

57

5

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

10

**CORAM: HON JUSTICE G.M. OKELLO, JA ✓**  
**HON JUSTICE S.G ENGWAU, JA**  
**HON JUSTICE A. TWINOMUJUNI, JA**  
**HON JUSTICE C.N.B KITUMBA, JA**  
**HON JUSTICE S.B.K KAVUMA, JA**

15

**CONSTITUTIONAL REFERENCE NO 05/2005**  
**(ARISING FROM HIGH COURT TAX APPEAL NO 0007 OF 2003)**

**HON. LADY JUSTICE JULIA SEBUTINDE:::::::::::::APPELLANT**

20

**VERSUS**

**THE ATTORNEY GENERAL:::::::::::::RESPONDENT**

25

**RULING OF THE COURT:**

**1. INTRODUCTION**

On the 25<sup>th</sup> day of November 2004, during the hearing of High Court Tax Appeal No 07 of 2003, The Hon. Justice Ogoola, the Principal Judge (P.J) made the following order:-

30

“ This appeal having come up for further consideration this 25<sup>th</sup> day of November, 2004 before the Honourable

5  
Justice Ogoola P.J. it was by consent of both counsel for the parties ordered that:

(a) the question

- 10
1. whether the appellant's remuneration as the chairperson of the commission of inquiry into Allegations of Corruption in the Uganda Revenue Authority is exempted from taxation by virtue of article 128 of the Constitution involves the interpretation of the Constitution under article 137, and

15

(b) the said question be referred to the Constitutional Court under article 137(5) for decision."

20

Following this order of the High Court, this constitutional reference was filed in this court. Counsel for both parties have had the opportunity to file conferencing submissions and to make oral submissions before us in open court. What follows is the ruling on the reference.

25

2. **BRIEF FACTS.**

30

The appellant, Hon. Justice Julia Sebutinde is a judge of the High Court of Uganda. On the 12<sup>th</sup> March 2002, she was appointed by the Minister of Finance to chair a commission of inquiry into Allegations of Corruption in Uganda Revenue Authority. She was to be paid an honorarium of Ug. Shs 9 million per month. From October 2002, the Uganda Revenue Authority (URA) started deducting a tax known as Pay As You Earn (PAYE) from the honorarium. The appellant protested against the taxation pointing out that as a sitting judge, her income was not liable to taxation as

5 it was protected by article 128(7) of the Constitution. The  
Commissioner General of URA refused to lift the tax or to refund  
what URA had already deducted from the appellant. In her letter to  
the appellant dated 20<sup>th</sup> June, 2003, the Commissioner General  
communicated her final decision to the appellant, who then  
10 appealed that decision to the High Court. It was during the  
consideration of the appeal that the order for a reference to this  
court was made.

3. **THE ISSUE**

15 The only question for determination remains the one which was  
framed in the High Court with the consent of counsel for both  
parties namely:-

20 “ whether the appellant’s remuneration as the chairperson of  
the commission of inquiry into the Allegations of Corruption in  
the Uganda Revenue Authority is exempted from taxation by  
virtue of article 128 of the Constitution.”

4. **ARGUMENTS OF COUNSEL:**

25 (a) **FOR THE APPELLANT**

Dr Joseph Byamugisha, learned counsel for the appellant, argued  
the reference on her behalf. He adopted the main legal arguments  
which he had presented in his conferencing submissions.  
Summarising the submissions, Dr. Byamugisha submitted that  
30 from March 2002, when the commission of inquiry was appointed  
up to October 2002, the appellant’s honorarium was not taxed by  
the respondent. It was the appellant’s case that between June and  
October 2002, the commission handled non-contentious matters

5 and its relationship with URA were generally cordial. However,  
towards the end of October, 2002, the commission started  
investigating and inquiring into personal wealth of individual URA  
officers. This did not go well with the officers, including the URA  
Commissioner General, Ms Annebrit Aslund and Mrs Feddy  
10 Mwerinde, the Commissioner in-charge of collecting the taxes. As  
a result, the Commissioner General made the decision to tax all  
people working on the commission, despite the fact that some were  
clearly exempted by law from the payment of tax. In the case of  
the appellant, she was exempted from the payment of income tax  
15 by the provisions of article 128(7) of the Constitution, which  
provides that:-

20 **“ the salary, allowances, privileges and retirement benefits  
and other conditions of service of judicial officers or other  
persons exercising judicial power, shall not be varied to his or  
her disadvantage.”**

Dr. Byamugisha submitted that the appellant was appointed in her official  
capacity as a High Court Judge to chair the commission. She conducted  
25 herself as a judge and the commission was a judicial commission of  
inquiry. In his view, her remuneration derived from the conduct of the  
commission was not liable to taxation as it was protected by the  
Constitution. He relied on the case of **Masalu Musene Wilson and 3  
others vs The Attorney General, Constitutional Petition No 5 of 2004,**  
30 in which the Constitutional Court, by a majority of three to two, held that  
the remuneration of judicial officers derived from the exercise of judicial  
power is protected by article 128(7) of the Constitution and is not subject  
to income tax. The appellant also relied on the opinion of the Attorney

5 General expressed in a letter he wrote to the Minister of Finance on 10<sup>th</sup> April 2002, in which he advised that the remuneration of judicial officers was protected by the Constitution and was not liable to taxation.

10 Finally, Dr. Byamugisha relied on the English case of Royal Aquarium and Summer and Winter Garden Society, Limited vs Parkinson (1892) IQB 431 to support a submission that commissions of inquiry do exercise judicial power and that they are courts within the meaning of that word in our Constitution. In further support of that proposition, he pointed out the following provisions of the Commission of Inquiry Act, which he argued, go to show that proceedings of the commissions set up under the Act are judicial proceedings:-

- Section 6: Duties of commissioners.
- 20 - Section 8: Commissioners' powers to regulate proceedings.
- Section 9: Powers of commissioners to summon and examine witnesses
- 25 - Section 11: Powers to deal with witnesses.

In Dr. Byamugisha's view, these provisions went along way to prove that commissions of inquiry were actually "*Courts*" within the meaning of the Constitution and commissioners' remuneration was protected from taxation by article 128(7) of the Constitution.

(b) **FOR THE RESPONDENT**

Mr. Joseph Matsiko, the learned Acting Director of Civil Litigation in the respondent's chambers adopted his legal arguments contained in his conferencing notes.

10

The gist of the arguments was as follows.

- (i) there is no requirement in the law, or at all, that a commission of inquiry must be chaired by a judge of the High Court or at all, and the appointing authority can appoint a person who is not a judge to head such a commission.
- (ii) There is no evidence at all, that the appellant's duties as a High Court judge include chairing commissions of inquiry, and her allegations to that effect are not supported by any facts or legal provisions.
- (iii) In any case, the Appellant was appointed as chairperson of the URA commission not as part of her duties as a High Court judge.
- (iv) The instrument of the appellant's appointment was signed by the Minister of Finance, Planning and Economic Development, who has no power to allocate duties to the appellant as part of her duties as a High Court judge.
- (v) A Judge of the High Court is appointed as a judicial officer by **the** President, acting on the advice of the Judicial Service Commission and the appellant's appointment by the said Minister to chair the

15

20

25

30

5

Uganda Revenue Authority commission was not and could not be for the purposes of exercising judicial power.

10

(vi) The salaries and allowances of High Court judges, including the appellant are charged on the Consolidated Funds by the Constitution.

15

(vii) The Constitution requires that the said salaries and allowances and other conditions of services of a judicial officer exercising judicial power shall not be varied to his or her disadvantage, but this does not apply to any other income.

20

(viii) The Constitution provides that judicial power shall be exercised by the courts established under the said Constitution.

25

(ix) The appellant was not appointed by the Minister to exercise judicial power through any court established by the Constitution and her remuneration as the chairperson of the URA commission was not a salary or allowance charged on Consolidated Fund and/or paid to her as a judicial officer exercising judicial power at all.

30

(x) The appellant's income from any other source other than what she earns as salary or allowance paid to her as a judicial officer exercising judicial power is liable to taxation, and such taxable income includes rental income and income derived from work in commissions of inquiry, like the URA commission.

(xi) The appellant's remuneration in relation to her duties as the chairperson of the URA commission was not an "*allowance as a*

5            *sitting Judge*” which is non taxable under Article 128 (7) of the  
Constitution as the appellant wrongly alleges in her statement dated  
12<sup>th</sup> October 2004.

10            (xii) Both in law and in fact, the respondents were correct in subjecting  
the appellant’s remuneration as the chairperson of the URA  
commission to taxation.

15            Mr. Matsiko submitted that article 128(7) of the Constitution exempted  
only the remuneration of a judicial officer who is exercising judicial  
power. The remuneration of a judicial officer derived from outside the  
20            exercise of judicial power is not protected. A commission of inquiry is  
not one of the organs of State which exercise judicial power. Therefore,  
income derived from chairing such a commission is taxable. In learned  
counsel’s view, the definition of judicial power in the Constitution clearly  
25            excludes commissions of inquiry. Judicial power can only be exercised  
by Courts of Judicature set up by article 129(1) of the Constitution. A  
commission of inquiry need not be chaired by a judge. Commissions of  
inquiry are appointed by a Minister and they conduct their inquiry as  
30            directed by the terms of the commission. On the other hand, judicial  
officers are appointed by the President on the advice of Judicial Service  
Commission. They, once appointed, are independent and cannot be  
directed by any person or authority.

30            In reply to some specific points raised by counsel for the appellant, Mr.  
Matsiko first dealt with the appellant’s assertion that she had never been  
taxed on income from other commissions of inquiry she had chaired  
before. He submitted that if that was true, then she is still liable to pay  
tax on the income she received because taxation laws have no time limit.



On the allegation that the decision to tax her and her fellow commissioners was motivated by animosity, Mr. Matsiko submitted that the evidence on record shows that the decision was reached after consultation between all stakeholders in order to comply with taxation legislation. He submitted that even if any animosity existed, which is denied, the issue before this court is a point of law which can only be resolved by looking at the relevant law and not sentiments.

On the relevance of the Attorney General's letter to the Minister of Finance, Mr. Matsiko clarified that it was referring to Judicial officers exercising judicial power and not to commissioners of inquiries.

On whether commissioners of inquiries are courts within the meaning of the Constitution, Mr. Matsiko cited the definition of "**Court**" in article 257(1) of the Constitution and submitted that it clearly excluded commissioners of inquiry. In his view, the English case of **Royal Aquarium vs Parkinson** (supra) supported his submission that the commissioners of inquiry did not exercise judicial power. He called upon us to decide the issue in the negative.

5. **CONSIDERATION AND DETERMINATION OF THE ISSUE**

For ease of reference, we will repeat the provisions of article 128(7) of the Constitution:-

**“ The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial**

5                    **officer or other person exercising judicial power, shall  
not be varied to his or her disadvantage.”**

To understand the full import of this provision, it must be read  
together with article 126(1) of the Constitution which states:-

10                    **“ Judicial power is derived from the people and shall be  
exercised by the courts established under this  
Constitution in the name of the people and in conformity  
with the law and with the values, norms and aspirations  
15                    of the people.”**

Article 257(1) states that **“judicial power”** means the power to  
dispense justice among persons and between persons and the  
state under the laws of Uganda.”

20                    Article 128 of the Constitution appears under chapter eight headed  
**“ THE JUDICIARY”**

It has got eight clauses under the sub-heading **“Independence of the  
25                    Judiciary.”** It is intended to apply to the judiciary and judicial officers  
within the judiciary. In order for anyone to benefit from the above  
provision, he/she must be:

- 30                    (a).    **A judicial officer, (or a retired one)**
- (b).    **The remuneration in question must be part of the terms and  
conditions of service of the judicial officer.**

5 (c). **It must be derived from the exercise of judicial power.**

It is now our duty to consider whether the remuneration of the appellant in her capacity as chairperson of the commission of inquiry into Allegations of Corruption in URA qualified for the constitutional protection accorded to judicial officers under article 128(7) of the  
10 Constitution.

The first question to be answered is, whether the appellant was at the material time, a judicial officer within the meaning of article 151 and the context of article 128(7) of the Constitution.

Article 151 of the Constitution provides:-

20 “ In this chapter, unless the context otherwise requires –  
*‘judicial officer’* means -

(a) a judge or any person who presides over a court or tribunal whatsoever described;

25 (b) the Chief Registrar or a Registrar of a court.

(c) such other person holding any office connected with a court as may be prescribed by law.” [ Emphasis added]

30 This Court had occasion to consider the meaning of article 151 within the context of article 128(7) of the Constitution in Constitutional Petition No 5 of 2004 Masalu Musene Wilson and 3 others vs The Attorney General (supra), where the court stated per TWINOMUJUNI, JA that:-

5 “Besides Judges, Magistrates and Registrars, there are other persons who preside over a court or tribunal howsoever called.

These include:-

- Members of Land Tribunal.
- 10 - Members of Industrial Court.
- Members of Tax Appeals Tribunal.
- Members of Non-Performing Assets Recovery Tribunal (NPART).
- Members of Courts-Martial.
- 15 - Members of Uganda Human Rights Commission.
- Members of Local Council Courts.
- ETC
- The list is very long.

20 - Then we must include:-

*‘Such other persons holding any office connected with a court.’*

*These must include all employees of the judiciary and all those employed in the various courts and tribunal I have listed above, including those I have omitted to list. Could the Constituent Assembly have intended to exempt all these people from the payment of Income Tax? My answer is definitely No. The expression ‘judicial officer’ means all the persons and offices mentioned in article 151, unless the context otherwise requires. The context in this case is article 128(7) of the Constitution. I have tried to explain the origins and the rationale of the article. The exposition contained in Evans vs Gore (supra) makes it very clear that the protection was intended for the protection of the*

5 *Independence of the Judiciary. The article only covers employees of the judiciary who are engaged in the adjudication of disputes. It cannot cover any one else employed outside the judiciary. That is why it was purposely put under a chapter of the Constitution dealing exclusively with the judiciary. In that*  
10 *context therefore, the expression 'judicial officer' can only mean the following:-*

- (a) Justices of the Supreme Court.
- (b) Justices of the Court of Appeal/Constitutional Court.
- (c) Judges of the High Court.
- (d) Magistrates.
- (e) Registrars.
- (f) **I would so hold.**" [Emphasis supplied]

20 We hasten to add that this latter list of judicial officers now includes the chairman and members of Land Tribunals, since the institution was recently transferred from the Ministry of Lands to the judiciary, where it properly belonged. The above analysis leaves us without any doubt  
25 whatsoever that at the material time, the appellant was a judicial officer within the meaning of article 151 of the Constitution. We still, however, have to consider whether, while chairing that commission of inquiry she was acting as a judicial officer within the context of article 128(7) of the Constitution.

5 In order to answer this, one must provide answers to two questions, namely:-

(a) **whether the remuneration which was taxed was part of her terms and conditions of service as a judicial officer, and**

10 (b) **[closely related to (a) above]**

**whether the income was derived from the exercise of judicial power.**

A careful reading of article 128(7) of the Constitution, clearly reveals that the remuneration which is protected is **“the salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other persons exercising judicial power.”** [Emphasis supplied]

15 It follows, therefore, that income derived from other activities outside the judicial officers' terms and conditions of service is not protected. On the evidence before us, we find no difficulty in holding that the appellant's remuneration of Ug Shs 9 million was not part of her terms and conditions of service as a judicial officer.

20 But, Dr. Byamugisha submitted that, since the appellant, in the capacity as chairperson of the commission, was exercising judicial power, and since she was a judicial officer, she qualified for exemption under article 128(7) of the Constitution. His argument on this aspect was multipronged. First, he argued that commissions of inquiry under the Commissions of Inquiry Act are courts with judicial powers. Secondly, he argued that the procedure applicable to such inquiries was similar to

5 that of the High Court and thirdly, that the powers vested in the commissions of inquiry conferred judicial powers on them.

In conclusion, he contended that the remuneration of all members of a commission of inquiry set up under the Act were protected from taxation by article 128(7) of the Constitution, whether they were judicial officers  
10 under article 151 of the Constitution or not.

Mr. Joseph Matsiko did not agree. In his view, a commission of inquiry was not a court and it did not exercise judicial power. The commissioners did not have to be judicial officers. They were appointed by a Minister, unlike judicial officers who are appointed by the President.  
15 The commissioners carried out their duties in accordance with the **directions** contained in letter of commission, unlike judicial officers who were not subject to **control** or **direction** of any person or authority. Their allowances were paid from moneys voted by Parliament, unlike judicial officers, whose allowances are payable from the Consolidated Fund. In  
20 his view, even if the Inquiries Act conferred some powers to commissions similar to those of the High Court, the Act did not confer to them judicial power within the meaning of articles 126 and 128 of the Constitution.

With respect to learned counsel for the appellant, we do not agree that the Commissions of Inquiries Act (chap 166) creates courts of law or confers  
25 judicial power, within the meaning of the Constitution, to the commissions. The Constitution defines the word "**Court**" to mean "**a court of judicature established by or under the authority of this Constitution.**" Commissions of inquiry are administrative tribunals set up by a Minister, not by an Act of Parliament, to make special inquiries  
30 into certain matters and report to the Minister. Their reports are mere findings and recommendations and are not binding on the Minister.

5 Courts of law on the other hand make decisions which are binding and can only be reversed by a Higher Court of law on appeal.

Earlier in this ruling, we quoted the Constitution as defining “ *judicial power* ” to mean “ **the power to dispense justice among persons and between persons and the State under the laws of Uganda.**” We are yet  
10 to witness a single commission of inquiry appointed under the commissions of inquiry Act perform the role stipulated in that definition.

We have read the English case of Royal Aquanium and Summer and Winter Garden Society, Limited vs Parkinson (supra), which Dr. Byamugisha relied on to buttress his argument that commissions of  
15 inquiry are courts of law. The headnote to the reported decision of the Court of Appeal reads:-

“A meeting of the London County Council for granting music and dancing licences under 25 Geo. 2, c. 36, s. 2, is not a Court within the meaning of the rule by which defamatory statements  
20 made in the course of proceedings before a Court are absolutely privileged. Therefore, a county councillor making a defamatory statement at such a meeting with regard to a person applying for a licence is not entitled to absolute immunity from an action in respect of such statement. He is  
25 only entitled to the ordinary privilege which applies to a communication made without express malice on a privileged occasion.”

In the judgment of LORD Esher M.R, reported at page 441 of the Queens Bench Report, he made the following observations:-



5 “ It was argued in the first place, on behalf of the defendant,  
that he was exercising a judicial function when he spoke the  
words complained of, and therefore, was entitled to absolute  
immunity in respect of anything he said. It is true that, in  
10 respect of statements made in the course of proceedings before  
a Court of justice, whether by judge, or counsel, or witnesses,  
there is an absolute immunity from liability to an action. The  
ground of that rule is public policy. It is applicable to all kinds  
of Courts of justice; but the doctrine has been carried further;  
and it seems that this immunity applies wherever there is an  
15 authorised inquiry which, though not before a court of justice,  
is before a tribunal which has similar attributes. In the case of  
Dawkins v. Lord Rokeby (1) the doctrine was extended to a  
military Court of inquiry. It was so extended on the ground  
that the case was one of an authorised inquiry before a tribunal  
20 acting judicially, that is to say, in a manner as nearly as  
possible similar to that in which a Court of justice acts in  
respect of an inquiry before it. This doctrine has never been  
extended further than the Courts of justice and tribunals  
acting in a manner similar to that in which such Courts act.  
25 Then can it be said that a meeting of the county council, when  
engaged in considering applications for licences for music and  
dancing, is such a tribunal? It is difficult to say who are to be  
considered as judges acting judicially in such a case. The  
manner in which the business of such a meeting is conducted  
30 does not appear to present any analogy to a judicial inquiry.”

5 Further on, his Lordship observed:-

10 “ Again, there is another consideration. It is argued for the plaintiffs that this function of granting licences, which has been transferred from the justices to the county council, is not judicial, but merely administrative. The justices had two distinct and separate duties. They had judicial duties. They had to try criminal cases, and in respect of that duty, they would be entitled to the absolute immunity which I have mentioned. They had also administrative duties, one of which was this duty of granting licences, and for the purpose of performing these , they held consultations among themselves. In the case of duties properly administrative, such as that of granting licences, their action was consultative, for the purpose of administration, and not judicial. When such duties are transferred to the county council, what they do in respect of them is likewise consultative for the purpose of performing administrative duty; it is not judicial. That consideration also appears to me to show clearly that the case does not come within the doctrine of absolute immunity applicable to tribunals similar to Courts of justice.”

25 With great respect to learned counsel for the appellant, we are unable to see how this decision can come to the aid of the appellant. The Court of Appeal ably made a clear distinction between courts of law exercising judicial power and administrative tribunals which do not exercise such powers. In Uganda, commissions of inquiry do not conduct their business as judicial tribunals. Their decisions are merely  
30 recommendations and advisory. They do not follow and are not bound by rules of evidence and procedure. Their procedures are not conducted

nearly as possible to those of courts of justice. The method of appointing their principal officers are quite different and whereas the commissioners are not independent, that is the hallmark of the courts of justice. Whereas a judicial inquiry is manned by a judicial officer or officers and their decisions are binding, there is no requirement that the chairperson or any of the commissioners be a judicial officer. We are persuaded by Mr. Joseph Matsiko's argument that a commission of inquiry under Chapter 166 of the Laws of Uganda is not a '*Court*', nor does it exercise '*judicial power*' within the meaning of articles 126(1) and 128(7) of the Constitution of Uganda. Therefore, article 128(7) of the Constitution does not apply to the chairman and the commissioners of those tribunals. The conclusion is that, the appellant's remuneration as chairperson of the commission of inquiry into URA, is not protected from taxation by article 128(7) of the Constitution.

We were not able to find any evidence to justify any inference that the decision to tax the appellant was motivated by animosity. On the contrary, there is ample evidence that it was taken after a lot of correspondence and consultations with stakeholders, including the appellant.

We also agree with Mr. Matsiko that the letter of the Attorney General to the Minister of Justice, dated the 10<sup>th</sup> April 2002 was in respect of judicial officers only. The phrase judicial officer means "*judicial officer*" as defined in article 151 of the Constitution within the context of article 128(7) of the Constitution as explained above in this ruling.

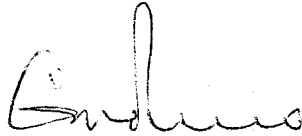
5

**REMEDIES**

We answer the question which was referred to us in the negative and hold that the appellant is not entitled to any remedy from this court. Each party will bear its own costs of this reference.

Dated this .....*5<sup>th</sup>*.....day of.....*October*.....2005.

10



HON JUSTICE G.M. OKELLO

**JUSTICE OF APPEAL**

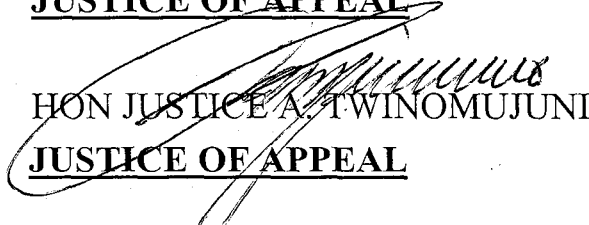
15



HON JUSTICE S.G. ENGWAU

**JUSTICE OF APPEAL**

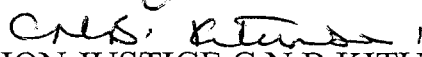
20



HON JUSTICE A. TWINOMUJUNI

**JUSTICE OF APPEAL**

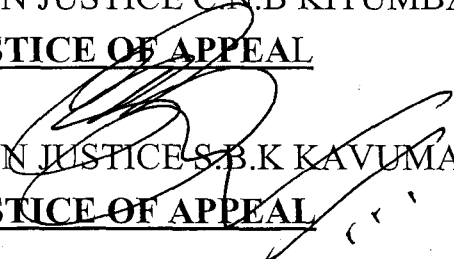
25



HON JUSTICE C.N.B. KITUMBA

**JUSTICE OF APPEAL**

30



HON JUSTICE S.B.K. KAVUMA

**JUSTICE OF APPEAL**