent with Articles 28, 29, 41, 43 and 44 of the Constitution. I would dismiss the petition with costs to the respondent. However, the decision of the court, by majority, is that this petition is allowed with costs to the petitioners.