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THE REPUBLIC OF UGANDA
IN THE CONSITUTIONAL COURT OF UGANDA
HOLDEN AT KAMPALA

CORAM: HON. S.T. MANYINDO, DCJ
HON. C.M. KATO, JA;
HON. J.P. BERKO, JA.
HON. S.G. ENGWAU, JA.
HON. A. TWINOMUJUNI, JA.

CONSTITUTIONAL PETITION NO. 15 OF 1997

1. CHARLES ONYANGO OBBO }::::::::::::::::PETITIONERS
2. ANDREW MUJUNI MWENDA}

VERSUS

ATTORNEY GENERAL::::::::::::::::::::::::::::::::::::RESPONDENT

JUDGMENT OF TWINOMUJUNI, JA.

This petition is brought under article 137 (3) of the Constitution seeking for declarations as follows:-

(a) That the decision of the State to criminally prosecute them for publishing an article captioned "KABILA PAID UGANDA IN GOLD – SAYS REPORT" published in the Sunday Monitor of 21st September is an act by any person or authority which is inconsistent with or in contravention of the Constitution as to render it unconstitutional within the meaning of article 137 (3) (b) of the Constitution.

(b) That section 50 of the Penal Code Act (Cap. 106) under which the petitioners were prosecuted is itself inconsistent

with the Constitution as to render it unconstitutional within the meaning of article 137 (3) (a) of the Constitution.

The Petition is supported by two affidavits sworn by the petitioners on 24th November 1997 here in Kampala. The respondent filed an answer to the petition in which he denied all the averments in the petition. The answer is also supported by an affidavit of one Monica Mugenyi Senior State Attorney in the Ministry of Justice sworn on the 2nd December 1997.

FACT GIVING RISE TO THE PETITION

The Petitioners are professional journalists and are respectively the Editor and Senior Reporters of the **MONITOR** Newspaper, an English daily published by Monitor Publications Ltd. On 21st September 1997 in the Sunday Edition of the Newspaper called **THE SUNDAY MONITOR** a story was published captioned **"Kabila paid Uganda in Gold – says Report."** The story reads in part as follows:-

> **"President Laurent Kabila of the newly named Democratic Republic of Congo (former Zaire) has given a large consignment of gold to the Government of Uganda as payment for "services rendered" by the latter during the struggle against the former military dictator the late Mobutu Sese Seko.**
>
> **According to the latest issue of French based Indian Ocean Newsletter (ION), the commander of Uganda Revenue Authority (URA) Anti-Smuggling Unit (ASU),**

Lt. Col. Andrew Lutaya, played a key role in the transfer of the gold consignment from the Democratic Republic of Congo to Uganda.

The Chief of ASU, the newsletter reported, used to provide accommodation to Kabila when the latter was still shopping for international support against the Mobutu government as a rebel.

Lutaya was reported in The Monitor mid this year to have gone to Kabila's Congo to help recruit, train and build up a force to help the new government curb smuggling of especially gold and diamonds from Kisangani and other mineral rich towns.

When contacted, the Director of Public Relations in Bank of Uganda, Walugembe Musoke refused to make any comment. He instead told The Monitor to wait until he gets a briefing from his bosses, he said.

Bank of Uganda is the institution that monitors the movement of gold in Uganda and where the country's gold reserves are kept.

However, when The Monitor contacted former Chief spy and currently Minister of State for Local Government, Col. Kahinda Otafiire, he said government has never received any payment from Kabila.

'We have not received any payment from Kabila. Payment for what?' **The Colonel asked.** *'These people of sijui Indian Ocean News letter are just gossiping and rumour mongering.'"*

On 24th October 1997, the petitioners were arrested and charged with two counts of publishing false news contrary to section.50 (1) of the Penal Code Act. The petitioners were acquitted of the charges on 16th February 1999. By that time this petition was pending in this Court. After their acquittal they decided to persue their constitutional rights in this Court.

THE STATUTORY AND CONSTITUTIONAL PROVISIONS IN DESPUTE

The most hotly contested statutory and constitutional provisions in this petition are section 50 of the Penal Code Act, articles 29 (a) and (e), 40 (2) and 43 of the Constitution. Section 50 of the Penal Code Act reads:-

"50 (1) **Any person who publishes a false statement, rumour or report which is likely to cause fear and alarm to the public, or to disturb the public peace is guilty of a misdemeanor.**

(2) It shall be a defence to a charge under section (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably believe that it was true."

In order for the state to successfully prosecute an accused, it must prove beyond reasonable doubt that:-

(a) He published a statement or rumour or report;
(b) The statement or rumour or report was false;
(c) The statement is likely to cause fear and alarm to the public or to disturb public peace.

A misdemeanor in Uganda is punishable by a sentence of imprisonment not exceeding two years.

Article 29 (a) and (e) read:-

> **"(a) Every person shall have the right to freedom of speech and expression which shall include freedom of press and other media.**
>
> **(e) Every person shall have a right to freedom of association which shall include the freedom to form and join associations or unions and political and other civil organisations."**

Article 40 (2) provides:

> **"Every person in Uganda has a right to practice his or her profession and carry on any lawful occupation trade or business."**

The freedom and rights in articles 29 and 40 are among several fundamental human rights and freedoms guaranteed in Chapter Four of our Constitution. In the words of article 20 of the Constitution:-

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

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:-

> **"(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;**
> **(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."

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.

HISTORICAL BACKGROUND TO THE DISPUTED STATUTORY AND CONSITUTIONAL PROVISIONS

(a) Section 50 of the Penal Code Act.

The origins of the offence of publishing false news are to be found in the Statute of Westminster of 1275 which introduced the offence of De Scandalis Magnatum or Scandalum Magnatum. The Statute provided:-

> **"For much as there have been oftentimes found in the Country Devisors of Tales, whereby discord or occasion of discord, hath many times arisen between the King and his people, or Great men of this Realm, for the Damage that hath and may thereof ensue; It is commanded, That, from henceforth none be so hardy to tell or publish any false New or Tales whereby discord or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm; and he that doth so, shall be taken and kept in Prison, until he hath brought him into the Court, which was the first Author of the Tale."**

It was observed by the Supreme Court of Canada (per Justice Mclachlin) in ***Zundel Vs The Queen and Others [1992] 10 CRR {20} 193 Canada*** that the Statute of Westminister of 1275 had as its primary objective the prevention of:

> **"false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the State..... This was no vain fear at the time when the offended great one was only too ready to resort to arms to redress a fancied injury."**

It seems however that De Scandalis Magnatum was not a very effective instrument and only a few cases trickled through Courts until in 1887 when the Statute was repealed. The English men who introduced De Scandalis Magnatum nearly eight centuries ago to protect **"the King and Great men of the Realm"** have now done without the law for more than a century but they did not hesitate to introduce the same law in Uganda when they enacted the same as section 50 of the Penal Code Ordinance of 1951 (Cap. 22). At Independence in 1962 Uganda inherited this law and has never considered reviewing it. This may have been because of the Independence Constitution which appeared to condone its continued existence. The same Constitutional provision was recruited in the 1967 Constitution. Article 17 of which reads:-

> **"17 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and import ideas and information without interference with his correspondence.**

(2) **Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision:**

(a) **that is reasonably required in the interests of national economy, the running of essential services, defence, public safety, public order, public morality or public health; or**

(b) **that is reasonably required for the purpose of protecting the reputations rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, prevent the disclosure of information received in confidence maintaining the authority and Independence of the Courts or regulatory telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainment."**[Emphasis mine]

It can therefore be argued that the 1967 Constitution authorised expressly the making or existence of a law similar to section 50 of the Penal Code Act. One of the main issues in this petition is whether the 1995 Constitution permits the position to remain the same or introduces changes.

(b) Articles 20, 29, 40 and 43 of 1995 Constitution.

Since 1962, a lot of water has passed under the bridge as the English saying goes. The country has witnessed the comings and going of brutal, repressive and tyrannical dictators and regimes. I would take judicial notice of the fact that thousands upon thousands of citizens have been killed, imprisoned or tortured for one reason or another. There was unprecedented abuse of fundamental rights and freedoms of the people. The 1962 and 1967 Constitutions guaranteed and gave the rights and freedoms to the people with one hand and took most of them away with another hand by enacting numerous exceptions to the provisions guaranteeing a right or freedom. The framers of the 1995 Constitution clearly desired to put all that behind them. They declared their commitment (in the preamble to the Constitution)

> **"to building a better future by establishing a social economic and political order through a popular and durable national constitution based on principles of peace, equality, democracy, freedom social justice and progress."**

It seems to me that it was with this background in mind that the framers of the Constitution enacted Chapter Four which includes Articles 20,29,40, and 43.

THE GENERAL LEGAL PRINCIPLES APPLICABLE

(a) Constitutional Interpretation:

The general principles governing constitutional interpretation were ably propounded by their Lordships of this Court in the case of ***Major General David Tinyefuza Vs Attorney General, Constitutional Petition No. 1 of***

1997 (unreported) and on appeal in *Constitutional Appeal No. 1 of 1997 (unreported) in the Supreme Court of Uganda*. I have had occasion to restate most of them in two Constitutional Cases of *Zachary Olum and Another Vs Attorney General, Constitutional Petition No. 6 of 1999 (unreported)* and *Dr. James Rwanyarare and Another Vs Attorney General, Constitutional Petition No. 5 of 1999 (unreported).* I do not intend to discuss them at length in this judgment. The principles discussed in those cases can, however, be summarised as follows:-

(a) principles of Interpretation applicable to Statutory Construction also apply to the construction of Constitutional instruments.

(b) words must be given their natural and ordinary meaning where they are not ambiguous.

(c) **the instrument being considered must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole.**

(d) **provisions relating to the fundamental human rights and freedoms should be given purposive and generous interpretation in such away as to secure maximum enjoyment of the rights and freedoms guaranteed.**

(e) **where the state or any person or authority seeks to do an act or pass any law which derogates on the enjoyment of the fundamental rights and freedoms guaranteed under**

Chapter Four of the Constitution, the burden is on that person or authority seeking the derogation to show that the act or law is acceptable within the derogations permitted under Article 43 of the Constitution.

In the application of these principles of constitutional construction, I take heed of two other pieces of advice drawn from other, but similar jurisdictions, which I find highly persuasive. They are also cited in the cases I have referred to above. In the case of ***De Clerk & Suct Vs Du Plassis & Anor [1994] 6 BLR 124, at page 128 – 9.*** The Supreme Court of South Africa stated:-

> **"When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in the human rights field. The state by legislative and administrative means curtailed.....the human rights of most of its citizens in many fields while the courts looked on powerless. Parliament and the Executive reigned Supreme. It is this malpractice which the bill seeks to combat. It does so by laying ground rules for state action which may want to interfere with the lives of its citizens. There is now a thresh hold which the state may not cross. The Courts guard the door."** [Emphasis mine]

The second one is from the case of ***Troop Vs Dulles 356 US 2 L. Ed. 785 at 590 [1956]*** a decision of the Supreme Court of the United States where Wallen C.J. stated:-

"We are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged... The task requires the exercise of judgement, not the reliance on personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the constitution forbids.

We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The judiciary has the duty of implementing the Constitutional safe guards that protect the individual rights. When the government acts to take away the fundamental rights... the safeguards of the Constitution, should be examined with special diligence.

The provisions of the Constitution are not time worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our nation. When the constitutionality of an Act of congress is challenged in Court, we must apply these rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of

the Constitution merely to accommodate a challenged legislation. We must apply these limits as the constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."

It is these principles of constitutional interpretation that I must bear in mind as I embark on the difficult exercise of planting boundary marks between to what extent the petitioners can go in the enjoyment of their fundamental human rights and freedoms and how far the state can go in regulating them.

(b) <u>The burden of proof</u>

Before I deal with the two main issues which fall for determination in this petition, it is important to determine who bears the burden to prove the constitutionality or unconstitutionality of an act or law complained of. In other Commonwealth jurisdictions which have operated written constitutions for much longer periods than us, it has been determined that it is the duty of a person who complains that his rights and freedoms have been violated to prove that indeed the state or any other authority has taken an action under the authority of a law or that there is an act or omission by the state which has infringed on any of the rights or freedoms of the petitioner enshrined in the constitution. Once that is established, it is the duty of the state or that other authority which seeks to restrict a guaranteed right or freedom to prove that the restriction is necessary within the limits prescribed by the Constitution.

In the Canadian Case of ***Regina Vs Oakes, 26 DLR (4th) 201 the Supreme Court of Canada at page 225*** held:-

> **"The onus of proving that a limit on a right or freedom guaranteed by the charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s.1 (Equivalent to our article 43 of the Constitution) that the limit on the rights and freedoms enumerated in the charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s.1 can bring itself within the exception criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which indicate that the onus of justification is on the party seeking to limit."**

In the case of ***Patel Vs Attorney General [1963] ZLR 99*** the High Court of Zimbabwe stated at page 118:-

> **"The policy of legislation which we have here to consider, namely Chapter III of the constitution (equivalent to our Chapter IV) is stated in s.13, that is to secure the fundamental freedoms and rights of the individual. That is the aim of the Chapter, the limitation imposed being, not a principle object of the legislation, but a restriction of that object, namely limitations designed to ensure that the enjoyment of the said rights and freedoms by an**

individual does not prejudice the rights and freedoms of others or public interest. ...I shall be dealing in due course with the question whether in considering generally the exercise of powers under the relevant provisions, the approach should be objective or subjective. Here we are dealing with a requirement that a stated set of facts exist, namely that certain conditions should be satisfied, and one of them is that the action taken is "necessary and expedient." If it is neither necessary nor expedient, then the exception cannot apply... I think the test of whether it is necessary and expedient is an objective one and must be proved... the facts upon which a conclusion must be based are peculiarly within the knowledge of Government and this is a further reason why I think that the onus of proving their existence should be placed on the state."

In the case of ***Zundel Vs The Queen and others (supra) the Supreme Court of Canada*** dealt with a situation which is on all fours with the present petition. The court was interpreting section 118 of the Canadian Criminal Code (similar to our section 50 of the Penal Code Act) against section 2 (b) of their Charter (equivalent to our article 29 (1) (a) of the Constitution) and section 1 of their charter (equivalent to our article 43 of the Constitution). The principal that if a limitation on guaranteed rights and freedom is established, the onus shifts to the state to show that the legislation is justified under section 1 (of the Charter) where the benefits and prejudices associated with the measure are weighed, was affirmed.

Similarly it was held in ***RE Ontario Film Appreciation Society and ontaria Board of Cencers 147 DLR (3rd) 58 at page 64*** that:-

> **" It is not in dispute that in the event that legislation is enacted which limits any of these freedoms, the government bears the onus of demonstrating that the limit comes within the language of s.1 (our article 43). The presumption of Constitutional validity, which generally applies in cases of ordinary legislation, are not available once it is shown that there has been interference with one of the fundamental freedoms."**

The same Court concluded at page 65 that:-

> **"The burden therefore falls on the Attorney General to satisfy us on the balance of probabilities that the requirement of s.1 of the Charter have been met and the standard of persuasion to be applied by the Court is a high one if the limitation in issue is to be upheld."**

Here in Uganda, the principle has recently been upheld in the case of ***Major General Tinyefuza Vs Attorney General (supra).***

In conclusion I would say that these principles are now firmly entrenched in our law and anyone who wishes to enact or sustain any law which restricts the rights and freedoms guaranteed under Chapter Four of our Constitution bears the burden to prove that such a law is justified under article 43 of the Constitution. The burden is quite high but not as high as proof beyond reasonable doubt.

THE ISSUES:

Since Counsel in this case made arguments through written submissions, the issues for determination were not agreed. From written submissions of the petitioners, two issues arise namely:-

(a) **whether the decision of the state to prosecute them for publishing false news contrary to s.50 of the Penal Code Act was an act inconsistent or in contravention of the Constitution, and**

(b) **whether section 50 of the Penal Code Act is inconsistent with articles 29 (1) (a) and (e), 40 (2) and 43 (2) of the Constitution.**

The reply to the petition by the respondent and in his written submission, he seems to agree that the above issues are indeed the issues for determination in this petition. I propose to adopt them as the issues for determination and to deal with them in the order they appear above.

Issue No. 1:

Does the act of the DPP to prosecute the petitioners under section 50 of the Penal Code Act violate or contravene the Constitution?

I have stated before and I shall reiterate here that human rights granted by the Constitution in Chapter Four thereof are inherent and not granted by the state. See article 20 of the Constitution. They are however not absolute. They can be limited in a manner authorised by article 43 of the

Constitution. Once a citizen establishes that a guaranteed right has been contravened by an act of the state, the burden shifts to the state, the respondent in this case, to prove that the act is permitted under article 43 of the Constitution. In the instant case, the act of the state complained of is the decision of the DPP to prosecute the petitioners under section 50 of the Penal Code Act. I have carefully studied the submissions of Counsel on this issue and with respect I find the submissions of Counsel for the petitioners misconceived. The duties of the DPP are stated in article 120 (3) of the Constitution and they include:-

Article 120 (3) (b):

> **"to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial."**

There is no doubt that when the DPP directed that the petitioners be prosecuted under section. 50 of the Penal Code Act, he was exercising his powers under article 120 of the Constitution. He was however in the process enforcing a statutory limitation to the petitioners' freedom of expression and press and the freedom to practise their lawful profession all of which are guaranteed under articles 29 and 40 of the Constitution. In order to do that, it must be shown that the DPP was acting within the limits provided for in article 43 of the Constitution, (supra). In other words it must be shown that the DPP was acting to prevent prejudice to:-

(a) the fundamental or human rights and freedoms of others;

(b) public interest.

It is the case for the respondent that section 50 of the Penal Code Act was preserved by article 273 of the Constitution in the spirit of article 43 to prevent prejudice to the rights and freedom of others and to public interest. Without prejudice to the debate whether section 50 of the Penal Code Act passes the standards set by article 43 [which I shall discuss in the next issue], I am of the opinion that section 50 of the Penal Code Act is valid law until it is declared otherwise by a competent Court of law. In my view, in seeking to prosecute the petitioners under that law, the DPP was doing no more than his constitutional duty imposed on him by article 120 (3) (b) of the Constitution. In my judgment the act of prosecuting the petitioners did not contravene the Constitution. The first issue is answered in the negative.

Issue No. 2:

The second issue for determination is whether section 50 of the Penal Code Act is inconsistent with or contravenes articles 29 (1) (a) and (e), 40 (2) and 43 (2) of the Constitution. In considering this issue it is necessary to raise and provide answers to the following matters:-

(a) Does section 50 of the Penal Code contravene articles 29 (1) (a) and (e), 40 (2) and 43 (2) of the Constitution?

(b) Is section 50 of the Penal Code Act a limitation of the enjoyment of rights and freedom prescribed by Chapter Four of the Constitution which does not go beyond what is acceptable and demonstrably justifiable in a free and democratic society?

SECTION 50 AND CONTRAVENTION OF THE CONSTITUTION

I wish first to dismiss the contention that section 50 of the Penal Code Act contravenes articles 29 (e) (freedom of association), 40 (2) (the right to practise ones profession and to carry out any lawful occupation trade or business). Section 50 forbids the publication of false reports likely to cause alarm to the public or to disturb public peace. I am unable to see how that interferes with the freedom of association or the right to practise ones profession. In their written submissions, the petitioners do not deal with the matter and do not shed any light on how these rights and freedoms relate to section 50 of the Penal code. It is the duty of the petitioners to establish that the Penal Code Act provision contravenes the above freedoms and human rights. In my judgment, I find no evidence from which I can justifiably draw the conclusion. In the circumstances the contention that section 50 of the Penal Code Act contravenes the petitioners' freedom of association and the right to practise their profession has no basis and I would dismiss it accordingly.

SECTION 50 AND FREEDOM OF SPEECH, EXPRESSION AND PRESS

The importance of freedom of speech, expression and press, enshrined in article 29 (1) (a) of our Constitution, in a free and democratic society cannot be over emphasised. In ***Rangarajam Ram 1990 LRC, Constitution 412 at 416,*** the Supreme Court of India defined freedom of expression as follows:-

"Freedom of expression is the right to express ones opinion by word of mouth, writing, printing, pictures or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinions. Communication could be made through any medium, newspaper or movie."

In the case of ***Edmonton Journal Vs Albarta [1989], 45 CRR 1, the Supreme Court of Canada per Cory J.*** stated the importance of freedom of expression as follows:-

"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over emphased. No doubt that is why the framers of the Charter (equivalent of Chapter Four of our Constitution) set forth s.2 (b) (similar to our article 29 (1) (a)) in absolute terms ... It seems that rights enshrined in s. 2 (b) should therefore only be restricted in the cleared circumstances."

In ***Manika Ghandhi Vs Union of India [1978] 2 SCR 621 Bhagwati J.*** of the Supreme Court of India observed:-

"Democracy is based essentially on a free debate and open discussion for that is the only corrective of

government of action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."

Concerning the extent to which this all important freedom is enjoyed in a free and democratic society, a number of eminent jurists in the common law system of justice have made the following important pronouncements:-

In ***Rangrajam Vs Jigjiram (supra) at page 424,*** it was observed that:

"in a democratic society it is not necessary that everyone should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Everyone has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means."

Alexander Meiklejohn, a leading American philosopher in his book **POLITICAL FREEDOM, 1960** at page 17 wrote on freedom of expression:-

"When men govern themselves it is they and no one else who must pass judgment upon unwisdom and unfairness and danger and that means that unwise ideas must have

> **a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un American as well as American... (These) conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant... To be afraid of ideas, any idea, is to be unfit for self government."**[Emphasis mine).

I have taken the liberty to quote experts on freedom of expression at length to demonstrate its importance in a free and democratic society and to show to what extent it must be enjoyed if it is to be meaningful. It follows therefore that any one seeking to restrict that freedom must be prepared to show that special and clear circumstances do exist that justify such restriction of the freedom. The task is not insurmountable but it is quite a demanding one.

SECTION 50 AND ARTICLE 29 (1) (a)

The first question I raised that needs an answer is whether section 50 of the Penal Code Act restricts in any way freedom of expression. The section itself is very clear. It seeks to prohibit publication of any:-

(a) **false statement, rumour or report;**
(b) **which is likely to cause fear and alarm to the public;**
(c) **or disturb public peace.**

On the face of it, there is no doubt that this section contravenes the freedom of speech, expression and the press guaranteed under article 29

(1) (a) of the Constitution. Unless it can be shown to be justified under article 43 of the Constitution, it should not stand.

JUSTIFICATION UNDER ARTICLE 43 OF THE CONSTITUTION

This now leads me to the consideration of the second question I posed namely whether the continued existence of section 50 can be justified on the ground that it is necessary to prevent prejudice to the rights and freedoms of others or public interest. I have already stated that once the petitioners establish, as they have in this petition, that an act or law contravenes their constitutional right, the burden shifts to the state, the respondent in this case to prove that the act or the law is justified under article 43 of the Constitution. In this petition, the respondent in the reply to the petition stated in paragraph 6 (a) that:-

> **"...Section 50 of the Penal Code Act reiterates Article 43 of the Constitution which requires that freedom to be mindful of the freedoms and the rights of others, trampling upon which entitles not only the Director of Public Prosecutions but also the public to seek protection from Courts of law."**

The above statement is the only justification for existence of section 50 of the Penal Code that is made in the reply to the petition. With respect I do not see how section 50 **"reiterates"** article 43. The two provide for different situations except that for section 50 to stand it must be within limits set by article 43.

In his written submission, the respondent only states that section 50 is justified under article 43 and that the freedom of expression guaranteed under article 29 does not protect false statement and rumours which are likely to cause fear or alarm or disturb public peace. No attempt is made to show how the full enjoyment of the freedom guaranteed under article 29 can prejudice the enjoyment of the rights and freedoms of other or public interest. The only assertion being made is that article 29 does not protect false statements. With respect I do not agree that merely because a statement is false, it does not merit protection under article 29. A similar matter was considered in the Supreme Court of Canada in the case of ***Zundel Vs Queen (supra).*** In that case Zundel was charged with publishing false news likely to cause injury or mischief to public interest contrary to section 181 of the Criminal Code of Canada which is almost similar and has the same historical origin as our section 50 of the Penal Code Act. The state submitted that false news published by Zundel were not protected by section 2 (b) of the Canadian Charter of Human Rights (similar to our article 29 (1) (a) of our Constitution.) This is how the leading majority judgment handled the issues at page 207:-

> **"The second argument advanced is that the appellant's publication is not protected because it serves none of the values underlying s.2 (b). A deliberate lie, it is said, does not promote truth, political or social participation, or self-fulfillment. Therefore it is not deserving of protection.**
>
> **A part from the fact that acceptance of this argument would require this Court to depart from its view that the content of a statement should not determine whether it**

falls within s.2 (b), the submission presents two difficulties which are, in my view, insurmountable. The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s.2 (b) of the Charter. The second lies in the difficulty of determining the meaning of a statement and whether it is false.

The first difficulty results from the premise that deliberate lies can never have a value. Exaggeration – even clear falsification – may arguably serve a useful social purposes linked to values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g. "cruelty to animals is increasing and must be stopped."

A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie. Consider the case of *Salman Rushdies Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the prophet.

All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. To accept the proposition that deliberate lies can never fall under s.2 (b) would be to exclude the statements such as the examples above from the possibility of Constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.....

The second difficulty lies in the assumption that we can identify the essence of communication and determine that it is false with accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing values and interest, while useful under s.1 of the Charter (similar to our article 43), can be unfair if used to deny prima facie protection. One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meaning, some which seem false, others of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the

reader..... The result is that a statement that is true on one level or for one person may be false on another level for a different person."

The learned judge then concluded at page 209:-

"Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometime have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom expression guaranteed by s.2 (b) hitherto adhered to by this Court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefits of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s.2 (b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s. 1 (our article 43)."

Although this Canadian Case is not binding on this court, the facts of the case are on all fours with those of the instant petition that I do not see any single reason why, after finding it highly persuasive, I should not follow it. I am fortified in my belief in the correctness of the Canadian authority

by a statement made by Archibald Cox in a publication called **SOCIETY** VOL 24 P.8 No.1 November/December, 1986 where he stated:-

> **"Some propositions seem true or false beyond rational debate, some false and harmful, political and religious doctrines gain wise public acceptance. Adolf Hitler's brutal theory of a "master race" is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough; no man, no committee and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both, from what is false. To licence one to impose his truth upon dissenters is to give the same to all others who have, but fear to loose, power. The judgment that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of a free people."** [Emphasis mine]

This leads me to the conclusion that it is of no comfort to the respondent to just assert that a false statement is not protected by article 29 (1) (a) of the Constitution. It is protected. The burden remains on the respondent to prove on a high balance of preponderance that section 50 falls within justifiable limits set by article 43 of the Constitution. The respondent never made any attempts to do that and therefore failed to discharge the burden of proof on him as a person or authority seeking to maintain the

restrictions on freedom of speech, expression and media. The answer to this second question is that the existence of section 50 cannot be justified on the ground that it is necessary to prevent prejudice to the rights and freedoms of others or public interest.

IS SECTION 50 A RESTRICTION WHICH IS ACCEPTABLE AND DEMONSTRABLY JUSTIFIABLE IN A FREE AND DEMOCRATIC SOCIETY?

In this judgement, it is necessary to examine the meaning of two important phrases used in article 43 (2) (c) of the Constitution and then consider whether section 50 of the Penal Code Act is in any way protected by that article. The phrases are:

(a) Acceptable and demonstrably justifiable.
(b) Free and democratic society.

I find it convenient to start with the latter phrase.

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 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 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 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 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 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 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 is no significant difference between the two phrases. In the Canadian case of ***Regina Vs Oakes (supra)*** the phrase was given meaning as follows:-

> **"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. ..... 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.1 (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.**
>
> **Secondly, once a sufficiently significant objective is recognised, then the party invoking s.1 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. 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 objective in the first sense, should impair "as little as possible" the right 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."

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 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 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 to be reasonable and demonstrably justified in a free and democratic society,"

Now, the issue is whether in this petition the state or the respondent has established on a preponderance of probabilities that section 50 of the Penal Code Act does not make restrictions to freedom of speech, expression and press beyond what is acceptable and demonstrably justifiable in a free and democratic society. In my opinion the state did not make any attempt whatsoever to address this issue at all. Yet the burden of proof was on them to explain how section 50 came to be part of our law, what purpose it was enacted to serve, whether it meets the standard set by the proportionality text propounded in the ***Regina Vs Oakes (supra)*** case, whether it is still good law in light of radical changes introduced by the 1995 Constitution. All that the respondent managed to state was that section 50 was justified by article 43 of the Constitution but there is no evidence to prove it. This Court stated in ***Major General Tinyefuza Vs Attorney General (supra)*** that a party wishing to justify a restriction in a guaranteed right and freedom has the burden to adduce evidence to prove that the restriction is justifiable and necessary and is protected by article 43. This decision was upheld by the Supreme Court of Uganda on appeal.

This serious omission on the part of the respondent leaves very many questions unanswered. Here is a law which has its origin in the Statute of Westminster of 1275 whose stated objective was to protect the **"King and his Great men of the Realm"** who were mostly powerful landlords, from damage from false publications which may tarnish their presumed reputations. The law was abolished in its country of origin (England) in 1887. A version of the same was however introduced in many British colonies many of which have since abolished the law on the grounds that its original objective has become irrelevant or that it violates human rights and freedoms of their Constitutions. The respondent should have attempted to adduce evidence to prove that such a law is still required here in the 21st Century in a free and democratic Uganda.

Another related problem was noted in ***Regina Vs Oakes (supra)*** at page 228 that:

> **"where evidence is required in order to prove the elements of a s.1 (Article 43) inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequence of imposing or not imposing the limit. ..... A Court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add however, that there may be cases where certain elements of the s.1 analysis are obvious or self evident."** In my view this case is not one of them.

Another problem with section 50 of the Penal Code Act is its vagueness. The section contains many words which are so vague that it is difficult to assign them any precise meaning. In their written submission, the petitioners pointed out some examples. The most striking of them are:-

(a) **The word "publish" is not defined in the Penal Code Act. Yet the word is capable of a variety of meanings. In some English Dictionaries the word means to put to or make public which means to circulate, sell, distribute e.t.c which casts such a wide net that includes those who may not even know that the so called false statement is present in the matter being published e.g. a newspaper seller.**

(b) **"False" is a word without any definite meaning. As already discussed above a statement may be said to be false merely because it is an unpopular view or a minority view. To make such a statement punishable with heavy criminal sanctions is an intolerance that goes beyond what is acceptable and demonstrably justifiable in a free and democratic society.**

(c) **"Statement" – what amounts to a statement? Is it a phrase, paragraph or sentence?**

(d) **"Public" – is it a community, a section of the community or a handful of it? Is it as perceived by government or does it have an objective assessment?**

(e) **"fear" and "alarm" to the public. How is this to manifest itself? Is it when there is a demonstration or riot by two, ten or a thousand members of the community?**

This is to mention only a few. The point here is that section 50, through it prescribes two years imprisonment for its breach is so vague that in my view it contravenes article 28 (12) which states:-

> **"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."** [Emphasis mine]

In the American case of ***Iguatius Lanzetta Vs The State of New Jersey 306 US 888 at 893*** it was held that:

> **"...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."**

In Tanzanian case of ***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 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 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."

Finally, section 50 appears under Chapter VII of the Penal Code Act which is headed **"TREASON AND OFFENCES AGAINST THE STATE."** Though its manifest intention is to protect public order, yet in reality its true practical application is to protect **"The King and the Great men of the Realm."** The petitioners in this case were charged for publishing contents of an article published in another magazine in France because the Article said:

(a) Uganda Government was paid in Gold by Congo (DRC) or services rendered.

(b) Lt. Col. Lutaya (of UPDF) had received and brought the Gold into Uganda on behalf of Government.

It is beyond my imagination to understand how this could cause **"fear"** and **"alarm"** to the **"public"** or disturb **"public peace"** even if it was proved false. Not so long ago, a journalist was arrested and charged under section 50 for writing in his publication that Rwanda was the 39th District of Uganda and that the then Vice President of Rwanda was the Resident District Commissioner of the District. This statement was obviously false and everyone knew this, but is this conduct that should be criminalised in a free and democratic society? It is a sad commentary on section 50 that the journalist died in official custody for this offence.

I believe I have said all there is to say about section 50 of the Penal Code. In my humble judgment it is an anachronism that has outlived its usefulness (if it ever had any in Uganda). It was introduced during the colonial rule as an instrument of repression for the protection and cover up of felonies and scandals committed by the colonial administrators and the colonial power. It was maintained by post independence regimes who found it a convenient tool for the same purpose. However, it has no place in a free and democratic society that the promulgation of the 1995 Constitution ushered in Uganda. The respondent failed to justify its continued existence and I cannot find any justification. It is inconsistent with article 29 (a) and cannot be saved by article 43 of the Constitution. It cannot be modified as required by article 273 so as to remain with any form of life or existence. As article 2 of the Constitution dictates, it is null and void.

In the result, I would allow the petition in part. It would succeed on the second issue but fail on the first issue. I would order that each party bears its own costs.

Dated at Kampala this...21st.....day of....July.....2000.

AMOS TWINOMUJUNI

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 15 OF 1997

CORAM: HON. MR. JUSTICE S.T. MANYINDO, DCJ.
HON. MR. JUSTICE C.M. KATO, JA.
HON. MR. JUSTICE J.P. BERKO, JA.
HON. MR. JUSTICE S.G. ENGWAU, JA.
HON. MR. JUSTICE A. TWINOMUJUNI, JA.

1. CHARLES ONYANGO-OBBO] .....PETITIONERS
2. ANDREW MUJUNI]

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF HON. J.P. BERKO, JA., (MANYINDO, DCJ; KATO, JA; AND ENGWAU, JA. CONCURRING)

The first petitioner, Charles Onyango-Obbo, is a journalist and editor of an English daily Newspaper called the Monitor published by a Company called the Monitor Publications Ltd. The second petitioner, Andrew Mujuni, is also a journalist and a senior reporter with the Monitor Publications Ltd. They have brought this petition through their advocates M/s. Nangwala & Co. Advocates against

the Attorney General. In the petition they seek the following declarations:

(a) that the action of the Director of Public Prosecutions in prosecuting them under the authority of section 50 of the Penal Code Act is inconsistent with the provisions of articles 29(1) (a) and (e) and 40(2) of the Constitution, and

(b) that section 50 of the Penal Code Act is inconsistent with the provisions of articles 29(i)(a) and (e) and 43(2)(c) of the Constitution.

They also prayed for the following orders:

(a) an order that they be released from Criminal Prosecution in Buganda Road Criminal Case No. U. 2636 of 1997;

(b) an Order that they are entitled to general damages for the unconstitutional prosecution and for an order referring the matter to the High Court to investigate and determine the quantum, and

(c) they also prayed for the cost of the petition and such other relief as the court may deem fit and just.

The facts giving rise to the petition arose in the following circumstances. On the 21st of September 1997, a story appeared in the front page of the Sunday Monitor captioned ***"Kabila paid Uganda in Gold, says report"*** The story was culled from ***"The Indian Ocean News letter",*** which is a weekly news letter based in Paris in France. On the 24/10/1997 the petitioners were summoned by the police, arrested and charged on two counts in Buganda Road Chief Magistrate's Court with the offences of

publishing false news, contrary to section 50(1) of the Penal Code Act.

It is the contention of the petitioners that the action of the Director of Public Prosecutions in criminally prosecuting them for publishing the article:

(a) is inconsistent with and/or is in contravention of article 29(1)(a) of the Constitution as the publication was done in the exercise of their freedom of expression and the press;

(b) is inconsistent with article 29(1)(e) of the Constitution as the publication was done in the exercise of their freedom of association;

(c) is inconsistent with article 40(2) of the Constitution as the publication was done in the exercise of their right to practise their profession in their lawful occupation and/or trade and/or business, and

(d) is inconsistent with article 43(2) (c) of the Constitution in that the publication was done in the enjoyment of their rights and freedoms enshrined in the Constitution in the reasonable belief that it is acceptable and justifiable in a free and democratic society.

They also contend that section 50 of the Penal Code Act under which they were charged is inconsistent with the Constitution in so far as it limits the enjoyment of the rights and freedoms prescribed in articles 29(i) (a) and (e) and 43(2)(c) of the Constitution.

In answer to the petition the Attorney General has contended:

(i) that the decision of the Director of Public Prosecutions to criminally prosecute the petitioners under section 50(1) of Penal Code Act is not inconsistent with the Constitution;

(ii) that the petitioners' freedom of expression guaranteed under article 29(1)(a) is subject to the qualifications in article 43 of the Constitution whose provisions fully support the offence created under section 50 of the Penal Code Act;

(iii) that the respondent has not stopped the petitioners from practising their profession nor has the respondent interfered or attempted to interfere with the petitioners' freedom of association and expression guaranteed by the Constitution;

(iv) that section 50 of the Penal Code Act is not inconsistent with articles 29(1)(a) and (e), 40(2) and 43(2) (c) of the Constitution;

(v) that the arrest and charging of the petitioners were perfectly legal under the Penal Code Act and that the petitioners should avail themselves the defence provided by sub-section (2) of section 50 of the Act if they so wish, rather than challenging the constitutionality of the section which is intended to protect the public from false publications, rumour or reports likely to cause fear and alarm to the public or to disturb public peace;

(vi) that the action of Director of Public Prosecutions under section 50 of the Penal Code Act are not inconsistent with the Constitution as:-

(a) they do not make freedom of expression, press and association as well as the right to practise journalism profession criminal acts as alleged in the petition. Instead section 50 of the Penal Code Act reiterates article 43(1) of the Constitution which requires that in the enjoyment of rights and freedom one must be mindful of the freedoms and rights of others and that the trampling upon which not only entitles the Director of Public Prosecutions to take appropriate action but also the public to seek protection from courts of law;

(b) Article 43(2)(c) of the Constitution is not a magic wand in the hands of journalists to publish irresponsibly, maliciously or unprofessionally and

(c) the democracy in Uganda is not measured solely by the petitioners simply because the truth or authenticity of their actions are being questioned in a court of law but is subject to the rule of law and must be for the good of society generally.

For the above reasons, the Attorney General, contended that the petition lacked merit and raised no constitutional issue worthy of interpretation and determination by this Court and that the petitioners are not entitled to any reliefs sought. He prayed for the dismissal of the petition with costs.

Both parties filed written submissions. I propose to deal first with the issue raised by the Attorney General that the facts, as alleged in the petition, did not constitute a constitutional question requiring interpretation. The issue has at once brought into focus the question as to whether or not this Court has jurisdiction to entertain the petition.

The jurisdiction of this court is derived from the provisions of article 137(3) of the Constitution which provides:

> ***"137 (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***
>
> ***(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".***

It is clear from the above provision that for this Court to have jurisdiction, the petition must show, on the face of it, that interpretation of a provision of the Constitution is required.

Here it has been alleged in the petition firstly, that the decision of the Director of Public Prosecutions to charge the petitioners under section 50(1) of the Penal Code Act is unconstitutional as it infringes articles 29(1)(a) and (e), 40(2) and

43(2) of the Constitution and secondly, that section 50 of the Penal Code Act itself is inconsistent with the above provisions of the Constitution.

In my opinion, as the petitioners have alleged that articles 29(1)(a) and (e), 40(2) and 43(2) are infringed by an act or a decision of any person or authority, or an Act of Parliament or any other law and have petitioned1 this court, the matter becomes the subject of interpretation by this Court. This Court becomes duty bound to interpret and give meaning to the articles mentioned above in relation to any other law, act or behaviour alleged to be in conflict with those articles of the Constitution. This is the import of the Supreme Court decisions in the cases of *Attorney General v David Tinyefuza, Constitutional Appeal 1 of 1997, (Supreme Court) unreported* and *Ismail Serugo v Kampala City Council and Another, Constitutional Appeal No. 2 of 1998 (Supreme Court) unreported.* The above decisions were reiterated by the Supreme Court in *Paul K. Ssemogerere and Another v The Attorney General, Constitutional Appeal No. 1 of 2000 (SC) (unreported.)*

I therefore do not agree with the submission of the Attorney General that the facts presented in the petition do not call for the interpretation of the Constitution. In my opinion, once the petitioners have alleged not only that section 50 of the Penal Code Act is inconsistent with articles 29(a) and (e), 40(2) and 43(2) of the Constitution, but also that the act of the Director of Public Prosecutions in prosecuting them under the authority of section 50 of the Penal Code Act has infringed the provisions of those articles, this Court has jurisdiction in the matter.

The merits of the petition can be considered under two broad heads. The first complaint of the petitioners is that the action of the state in criminally prosecuting them under section 50(1) of the Penal Code Act for publishing the article which was the subject matter of the charge, contravenes article 29(1)(a) of the Constitution which provides:

> ***29 (1) "Every person shall have the right to –***
> ***(a) freedom of speech and expression, which shall include freedom of press and other media."***

I agree that this article guarantees the petitioners free speech and expression and also secures press freedom. I also agree that it does not matter how they exercise that freedom unless the state can prove by evidence that they offended part of article 43 of the Constitution and that the course the state took was proper. Section 50(1) of the Penal Code Act under which the state prosecuted the petitioners provides:-

> ***"50(1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour."***
> ***(2) It shall be a defence to a charge under sub-section (1) if the accused proves that, prior to publication, he took such measures to verity the accuracy of the statement, rumour and or report as to lead him reasonably to believe that it was true".***

Section 50 is part of the existing laws saved by article 273 of the Constitution, and should ***"be construed with such modification, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with"*** the Constitution. Article 43(1) of the Constitution provides:

> ***"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 enjoyment of 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."***

In view of the above provision, in order to obtain conviction under section 50(1) of the Penal Code Act, the state has to prove that ***"the false statement, rumour or report is likely to prejudice the fundamental or other human rights and freedoms of others or the public interest".*** In other words since section 50(1) of the Penal Code Act is to be ***"Construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity"***

with the Constitution, the state now need not prove that ***"the false statement, rumour or report is likely to cause fear and alarm to the public or to disturb the public peace."*** Instead it will be enough if the state is able to prove that ***"the false statement, rumour or report is likely to prejudice the fundamental or other human rights and freedom of others or the public interest".*** The state has to prove such matters by evidence in court.

One of the functions of the Director of Public Prosecutions under article 120(3) of the Constitution is to institute criminal proceedings against any person or authority in any court with competent jurisdiction. Criminal prosecutions are instituted under the Penal Code Act and other statutes or laws that have penal provisions. I therefore do not agree with the argument of Mr. Nangwala, learned counsel for the petitioners, that the action of the Director of Public Prosecutions to prosecute the petitioners under section 50(1) of the Penal Code Act contravened article 29(1)(a) of the Constitution. The mere fact that, in this instance, the state did not have evidence to prove its case, which led to the acquittal of the petitioners, does not mean that the decision to prosecute them was unconstitutional.

Similarly, I do not see in what way the decision to prosecute the petitioners for publishing in their Newspaper in Uganda the article they found in the Indian Ocean Newsletter infringed their right to associate with the Indian Ocean Newsletter. The prosecution was rather a warning to them that they do not have to publish for the consumption of the unsuspecting Ugandan public

any trash they come across in foreign Newspapers and Newsletters. In my view article 29(1)(e) of the Constitution was not contravened by the act of the Director of Public Prosecutions.

I equally do not see any merit in the argument of Mr. Nangwala that the action the Director of Public Prosecutions took to prosecute the petitioners for publishing the article in dispute prevented them from practising their profession as journalists or to carry on their lawful occupation or business. It has not been shown that the petitioners stopped to practise their profession as journalists when they were charged. The mere fact that they wasted sometime in going to court did not make the decision to charge them unconstitutional.

I therefore hold that the petitioners have failed to make out a case against the Director of Public Prosecutions of infringement of their rights and freedoms under articles 29(1)(a) and (e) and 40(2) of the Constitution.

The second complaint of the petitioners is that section 50 of the Penal Code Act under which the state prosecuted them is inconsistent with or is in contravention of articles 29(c)(a) and43(2)(c) of the Constitution. I have already set out the provisions of section 50 of the Penal Code Act. Under the section it is a defence if the accused proves that prior to the publication of the false statement, rumour or report, he took measures to verity the accuracy of the statement that led him reasonably to believe that it was true. The quarrel of counsel for the petitioner is that the defence is only relevant after the person has been charged and

put before court and after the court has found that he has a case to answer. According to counsel it is not justifiable that a person should first be prosecuted and later, in his defence, show that he made investigation which convinced him that what he published was true. In the opinion of Mr. Nangwala that makes the section an absurd.

With due respect, I do not find anything offensive about the requirement for the accused to establish his defence or offer an explanation after a prima facie case has been established against him. That is what obtains in an adversarial criminal justice system. An accused person is only required to enter into his defence after the court has found that a prima facie case has been made against him. This procedure is provided for, in the case of trial on indictment, by section 71 of The Trial On Indictments Decree 1971 (Decree 26). That requirement cannot therefore make the section unconstitutional.

I do agree that article 29(1) of the Constitution guarantees free speech and expression and also secures press freedom. These are fundamental rights. It can be said that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society. Therefore in my view, the function of the law, and particularly criminal law, should exclude from the range of individual choice those acts that are incompatible with the maintenance of public peace and the safety and rights of individuals. Freedom of speech and expression cannot be invoked to protect a person ***"who falsely shouts fire, fire, in a theatre and causing panic".***

In my opinion where there are no constraints on freedom of speech and expression, the difficulty would arise that one of the objects of upholding free expression – truth – would be defeated. It is therefore important to regulate or limit the extent to which this can happen. That is reason for the justification for enacting article 43 of the Constitution. A citizen is entitled to express himself freely except where the expression would p***rejudice the fundamental or other human rights and freedom of others or the public interest".*** I find that section 50 of the Penal Code is necessary to cater for such excesses. Clearly the democratic interest cannot be seen to require citizens to make demonstrably untrue and alarming statements under the guise of freedom of speech and expression. The section prohibits illegal and criminal conduct under the cover of freedom of speech and expression.

I do not subscribe to the argument of Mr. Nangwala that the truth or falsehood of the article is not the issue. In my view the truth or falsehood of the article is one of the ingredients of the offence the state has to prove.

It may well be that no adverse consequences to public interest resulted in the publication of this particular article. That was the reason why the state could not prove the charges against the petitioners. There is no guarantee that such an eventuality could not occur in future. That is the justification for having such laws in place. In my view section 50 of Penal code Act is not inconsistent with the Constitution.

For the above reasons I would decline to make the declarations sought. I find that the challenged law and act of the Director of Public Prosecutions are not inconsistent with the Constitution. I would dismiss the petition with costs to the respondent.

Dated at Kampala this ....21st.....day of .....July.....2000.

J.P. Berko

Justice of Appeal.

Order: By majority of four to one the Court declines to make the declarations sought and the petition is dismissed with costs to the respondent.

S.T. Manyindo

Deputy Chief Justice.

C.M. Kato

Justice of Appeal.

J.P. Berko

Justice of Appeal.

S. G.M. Engwau

Justice of Appeal.