

THE REPUBLIC OF UGANDA

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NUMBER 02 OF 2013**

DAVIS WESLEY TUSINGWIRE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

CORAM:

HONOURABLE MR. JUSTICE STEVEN B K KAVUMA, Acting DCJ

HONOURABLE MR. JUSTICE REMMY KASULE, JA/JCC

HONOURABLE LADY JUSTICE SOLOMY BALUNGI BOSSA, JA/JCC

HONOURABLE MR. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

**HONOURABLE JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA,
JA/JCC**

**JUDGMENT OF THE HONOURABLE LADY JUSTICE SOLOMY BALUNGI
BOSSA**

Introduction

This Petition challenges, for various reasons detailed below, the constitutionality of *The High Court (Anti Corruption Division) Practice Directions, 2009* issued by the Chief Justice on August 18, 2009 and seeks declarations that the Directions be declared null and void for being unconstitutional.

Background

The Chief Justice issued the Directions (hereinafter referred to as the impugned Directions) in exercise of the powers conferred on him by *Article 133 1(a) of the Constitution*. In summary, the impugned Directions established the Anti Corruption Division of the High Court to "*operate as an orderly, expeditious, efficient and cost effective forum for adjudication of corruption and corruption related cases*".

Two Judges and a Registrar initially composed the Division. Designated Magistrates, (Chief Magistrate or Magistrate Grade 1) are attached to the Division.

The Division is located in Kampala, but it could operate in such other places in Uganda as the Principal Judge may determine.

The Division has jurisdiction to try any offence under the *Anti Corruption Act, the Penal Code Act, the Leadership Code Act* or any other law related to corruption. Designated magistrates attached to the Division have territorial jurisdiction to try specified offences committed anywhere within the geographical boundaries of Uganda. The Chief Justice may assign magistrates to work in any or part of a Magisterial Area.

The Petition

The Petitioner is an advocate of the courts of Judicature. He filed this petition against the Respondent under *Articles 137(1), (2), (3) and 7 of the Constitution of the Republic of Uganda* and *Rule 3 of the Constitutional Court (Petitions and References) Rules 2005* challenging the impugned Directions as unconstitutional. The Petitioner's grounds were that the impugned Directions were inconsistent with and in contravention of certain provisions of *the Constitution* and that the petition raises serious questions requiring interpretation of *the Constitution* in relation to the impugned Directions. He was aggrieved and interested in and sought several declarations and orders, in the interests of maintaining the supremacy of *the Constitution*, the power of Parliament to make laws, the proper administration of criminal justice in Uganda, and the fight against corruption.

For the purpose of clarity and effect, I have reproduced the declarations and orders sought by the petitioner below verbatim:

- (i) *Directions 2, 8, and 10* of the impugned Directions which provide for the appointment to and exercise of judicial duties by the Chief Magistrate and Grade 1 Magistrates and Designated Magistrates in the Anti-Corruption Division of the High Court distort the Constitutional composition and function of the High Court and are in contravention of *Articles 2, 79, 126, 138 and 257(1) of the Constitution* of the Republic of Uganda.
- (ii) *Directions 2, 8, and 10* of the impugned Directions which provide for the appointment to and exercise of judicial duties by the said "Designated Magistrates" under the Anti-Corruption Division of the High Court which is not a Designated Magisterial Area or Magistrates Court are contrary to and in contravention of *Articles 2, 79, 126(2), 133(1) (b) and 138 of the Constitution* of the Republic of Uganda.
- (iii) *Direction 10* of the impugned Directions which allows the said Designated Magistrates who are judicial officers of subordinate courts to double as judicial officers of the High Court and exercise unlimited territorial jurisdiction concurrently with the High Court is contrary to and inconsistent with *Articles 2, 79, 126, 128(2) and 139 of the Constitution* of the Republic of Uganda.
- (iv) That the criminal trials conducted by the said designated magistrates under the Anti-Corruption Division of the High Court pursuant to the impugned Directions are not lawful and they derogate an accused's right to a fair hearing before an independent and competent court established by law contrary to *Articles 2, 28(1), 44(c) and 126 of the Constitution* of the Republic of Uganda.

Other declarations sought include one for an order for costs of the petition and any other or further declaration or order as the Court may deem fit.

The Petition was accompanied by an affidavit sworn by the Petitioner. The gist of the Petitioner's factual evidence from his affidavit is that he is an advocate of the Courts of Judicature in Uganda. In that capacity, he was well versed with the provisions of the impugned Directions. He had encountered them in the course of his practice. He had also been to the High Court Anti Corruption Division in Kololo Kampala, and perused court pleadings. He had further observed the conduct of proceedings by magistrates and Judges of that Court pursuant to the impugned Directions. He had noticed that magistrates sit and entertain matters as judicial officers of the High Court and issue orders supposedly from the High Court Anti Corruption Division and yet they are constitutionally not judicial officers of the High Court under *Article 138 of the Constitution*. He attached to his affidavit copies of lists of cases the magistrates were handling, summons, bail bond forms and some judgments marked RA1 to RA5 as evidence of the alleged exercise of this jurisdiction. He was therefore aggrieved by the impugned Directions as they gravely affect the administration of criminal justice in Uganda and he was also interested in a proper constitutional interpretation. The rest of the affidavit was devoted to legal arguments.

The Respondent filed an answer to the Petition that was also accompanied by an affidavit. The gist of the Respondent's case was that the Petition was premature and raises no issues or questions for constitutional interpretation by this Court. The Respondent denied that the impugned Directions contravened *Articles 2, 79, 126(2), 128(2), 133(1)(b), 138, 257(1) of the Constitution* or that by any act or omission, the Respondent violated or infringed any provisions of *the Constitution*. The Respondent finally argued that the Petitioner's rights shall not in any way be prejudiced by the dismissal of the Petition.

The Respondent also adduced affidavit evidence in rebuttal. The first affidavit was sworn by one Elisha Bafirawala, a Senior State Attorney. He denied that magistrates were exercising powers reserved for Judges of the High Court or exercising powers beyond their jurisdiction. He asserted that judicial officers were exercising their respective jurisdiction functions and discretion in accordance with the Rules and *the Constitution*. He concluded that trials conducted by the High Court Anti Corruption Division were in accordance with *the Constitution* and *Laws of Uganda* and did not in any way derogate from the rights of the accused.

The second affidavit for the Respondent was sworn by one Waninda Fred K B, the Registrar of the High Court Anti Corruption Division. He stated that he knew the High Court Anti Corruption Division and that the proceedings conducted by the Chief Magistrate in that Division were carried out in accordance with and under the authority of *the Constitution, the Judicature Act, the Magistrates Courts Act (MCA)* and other laws related to prosecution of criminal offences. It was not true that designated Magistrates attached to the High Court Anti-Corruption Division sit and entertain matters as judicial officers of the High Court. Being judicial officers in their own right under *Article 148 of the Constitution*, they carry out their duties in accordance with their powers under *section 161 of the MCA* and the *Anti Corruption Act*. Each and every case allocated to the designated Chief Magistrate and Magistrates Grade One is within their magisterial criminal jurisdiction and the

designated Magistrates are mandated to preside over the prosecutions by virtue of *section 161 of the MCA*. They only assist in the work of the High Court Anti-Corruption Division and in the execution of their duties; they are subject to supervision from that Division. He knows that the designation of magistrates to the High Court Anti-Corruption Division was done in accordance with *section 7(b) of the MCA*. It was not true that magistrates in the High Court Anti-Corruption Division sit and exercise powers of the High Court. Their courts were properly and duly constituted and their proceedings were governed by the *MCA* and other laws related to criminal prosecutions. Therefore, they conformed with an accused person's right to a fair hearing under *Articles 2, 28(1), 44(c) and 126 of the Constitution*.

On work relating to the High court, they only presided over pre-indictment proceedings in the High Court Anti-Corruption Division and that the law gave them jurisdiction to do so. The Judges hear appeals from the decisions of designated Magistrates. It is the Director of Public Prosecutions (DPP) who elects to refer a matter to High Court in accordance with the powers granted to him under *section 169 MCA*. This Petition did not raise any questions for constitutional interpretation. He concluded that it was in the interest of the fight against corruption in Uganda that this Petition should be dismissed with costs.

At the conferencing done immediately before the commencement of the hearing of the petition, the parties framed the following issues:

1. Whether *Directions 2, 8 and 10* of the impugned Directions distort the Constitutional composition and function of the High Court and are in contravention of *Articles 2, 79, 126, 138 and 257(1) of the Constitution* of the Republic of Uganda.
2. Whether *Directions 2, 8 and 10* of the impugned Directions which provides for the appointment to and exercise of judicial duties by the said "Designated Magistrates" under the Anti-Corruption Division of the High Court is contrary to and in contravention of *Articles 2, 79, 126, 128(2) and 139 of the Constitution* of the Republic of Uganda.
3. Whether *Direction 10* of the impugned Directions which allows the said Designated Magistrates to exercise unlimited territorial jurisdiction is contrary to and inconsistent with *Articles 2, 79, 126, 128(2) and 139 of the Constitution* of the Republic of Uganda.
4. Whether criminal trials conducted by the said designated Magistrates under the Anti-Corruption Division of the High Court pursuant to the impugned Directions derogate an accused's person's right to a fair hearing before an independent and competent Court established by law contrary to *Articles 2, 28(1), 44(c) and 126 of the Constitution* of the Republic of Uganda.
5. Remedies.

Before I resolve the issues, it is pertinent to recall the principles of constitutional interpretation that I consider relevant for the determination of the issues before us.

Principles of Constitutional interpretation

1. *The Constitution* is the supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. (*Article 2(2) of the Constitution*).
2. *Article 126 of the Constitution* provides that judicial power which is derived from the people shall be exercised by the Courts established under *the Constitution* in the name of the people and in conformity with law and with the values, norms and aspirations of the people. In adjudicating cases, the Courts shall, subject to the law, apply certain principles including the concepts that Justice shall be done to all irrespective of their social or economic status, promotion of reconciliation between the parties and the administration of justice without undue regard to technicalities (*Attorney General v. Major General David Tinyefuza Constitutional Appeal No. 1 of 1997 (SC)*).
3. The Constitutional Court has no jurisdiction in any matter which does not involve the interpretation of a provision of the Constitution. Also for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of a provision of *the Constitution* is required. An application for redress can be made to the Constitutional Court only in the context of a petition under *Article 137 Constitution*, brought principally for interpretation of the Constitution (*Attorney General v Tinyefuza Constitutional Appeal No. 1 of 1997*).
4. Where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of *the Constitution* with which the Act or its provision is inconsistent or in contravention of and seeks a declaration to that effect. A liberal and broader interpretation should be given to a constitutional petition than is given to a plaint in a normal civil suit when determining whether a cause of action has been established (*Baku Raphael Obudra and Another v Attorney General Constitutional Appeal No. 1 of 2003 (SC)*). The same principle applies to subsidiary legislation.
5. If an Act of Parliament has the effect of adding to or varying or repealing any provision of *the Constitution*, then the Act is said to have amended the affected article of the Constitution. There is no difference whether the Act is an ordinary Act of Parliament or an Act intended to amend *the Constitution*. The amendment may be effected expressly, by implication or by infection as long as the result is to vary or repeal a provision of *the Constitution*. It is not material whether the amendment Act states categorically that the Act is intended to affect a specified provision of *the Constitution*. It is the effect of the amendment that matters. (*Paul Semogerere v. Attorney General Constitutional Appeal No. 1 of 2002 per Kanyeihamba JSC (SC)*). The above principle equally applies to subsidiary legislation or any other act or omission

(Fox Odoi-Oywelowo and Another v. Attorney General Constitutional Petition No. 8 of 2003 (CC)).

6. If the purpose of an Act is inconsistent with a provision of the Constitution, it shall be declared unconstitutional. Similarly, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, that provision of the Act shall be declared unconstitutional. In determining the constitutionality of any legislation its purpose and effect must be taken into account. If the purpose of an Act of Parliament is inconsistent with a provision of the Constitution, the Act or the section which is being challenged will be declared unconstitutional. In the same way, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, the provision would be declared unconstitutional. Similarly, if the purpose or effect of an act or omission of an authority is unconstitutional, it will be declared unconstitutional. (*Attorney General v. Salvatori Abuki Constitutional Appeal No. 1 of 1998 (SC)*). This principle equally applies to subsidiary legislation (*Fox Odoi-Oywelowo and Another v. Attorney General supra*).
7. In interpreting *the Constitution*, the rule of harmony or completeness requires that Constitutional provisions should not be looked at in isolation. Rather, *the Constitution* should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of *the Constitution*. (*Paul Semogerere v. Attorney General Constitutional Appeal No. 1 of 2002 (SC)*; *Attorney General v. Susan Kigula and Others Constitutional Appeal No. 03 of 2006 (SC)*;)
8. Where several provisions of *the Constitution* have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred over the other. (*Twinobusingye Severino v. Attorney General Constitutional Petition No. 47 of 2011 (CC)*)
9. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and must be given an interpretation that realizes the full benefit of the guaranteed right (*Attorney General V Uganda Law Society Constitutional Appeal No. 1 of 2006 (SC)*).
10. There can be no trial at all where the court is not competent. A trial by an incompetent court is by that fact alone a nullity *ab initio*. (*Attorney General V Uganda Law Society (supra)*).
11. A non-derogable article confers absolute protection and should be enforced by all government and non-government organs and individuals (*Attorney General v. Salvatori Abuki (supra)*).
12. There is a rebuttable presumption that every legislation is constitutional and the onus of rebutting the presumption rests on the person or persons who

is/are challenging its constitutionality (*Akankwasa Damian v. Uganda Constitutional Petition/Reference No. 05 of 2011 (CC)*).

13. At the hearing, the Petitioner was represented by Counsel Fred Muwema, assisted by, Richard Mulema Mukasa and Friday Roberts Kagoro. Counsel George Kalemera represented the Respondent.

Resolution of the issues

The parties appear to have conceded that this petition raises triable constitutional issues as no issue was framed to the contrary. On my part, I am satisfied that the challenging of the enactment of the impugned Directions, and more specifically the provisions of the Directions cited and the allegation that those provisions contravene specified articles in *the Constitution* on the face of it raises triable constitutional issues. A cause of action has therefore been established within the meaning of *Baku Raphael Obudra and Another v Attorney General (supra)*.

Issues No. 1, 2 and 3

The three issues are interwoven and interrelated. I have therefore chosen to handle them together. In summary, I have to resolve whether *Directions 2, 8, and 10* of the impugned Directions contravene *Articles 2, 79, 126, 128(2), 138 and 139 of the Constitution*.

All the three Counsel representing the Petitioner made submissions which have been reproduced in a summary form. First of all, they argued that under the impugned Directions, Magistrates, namely Chief Magistrate and Magistrate Grade 1 were appointed as judicial officers to work in the High Court. The Directions were issued contrary to *Articles 133 and 138 of the Constitution* as the Chief Justice has no powers to designate magistrates to the High Court and alter its structure and composition. Magistrates could not lawfully assist the Judges in their work as the regimes that governed their appointment and discipline were separate. The Chief Justice has power under *section 6 of the Magistrates Courts Act* to transfer magistrates but that power does not include a transfer of a magistrate to the High Court. In this regard, *Directions 2, 8, and 10* contravened *Articles 2, 79, 126, 128(2), 138 and 257(1) of the Constitution* and should be annulled.

Secondly, they submitted that *Direction 8* provides that the High Court Anti Corruption Division handles offences under the *Anti-Corruption Act, the Penal Code Act, the Leadership Code Act* and any other law related to corruption. In this regard, the High Court had Magistrates who were doing the same work as the Judges. Counsel cited an example of a judgment attached to the pleadings entitled "***In the High Court of Uganda, the Anti Corruption Division of the High Court***" as evidence that magistrates were exercising a jurisdiction vested in the judges. Magistrates were now part and parcel of an appellate court that handles decisions from them, given that a decision from a Magistrate may be appealed to the High Court.

Thirdly, they argued that *Article 129 of the Constitution* provides for the hierarchy of the courts, with separate functions for each court. *Section 3 of the MCA* provides that it is the duty of the Minister of Justice in consultation with the Chief Justice to establish Magistrates Courts while *section 5 MCA* provides for their composition by Chief Magistrates, Magistrates Grades one, two and three. Magistrates should therefore perform their functions in a magistrate's court duly gazetted by statutory instrument in accordance with *The Magistrates Courts (Magisterial Areas) Instrument No. 45 of 2007*. As no magisterial area is gazetted in the High Court Anti-Corruption Division, it was therefore unconstitutional to put a Magistrate's Court under that Division. The performance of work by magistrates in the Division offends *Article 126(2) of the Constitution*. The power of the Chief Justice conferred upon him by *section 6 of the MCA* to assign and transfer magistrates to any magisterial area should not be exercised contrary to *Article 138 of the Constitution* which provides for mandatory composition of the High Court. The High Court Anti Corruption Division was therefore not constituted in compliance with *the Constitution*.

Fourthly, Counsel for the Petitioner submitted that it is only the High Court under *Article 139 of the Constitution* that is vested with unlimited territorial jurisdiction. It is also vested with unlimited jurisdiction in civil and criminal matters under the *Judicature Act*. *Article 139 of the Constitution* did not confer unlimited original jurisdiction on Magistrates. Under *section 51 of the Anti Corruption Act*, it was envisaged that a magistrate's court would try a matter in a particular magisterial geographical area. There was circumscribed geographical jurisdiction for magistrates under *sections 2, 3, and 4 of the MCA*. *Direction 10* provides that Magistrates shall have territorial jurisdiction to try all the offences specified in *Direction 8* committed anywhere within the geographical boundaries of the Uganda contrary to *Article 2 of the Constitution* that establishes the supremacy of the *Constitution* and *Article 79* that deals with powers of Parliament to make laws. *Directions 8 and 10* of the impugned Directions which purport to confer such jurisdiction to magistrates therefore contravene *the Constitution*. There had to be harmonious interpretation of *the Constitution*. *Article 133 of the Constitution* should not offend other provisions of the *Constitution* especially *Articles 150 and 79*. The creation of the impugned Directions did not follow *the Constitution* and various laws that are made pursuant to *Articles 79 and 150 of the Constitution*.

This case was not about the jurisdiction of magistrates to try offences. It was about the appointment to and exercise of judicial duties of designated magistrates in the High Court and trying offences in a non gazetted magisterial area.

Learned Counsel for the Respondent argued firstly that the Chief Justice acted in furtherance of the *Anti Corruption Act No. 6 of 2009* and did not act in contravention of *Articles 126, 138 and 257 (1) of the Constitution*. The Petitioner had not demonstrated by even a single instance that the designated Magistrates sat and determined matters as High Court Judges or in appellate capacity in the High Court Anti Corruption Division. Inclusion of designated Magistrates in the High Court Anti-Corruption Division did not in any way amend *Article 138 of the Constitution* that establishes the High Court of Uganda. The impugned Directions were alive to *Article 138 of the Constitution* and differentiated between the designated magistrates and

the Judges of the Court in that they provided that a designated magistrate shall be available to assist the High Court Judges in execution of their duties.

Secondly learned Counsel for the Respondent submitted that assignments of Chief Magistrates and Magistrates Grade One to the Anti-Corruption Division by the Chief Justice based on the impugned Directions amounted to written authorization made under *sections 6 and 7(1)9(b) of MCA* for those magistrates to hold court outside the local limits of the jurisdiction. No evidence had been adduced by the Petitioner that the Directions do not clearly authorize the magistrates to sit in the Anti-Corruption Division of the High Court. They were not transferred there to serve as judicial officers of the High Court but rather to serve within the limits of the criminal jurisdiction of the respective magistrates in the court house of the High Court. This was a unique position where designated magistrates assisting the functioning of the High Court were sitting and exercising jurisdiction conferred on them by the *MCA*.

Thirdly, Counsel for the Respondent submitted that no evidence had been led to show that magistrates were exercising unlimited territorial jurisdiction. The only evidence consisted of cause lists and proceedings of the High Court Anti-Corruption Division. He submitted that under *section 6 of the MCA*, every magistrate is deemed to have jurisdiction in each and every magisterial area and could be assigned to any particular area or to a part of any magisterial area by the Chief Justice. He argued that the Chief Magistrate and Magistrates in the Anti Corruption Division were lawfully carrying out their duties as provided for by *section 6 of the MCA*. Again, no evidence had been adduced by the Petitioner that the Directions did not clearly authorize Magistrates to sit in the Anti Corruption Division. The Chief Justice had not in any way transferred the Chief Magistrate or Magistrates to the High Court to serve as judicial officers. There was no need for a statutory instrument to put in place transfer of a Magistrate to a division of a Court especially if it is within the criminal jurisdiction of the judicial officer. *Direction 3* of the impugned Directions conferred to the designated magistrates jurisdiction strictly within the *Anti Corruption Act* and for offences that fall under the *Penal Code Act* and the *Leadership Code Act*. The situation was unique in that there was a division of the High Court with designated magistrates assisting the functionality of the Court but sitting and exercising their jurisdiction as conferred upon them in the *MCA*.

Fourthly, Counsel for the Respondent submitted that should this Court consider the substance of the judgment attached to the Petition as evidence of alleged exercise by magistrates of powers of the High Court, then this was purely administrative. The magistrate did not exercise jurisdiction outside the powers granted to him under the *MCA*. He referred to evidence by affidavit of the Registrar of the Anti Corruption Division who stated that in his capacity as Registrar, he knew and confirmed that each and every case allocated to a designated Chief Magistrate and Magistrate Grade 1 was within their magisterial criminal jurisdiction conferred on them by *section 161 of the MCA*. He further submitted that the discretion to refer matters to the Division rested solely with the Director of Public Prosecutions in accordance with his powers granted under *section 169 of the MCA*.

Lastly, Counsel submitted that no evidence had been led to show that the Magistrates were exercising unlimited territorial jurisdiction contrary to *Articles 126,*

128(2) and 139 of the Constitution. What was annexed to the affidavits in support and rejoinder were cause lists and proceedings of the Anti Corruption Division of the Court in Kololo. *Section 6 of the MCA* deems every Magistrate to have jurisdiction in each and every magisterial area.

In essence, the Petitioner's challenge to the deployment and location of magistrates in the High Court is three pronged. The first is that their location there has caused a structural distortion of the High Court and that the Chief Justice did not have the power to deploy them there. The second is that the High Court is not a gazetted magisterial area and magistrates cannot lawfully be deployed there; and the third one is that magistrates and judges do the same work while their jurisdiction limits and territorial jurisdiction are different.

For ease of reference and for completeness and context, I have set out *in extenso* the relevant text of the impugned Directions below;

"3. Anti Corruption Division of the High Court

There is established in the High Court a division to be known as the Anti Corruption Division."

"4. Objective

The Division shall operate as an orderly, expeditious, efficient and cost effective forum for adjudication of corruption and corruption related cases.

"5. Composition

(1)The Division shall initially be composed of two Judges and a Registrar.

*(2)The Head of the Division shall supervise such number of magistrates, as may be designated by the Chief Justice **to assist in the work** of the Division.*

"6. Administrative set up

(1)The Principal Judge shall in consultation with the Chief Justice designate the Head, Deputy Head, Judges, and the Registrar of the Division

(2)The Head of the Division shall be responsible for the supervision and administration of the Division.

(3)The Registrar shall be responsible for the day-to-day running of the Division and in that capacity shall assist the Head and Deputy Head of the Division.

"7. Location

The Division shall initially be located in Kampala, but may operate in such other places in Uganda as the Principal Judge may determine.

"8. Jurisdiction

(1) The Division shall have jurisdiction to try any offence under the Anti Corruption Act, Penal Code Act, Leadership Code Act or any other law related to corruption.

(2) Where an accused person is charged with an offence (principal offence) under sub paragraph (1) and is also charged with any other offence related to that offence, the Judge or designated Magistrate shall be competent to try the related offence.

(3) The Division may, subject to any law relating to the transfer of criminal cases, take on any case falling under its jurisdiction from a magistrate's court to the Division

"9. Prosecution of criminal cases in the Division by the Director of Public Prosecutions, the Inspector General of Government or any other person

Subject to section 42 of the Magistrates Courts Act and section 26 of the Trial on Indictments Act, prosecution of offences in this Division shall be initiated by the Director of Public Prosecutions, the Inspector General of Government or any other person.

10. Territorial jurisdiction of magistrates

*(1) Designated magistrates **attached** to the Division shall have territorial jurisdiction to try offences specified in paragraph 8 committed anywhere within the geographical boundaries of Uganda.*

11..."

I have also noted the provisions of *sections 6 and 7 of the MCA*. The former provides;

"6. Assignment of magistrates

Every magistrate appointed under this Act shall be deemed to have been appointed to, and have jurisdiction in, each and every magisterial area but may be assigned to any particular magisterial area or to a part of any magisterial area by the Chief Justice."

Thus every magistrate appointed under this Act (*MCA*) is deemed to have been appointed to, and have jurisdiction in, **each and every magisterial area** but may be assigned to any particular magisterial area or to a part of any magisterial area by the Chief Justice.

The natural and ordinary meaning of the section is that magistrates have jurisdiction, within their jurisdiction limits, to work anywhere within Uganda.

I have set out *section 7* in full below. It provides;

"7. Place of sitting.

(1) A magistrate's court-

(a) May be held at any place within the local limits of its jurisdiction;

Or

(b) If it appears to the Chief Justice that the interests of justice so require, may be held, with the written authorization of the Chief Justice, at a place outside the local limits of its jurisdiction designated in the authorization, And shall be held in such building as the Chief Justice may from time to time, assign as the Courthouse.

(2) Notwithstanding subsection (1), if a magistrate's court sits in any building or place within the local limits of its jurisdiction for the transaction of legal business, the proceedings shall be as valid in every respect as if they had been held in a courthouse assigned for that purpose."

I shall revert to the above provisions later in this judgment.

In order to appreciate the arguments of the parties, it is also necessary to set out the context, in which the *impugned Directions* were made before I examine their constitutionality. I recall that corruption is widespread in the country and take judicial notice that it has led to vast financial losses of public funds and impacted negatively on the development of the country. It was this concern that prompted Parliament to pass the *Anti Corruption Act No 6 of 2009*. The title of the Act speaks to the seriousness of the matter. It provides;

(1) "An Act to provide for the effectual prevention of corruption in both the public and private sector, to repeal and replace the Prevention of Corruption Act, to consequentially amend the Penal Code Act, the Leadership Code Act and to provide for other related matters."

The Act received Presidential assent on July 25, 2009 and commenced on August 25, 2009. Commenting on this preamble, this Court stated thus in the case of *Uganda v Atugonza Francis Constitutional Reference No. 31 of 2010*;

"...it is important to determine the object of the Anti Corruption Act. The preamble is a vital aid to its interpretation. It determines its objective. The preamble normally is a preliminary statement of the reasons which have made the Act desirable. It may also be used to introduce a particular section or group of sections."

The Preamble thus makes clear that the said Act was enacted to prevent corruption in both the public and private sector.

The impugned Directions were enacted on August 19, 2009, subsequent to the Presidential assent but before the commencement of the said Act. The objective of the Directions is to establish a specific Division of the High Court to deal with corruption related cases. In particular and to quote *Direction 4* of the impugned Directions; "The Division shall operate as an orderly, expeditious, efficient and cost effective forum for adjudication of corruption and corruption related cases."

To this end, Magistrates are attached to the Division to **"assist in the work of the Division"** (*Direction 5(2)*). The objective of the impugned Directions is a noble one. It was meant to give impetus to the fight against corruption by deploying judicial officers to a specific Division solely devoted to corruption cases, and to speed up such trials. It forms part and parcel of the institutional arrangements to address corruption. It is the judiciary's initiative and contribution in this regard. Having taken into account the submissions of the parties, and the evidence adduced and the law, I conclude that the objective of the establishment of the Division *per se* did not contravene the *Constitution* or the *Anti Corruption Act*. I consider that it is an administrative arrangement to improve on service delivery by the courts in relation to rampant corruption.

I next revert to the issue whether the Chief Justice had power to deploy the magistrates to the High Court Anti Corruption Division through the impugned Directions and to examine the Constitutional provisions that are alleged to be contravened in that regard. However, before I do so, let me recall some of the relevant constitutional interpretation principles.

According to the case of *Twinobusingye Severino v. Attorney General Constitutional Petition (supra)* where several provisions of *the Constitution* have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred over the other.

I further recall that in interpreting *the Constitution*, the rule of harmony or completeness requires that Constitutional provisions should not be looked at in isolation. Rather, *the Constitution* should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of *the Constitution*. (*Paul Semogerere v. Attorney General Constitutional Appeal (supra)*; *Attorney General v. Susan Kigula and Others Constitutional Appeal No. 03 of 2006*)(SC).

The relevant Constitutional provisions have already been mentioned in the declarations sought. I have reproduced them below for ease of reference. The first one is *Article 2* that establishes the supremacy of *the Constitution*. It provides that *the Constitution* is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any other law or any custom is inconsistent with any of the provisions of this Constitution, *the Constitution* shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

Article 79 provides for the role and function of Parliament. It reads;

"79. Functions of Parliament.

(1) *Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.*

(2) **Except as provided in this Constitution**, *no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament*

(3) *Parliament shall protect this Constitution and promote the democratic governance of Uganda."*

The Article gives Parliament power to make laws on any matter for the peace, order, development and good governance of Uganda. Simply put, Parliament is the supreme organ charged with the making of laws. Other persons or bodies may make provisions having the force of law provided that they act under the authority conferred by an Act of Parliament. However, exceptions are provided for in *the Constitution*.

Article 126 provides;

"126. Exercise of judicial power.

(1) *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 law and with the values, norms and aspirations of the people.*

(2) *..."*

This provision has already been interpreted in the jurisprudence set out at the beginning.

Then *Article 138 of the Constitution* provides:

"138. High Court of Uganda

(1) *The High Court of Uganda shall consist of_*

- (a) *The Principal Judge; and*
- (b) *Such number of judges of the High Court as may be prescribed by Parliament.*
- (2) *The High Court shall sit in such places as the Chief Justice may, in consultation with the Principal Judge, appoint; and in so doing, the Chief Justice shall, as far as practicable, ensure that the High Court is accessible to all the people."*

The Article provides for the setting up of the High Court and names the judicial officers who will comprise it.

Article 133 of the Constitution reads:

"Article 133. Administrative functions of the Chief Justice.

- (2) *The Chief Justice*
- (a) *Shall be the head of the judiciary and shall be responsible for the administration and supervision of all courts in Uganda; and*
- (b) *May issue orders and directions to the courts necessary for the proper and efficient administration of justice.*
- (3) *..."*

This Article makes clear that the Chief Justice is the head of the Judiciary and is responsible for its administration and the supervision of all courts in Uganda. In this capacity, he may issue orders and directions to the courts necessary for the proper and efficient administration of justice.

Lastly, Article 139 of the Constitution sets out the Jurisdiction of the High Court. It reads:

"139. Jurisdiction of the High Court

- (1) *The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.*
- (2) *Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court."*

When all the above articles are read together and harmonized, it is clear that the Constitution vests with the Chief Justice overall powers of administration over all courts in Uganda, including the High Court. *Article 133 of the Constitution* gives these powers directly to the Chief Justice and the intervention or intercession of Parliament through an Act is not required. This is one of the exceptions to Article 79(2) whereby the Chief Justice is authorized to issue orders and directions to the courts necessary for the proper and efficient administration of justice. This does not impinge on or detract from the powers given by *the Constitution* to Parliament under *Article 79 of the Constitution* to make laws.

Although the impugned Directions mention that the Chief Justice acted only under *Article 133(1) of the Constitution* and omit to mention *Article 133(2) of the Constitution*, I find it equally relevant as it empowers the Chief Justice to issue orders and directions for the proper administration of justice. In conclusion on this particular aspect therefore, when the Chief Justice makes such orders or directions, I do not consider him to be usurping the powers of Parliament to make laws. *Articles 133 and 79* are constitutional provisions of equal importance and each should be given due recognition and weight. It is therefore my judgment that the Chief Justice

was empowered to make the impugned Directions under *Article 133 of the Constitution*.

I now revert to the powers conferred on the Chief Justice under *sections 6 and 7 of the Magistrates Courts Act*. *Section 6 MCA* concerns two aspects. The first one is the powers of the Chief Justice to assign any magistrate to any particular magisterial area or to a part of any magisterial area. In my view, this does not prevent or even prohibit the Chief Justice from assigning a magistrate to perform specific duties, as long as they are authorized by law, under *Article 133 of the Constitution*. The second aspect concerns the jurisdiction granted to a magistrate on appointment. Every magistrate shall be deemed to have been appointed to, and have jurisdiction in **each and every magisterial area** but may be assigned to any particular magisterial area or to a part of any magisterial area by the Chief Justice. So then, once a magistrate is appointed, s/he has jurisdiction wherever s/he may be deployed within Uganda and within any magisterial area within Uganda. Therefore the Chief Justice may assign any magistrate to work anywhere within the geographical boundaries of Uganda since the entire country has been designated into magisterial areas.

Sections 7 MCA has already been reproduced in full. It also addresses two aspects. The first one is that a magistrate's court may be held in any place within the local limits of its jurisdiction. The second and more relevant one is that the Chief Justice, may, if the interests of justice require, make written authorization for a magistrate's court to be held "***at a place outside the local limits of its jurisdiction designated in the authorization***". Therefore, in addition to the powers granted to the Chief Justice under *Article 133 of the Constitution*, he has powers under *sections 6 and 7 of the MCA* to authorize a magistrate to hold a court anywhere in Uganda, provided that the authorization is in writing.

After considering the submissions of the parties and the evidence, it is my judgment that the impugned Directions authorizing magistrates to hold courts within the precincts of the High Court Anti Corruption Division were legally issued both under *Article 133 of the Constitution* and under *sections 6 and 7 of the MCA* and did not contravene *the Constitution* in this regard.

I now move on to the issue whether magistrates were properly attached to the High Court which was not a gazetted magisterial area. *Sections 2 and 3 of the MCA* have been relied upon by the Parties. *Section 2* provides that the Minister may, after consultation with the Chief Justice, by statutory instrument divide Uganda into magisterial areas for the purposes of the MCA. *Section 3* provides that the Minister of Justice may, after consultation with the Chief Justice, by statutory instrument designate magistrates courts to be known as the magistrates court for the area in respect of which it has jurisdiction.

In accordance with the above sections and after the coming into force of the *Constitution* the Chief Justice enacted the *Magisterial Courts (Magisterial Areas) Instrument No. 45 of 2007*. In the relevant part, that instrument provides for Magisterial Areas. Among them is Mengo, Buganda Road and Nakawa Magisterial

Areas. I note that the Anti Corruption Division is situated in Kololo Kampala, within Mengo magisterial area.

I see nothing illegal or unconstitutional in the Chief Justice assigning Magistrates to the High Court to assist in any Division in the performance of its work, given that he has powers to do so under both *Article 133 of the Constitution* and *sections 6 and 7 of the MCA* as already discussed. I also recall that a number of magistrates of various grades have been assigned as personal assistants to the Chief Justice, the Deputy Chief Justice and the Principal Judge. That does not make them Judges of those courts.

I further recall that despite the fact that Judges may be deployed to specific divisions or circuits within the High Court, this does not prevent the Chief Justice, in consultation with the Principal Judge, from assigning any judge to work in any circuit in Uganda on any case, as may be required. Holding otherwise would lead to unnecessary fettering of the powers given by the Constitution to the Chief Justice under *Article 133 of the Constitution*.

I observe that the challenges to the establishment and operation of Anti Corruption courts are not unique to Uganda. They have occurred in other commonwealth jurisdictions. I have found strong inspiration in the decision of the Kenyan Constitutional Court case of *Meme v Republic and Another Miscellaneous Criminal Application No. 495 of 2003*. This case describes the circumstances in which the Kenya Anti Corruption Division was set up and the challenges it faced. For now, it is sufficient to narrate the circumstances leading to its establishment. I revert to the challenges later on in the judgment.

On August 15, 2001, the Kenyan Government issued directives for the formation, within the Police Department, of an Anti Corruption Unit to investigate all corruption and corruption-related offences either at their own initiative and/or as directed by the Attorney General. The Commissioner of Police formed the Kenya Anti Corruption Police Unit (ACPU) on September 13, 2001. It took over all matters that were then being investigated by the Kenya Anti Corruption Authority, whose existence terminated with the creation of the ACPU. The Attorney General was also expected to set up a Corruption Prosecution Unit.

The Kenyan Judiciary took the initiative, in tandem with these developments to launch an Anti Corruption Court on April 25, 2002. In the same year, subordinate courts were reorganized to make specific provision for anti corruption cases.

The then Kenyan Chief Justice Honourable B Chunga made the following statement when he was setting up the Anti Corruption Court, which is quoted from the same case;

"Corruption is a global issue with far reaching economic and social effects. It is only through the concerted and coordinated efforts of everyone that the fight against corruption can be won. Every institution and individual has a role to play in this fight. The whole of our society and the whole country has a role to play. ... The courts will be in the forefront in supplementing efforts towards the eradication of corruption...."

Whereas the Courts will handle cases of corruption firmly, our cardinal consideration will remain efficiency, fairness, expedition and above all, the Rule of Law...

Today, I am pleased to announce the establishment of an Anti Corruption Court in Nairobi under the existing arrangement in the subordinate Courts. The Court will exercise the jurisdiction set out in the provisions of various statutes with regard to Magistrates Courts....

These are administrative measures which I am, undoubtedly, empowered to take from time to time to improve judicial services and to enhance speed in the dispensation of justice."

The Kenyan Chief Justice then proceeded to name a chief magistrate and a principal magistrate to preside over the two Anti Corruption Courts he set up in Nairobi.

The Chief Justice of Uganda may not have been as elaborate but there is no doubt in my mind that he was motivated by similar sentiments. This is reflected in the objective of the impugned Directives as stated therein. He went a step further to notify the issuance of the impugned Directives in the gazette. *The Interpretation Act* as amended by *the Constitution* authorized him to do so.

Section 19 of the Interpretation Act provides thus;

"19. Publication of specified instruments

All specified instruments shall be published in the Gazette and shall be judicially noticed.

In this section, "specified instruments" means-

Orders, regulations and statutory instruments made in the exercise of power conferred by the constitutional instruments on the President or on a commission established by the Constitution; and

... "

The Interpretation Act commenced on 23 July, 1976. It thus preceded the 1995 Constitution. In that regard, I recall the provisions of *Article 274 and 292 of the Constitution which I have reproduced below.*

Article 274 provides;

"274. Existing law

(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptation, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."

(2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date."

Article 292 is also relevant. It provides;

"292. Modification of laws

(1) Subject to any express provision of this Constitution any laws in existence before the commencement of the Constitution (Amendment Act 2005) shall continue in

force subject to such modifications, adaptations and qualifications as may be necessary to give effect to this Constitution.

(2)...”

Applying Articles 274 and 292 of *the Constitution* to this provision, that is construing this law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with *the Constitution*, it is now clear that the list includes the Chief Justice and other authorities who were empowered by *the Constitution* to issue such specified instruments.

The cases to be handled by the High Court Anti Corruption Division and by the respective cadres of judicial officers were specified. The only difference is that the Chief Justice set up the Anti Corruption Division to encompass both Judges and magistrates, both exercising their respective jurisdictions.

I consider that the Kenyan Anti Corruption Court was set up in circumstances very similar to ours and the motivation to set it up was the same.

On whether magistrates were performing the same work as the Judges, I observe that *Direction 2* constitutes the interpretation section of the impugned Directions. It defines designated magistrate as a Chief Magistrate or Magistrate Grade 1 **attached (emphasis added)** to the High Court Anti-Corruption Division.

The Advanced Learners Dictionary 5th Edition page 65 defines the word "attach" to mean "to make somebody available to a person or group for special duties". We consider that the use of the word "attached" in *Direction 2* was deliberate, and not an accident.

Black's Law Dictionary, Ninth Edition at page 145 on the other hand defines the word attach as follows; "To annex..."

The two definitions imply an assignment or addition to but not an alteration. That type of assignment for magistrates to the High Court Anti Corruption Division was not meant to give them any additional jurisdiction. They were assigned to assist the Division **in its work**. Their assignment did not constitute a substantive appointment to the High Court bench. Rather the Chief Justice appointed them for special duties, both judicial and administrative, to the High Court Anti Corruption Division, but within their respective jurisdictions conferred on them by law.

I am emboldened in this understanding by the clear language of the *Directions 5 and 6* of the impugned Directions, which I have given their natural and ordinary meaning. *Direction 5* concerns the composition of the Division and the administrative setup. It limits the composition of the Division initially to two judges and the Registrar. *Direction 6* lays down the administrative set up. The Head of Division, Judges and Registrar constitute the Division. Magistrates assist in the work of the Division.

I also consider that the deployment of magistrates to the High Court Anti Corruption Division neither detracts from nor diminishes the powers given to the Minister of Justice, in consultation with the Chief Justice to establish magisterial areas under *section 2 MCA*. There is nothing in the *MCA* that prohibits or even forbids the Chief

Justice from exercising his powers under *Article 133 of the Constitution*. Moreover, although there is no conflict between *Article 133 of the Constitution* and *section 2 of the MCA*, the former supersedes the latter. The provisions of the *MCA* should therefore be read subject to *the Constitution* that is the supreme law of the land.

I note that the *Magistrates Courts Act* was enacted in 1970 prior to the enactment of the 1995 *Constitution*. I see no inconsistency between *the Constitution* and the *MCA*. In any event, the *MCA* has to be read subject to the *Constitution*, with modifications, adaptations and qualifications, where warranted.

The Petitioner also challenged the territorial jurisdiction of Magistrates, and the limits of their criminal jurisdiction within the High Court Anti Corruption Division. In essence, the question is whether the impugned Directions amend the specified constitutional provisions and clothe magistrates' courts with jurisdiction that they did not have.

This matter has largely been answered above. For avoidance of doubt however, specific allegations of exercise by magistrates of unlimited territorial jurisdiction and unlimited jurisdiction need to be specifically addressed.

Section 51 of the Anti Corruption Act in relevant part provides that;

"...jurisdiction to try offences under this act shall be exercised only by;

(a) The High Court

(b) A Magistrate court presided over by a Chief Magistrate or a Magistrates Court presided over by a Magistrate Grade one"

Under this section, the *Anti Corruption Act* grants jurisdiction for offences under the Act to the High Court, a magistrate's court presided over by a Chief Magistrate, or a magistrate's court presided over by a Magistrate Grade 1. Thus sentence is the decisive factor as to which court has jurisdiction.

I have noted the provisions of *Direction 8* that provides for the jurisdiction of Judges and magistrates in the High Court Anti Corruption Division to try any offence under the *Anti Corruption Act*, *Penal Code Act*, *Leadership Code Act* or any other law related to corruption.

I further observe that the criminal jurisdiction of magistrates can only be exercised in accordance with *section 161 of the MCA*. That section is reproduced below for ease of reference. It provides;

"161. Criminal Jurisdiction of magistrates

(1) Subject to this section, a magistrate's court presided over by-

(a) A chief magistrate may try any offence other than an offence in respect of which the maximum penalty is death;

(b) A magistrate grade 1 may try any offence other than an offence in respect of which the maximum penalty is death or imprisonment for life;

(c) ...'

The language of the subsection is clear and needs no amplification.

The effect of the totality of the above provisions is that the jurisdiction of the different benches is made clear and distinct. I am therefore not persuaded that there was a departure from the above provisions in the enactment of the impugned Directives.

I recall that an amendment may be effected expressly, by implication or by infection as long as the result is to vary or repeal a provision of the Constitution. It is not material whether the amendment Act states categorically that the Act is intended to affect a specified provision of the Constitution. It is the effect of the amendment that matters. (*Paul Semogerere v. Attorney General Constitutional Appeal (supra)*). The above principle equally applies to subsidiary legislation or any other act or omission (*Fox Odoi-Oywelowo and another v. Attorney General (supra)*).

I have considered the affidavit evidence adduced by both sides. It is the only evidence that was tendered to prove or disprove the allegations. I note that the title of one of the judgments attached to the affidavit is "***The Republic of Uganda, In the High Court of Uganda Anti-Corruption Division***" and it was signed by His Worship Baguma Principal Magistrate Grade 1. I have also noted the content of the judgment. Despite, its title, the content of the judgment demonstrates that the trial magistrate had jurisdiction, and that the trial was conducted in accordance with the law, with the observance and accordance of all guaranteed rights. I believe the evidence of the Registrar that no magistrate has ever handled a case beyond the jurisdiction granted to her/him. Furthermore, as already mentioned, Magistrates are deemed to have jurisdiction to try the offences that are within their limits under *sections 2 and 3 of the MCA*, wherever they may be deployed anywhere in Uganda.

As already observed, by deploying magistrates to the Anti Corruption Division of the High Court, the Chief Justice did not thereby constitute them into High Court Judges. Magistrates were expected and indeed have been discharging their functions in strict compliance with the jurisdiction vested in them in accordance with the *MCA, the Anti Corruption Act, the Leadership Act and the Penal Code Act*. Based on the documents submitted by the Petitioner, the affidavits and the arguments of all Counsel and the law, I am not convinced that magistrates attached to the Anti Corruption Division exercised any jurisdiction that was not vested in them.

The only blight I see in their proceedings is the titling of the court documents, for example summons and judgments. The title "*In the High Court of Uganda*" may cause confusion in perception. However, this is merely a label and a matter of form rather than substance. It is not fundamental as it does not go to jurisdiction given that the magistrate who sat in the case was competent and duly authorized to exercise that jurisdiction that was vested in him by law. It does not therefore render proceedings conducted by the particular magistrate or any other magistrate null and void as the core competence to try the cases exists. I therefore decline to declare such court proceedings null and void.

I now revert to another challenge that the Kenyan Anti Corruption Court faced relating to the name of the Court, and the analogy to this case. It is pertinent at this juncture to give the full facts of the case of *Meme v Republic and Another (supra)*.

On April 10, 2003, the applicant was charged as first accused with offences of abuse of office contrary to *section 101(1) of the Penal Code Act (cap 63, Laws of Kenya)* on account of the loss of the sum of Kenya Shillings 51,000,000/= (fifty one million only) within the frame work of the Chief Justice's direction. That money belonged to the Kenyatta National Hospital where he was the director between 1992 and 1998. The money was invested in Euro Bank that became insolvent. A second accused who was later allowed to join the reference as an interested party was arraigned before the Anti Corruption Court, and charged with offences under the *Penal Code*. He appeared before a regular and duly qualified magistrate who was serving within the Anti Corruption Court. Subsequently, the Anti Corruption and Economic Crimes Act No. 3 of 2003 was enacted and entered into force on May 2, 2003.

The Kenya Anti Corruption Commission (KACC) was joined as a party to the proceedings on the grounds, *inter alia*, that the investigations that led to the institution of criminal proceedings in the applicant's criminal case (No. 22 of 2003) were conducted by the ACPU and subsequently by the KACC.

At the first hearing, the trial did not proceed. On July 22, 2003, Applicant applied for his case to be referred to the High Court under *section 67(1) of the Kenyan Constitution* for determination of several constitutional questions. Among them were the following; the Applicant argued that the magistrates and the prosecutor of the Anti Corruption Court had no constitutional or legal authority to try him and further that the principle of presumption of innocence and natural justice would not be observed.

Counsel for the applicant also challenged *section 3 of the Kenya Anti Corruption and Economic Crimes Act (No. 3 Of 2003)* for contravening *section 27 of the Constitution*. Section 3 of the Kenya Anti Corruption and Economic Crimes Act provides:

"(1) The Judicial Service Commission may, by notification in the Kenya Gazette, appoint as many special magistrates as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely-
(a) Any offence punishable under this Act; and
(b) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in paragraph (a).
(2) A person shall not be qualified for appointment as a special magistrate under this Act unless he is or has been a chief magistrate or a principal magistrate or an advocate of at least ten years' standing."

Counsel for the Applicant argued that any appointment under this section was a nullity because it was establishing a new, unknown category of magistrates called special magistrates. He also argued that the marginal note to the section read; *"Power to appoint special judges"*.

Counsel further submitted that special magistrates were purveyors of a certain category of justice entirely different from justice commonly known. The category

was imbued with an objectionable stigma, which would create a doubt in the mind of any person about the Anti Corruption Courts.

The question before the Kenyan Constitutional Court was whether the trial process before the Principal Magistrate was contrary to *the Constitution* and the law and must be terminated and the applicant let free, or whether the said trial was a lawful process of criminal justice conducted in accordance with *the Constitution*, and should be cleared to proceed.

The Court found that since the content of that section is squarely concerned with magistrates, the term "*judges*" in the marginal note was a minor error to which the principle of *de minimis non curat lex* applied (Black's Law Dictionary 2nd Edition translates this to mean that "*the law does not care for, or take notice of, very small or trifling matters. The law does not concern itself about trifles...*"). The Law Reform Commission could ensure that the error was corrected.

The Court found that the applicants pleadings and submissions were not only a generalized assault on the magistrates and the courts, but also on the entire regime of the *Anti Corruption and Economic Crimes Act*. The Court then went on to state:

"...In our view, an attack so broadly aimed should not lend itself to the Court's concurrence; firstly because Counsel has a duty to prosecute the case only on the basis of the specific grievances of his client; secondly because the legislative mandate of Parliament, which is clearly spelt out in section 30 of the Constitution, ought in principle to be given fulfillment, of course, subject to the constitutional document itself; and thirdly, because the fulfillment of Parliament's legislative mandate necessarily entails the establishment of new institutions of implementation, such as the Kenya Anti Corruption Commission and the parallel support structures within the Courts and the Police."

The applicant's application was rejected by the Court on the ground that it had not fully complied with the basic test of constitutional references. The Court held that the trial of the applicant in the Magistrate's Court was neither intended nor likely to deny him any constitutional and ordinary rights. The apprehension that the applicant may be denied the presumption of innocence was unfounded, as trials in the Anti Corruption Court were guided by normal judicial practice as obtaining in all the courts forming part of the judicial system. They also held that the term "Anti Corruption Court" was just a label to describe a division in the Magistrate's Court system lawfully established by the Chief Justice by virtue of the powers conferred upon him by the *Magistrates Courts Act (cap10)*. There was entirely no inconsistency between the set up of the Anti Corruption Court and the provisions of *the Constitution*.

I commend and adopt their Lordships' reasoning in that case. Although the designated magistrates in the Kenyan case were placed in magistrates' courts, I consider that the principles enunciated in that case equally apply to this case. The trial of an accused person before a magistrate in the High Court Anti Corruption Division is neither intended nor likely to deny any accused any constitutional or other rights. The trials before magistrates are guided by normal judicial practice as obtain

in all courts of judicature. Parliament in Uganda enacted *the Anti Corruption Act* in the circumstances already described. It gave jurisdiction to the High Court and Magistrates Courts to try offences related thereto. It was incumbent upon the Judiciary and all other organs to give fulfillment to Parliament's objective and mandate of fighting corruption by setting up structures to deal with the scourge. The Judiciary had to set up its own structures within the Courts.

On the authority of the Jamaican case of *Hinds and others v. the Queen* [1976] 1 All ER 353, the Kenyan Constitutional Court in the *Meme* case (supra) also decided that the Anti Corruption Court truly represents a normal and quite practical approach to the management of the Court system, for the purpose of achieving the efficient disposal of cases. The *Hinds and others v The Queen* case (supra) quoted in the *Meme Case* concerned judges who had been appointed to a court labeled "*The Gun Court*". It was challenged for being unconstitutional. This case laid down the principle that the exercise of judicial power does not depend on the label of the Court. It is the substance of the law that must be regarded, and not the form. To quote the judges in the *Hinds* case, the question should be;

"What is the nature of the jurisdiction to be exercised by the judges who are to compose the Court to which the new label is attached?"

The principle enunciated in that case equally applies in this case. The magistrates concerned were duly appointed and had the requisite jurisdiction to hear the cases before them. The label of the "High Court Anti Corruption Division" does not make them any more or less so.

On the titling of the court documents, the Chief Justice and/or the administrators of the court can easily find a solution for example by directing proper titling of documents from magistrates. The documents could for example read, "In the Chief Magistrates Court of Mengo attached to the High Court Anti Corruption Division at Kampala". I am sure that a suitable formulation can be found by those concerned. This would deal with the problem of titling documents emanating from magistrates under the High Court Anti Corruption Division.

It is my judgment therefore that Magistrates' exercise of unlimited territorial jurisdiction was not contrary to *Articles 126, 128(2) and 139 of the Constitution*.

Therefore *Directions 2, 8, and 10* of the impugned Directions do not conflict with or contravene *Articles 2, 79, 126, 128(2), 133, 138 and 139 of the Constitution*. Issues Nos. 1, 2 and 3 are accordingly answered in the negative.

Issue No. 4

Issue No. 4 concerns the alleged derogation of the accused's right to a fair trial. The Petitioner submitted that there was derogation of the accused's right to a fair hearing because of the manner in which the High Court Anti-Corruption Division was structured contrary to *Article 28(1) of the Constitution*. Accused could not be granted a fair hearing because the courts were incompetent. A fair hearing could only be received in a competent court. Establishment of the High Court Anti-Corruption Division was therefore in violation of the non-derogable right of an accused person's right to a fair hearing under *Articles 28(1) and 44 (c) of the*

Constitution. Counsel relied on the authorities of *Macfoy v. United Africa Company Limited* [1963] All ER and *Hon. Sam Kuteesa and Others v Attorney General Constitutional Reference No. 47 of 2011* and *Attorney General v. Uganda Law Society Constitutional Appeal No. 001 of 2006 (SC)* and submitted that the proceedings conducted under the High Court Anti-Corruption Division by Magistrates, including committal proceedings, be declared null and void. Counsel urged the Court not to restrain itself from doing their duty and uphold the concept of prospective overruling as was done in *Semwogerere v Attorney General (supra)*. Instead, it should perform its duty to enable citizens to enjoy their fundamental rights guaranteed by *Article 20 of the Constitution*, relying on the case of *Dr. Kiiza Besigye and others v Attorney General Constitutional Petition No. 007 of 2007*.

Counsel for the Respondent in response stated that trials being conducted by the designated magistrates under the Anti Corruption Division did not derogate the accused person's right to a fair hearing and therefore were not contrary to *Articles 2, 28(1), 44(c), and 126 of the Constitution*. *Article 28(3)* goes into detail about what amounted to a fair hearing. This included presumption of innocence, information to the person in a language s/he understands about the charge, the proceedings of the court, and how a matter should proceed. The Petitioner is misinterpreting competence of the court and the right to a fair hearing. The two were distinct. The Petitioner did not adduce any evidence to illustrate that the fundamental principles that form a right to a fair hearing as established in *Article 28 of the Constitution* had been breached.

I have already resolved the issue of competence of the court. Given that I have found no breach of any constitutional provision, it goes without saying that I find no merit in the Petitioner's allegation that the right to a fair hearing was derogated from by the impugned Directions contrary to *Articles 2, 28(1) and (2), 44 and 126 of the Constitution*. Moreover, these are generalized attacks on the proceedings of all magistrates in the High Court Anti Corruption Division that are not supported by any evidence. They are thus rejected. Accordingly, this issue is also answered in the negative.

Issue No. 5

On the issue of remedies, learned Counsel for the Respondent submitted that the burden of proof lies on a petitioner who brings a petition under *Article 137 of the Constitution* to prove that a law, act, or omission is inconsistent with *the Constitution*. The Petitioner had not led evidence to show that the magistrates and Judges of the Anti Corruption Division were exercising concurrent jurisdiction. Accordingly the prayers of the Petitioner for declarations and for striking out the impugned Directions should be dismissed. I agree with the submissions of the Respondent. No evidence has been led to establish that judges and magistrates in the High Court Anti Corruption Division were exercising concurrent jurisdiction. No breach of *the Constitution* has been established by the Petitioner. The High Court Anti Corruption Division was established in accordance with the Constitution and all relevant laws. Accordingly, I find that the Petitioner is not entitled to any remedies. In the result, this petition is dismissed with costs to the Respondent.

Dated December 20, 2013

Signed by:

Honorable Justice Solomy Balungi Bossa JA/JCC

JUDGMENT OF THE HONOURABLE JUSTICE REMMY K.KASULE

I have had the opportunity of reading the Judgment of the Honourable Lady Justice Solomy Balungi Bossa and I entirely agree with the conclusions she has reached. I concur that the petition be dismissed with costs to the respondent.

Dated at Kampala this **20th December, 2013**

Remmy K. Kasule

Justice of the Court of Appeal/Constitutional Court

JUDGMENT OF HON JUSTICE GEOFFREY KIRYABWIRE, JA/CC

I have read the Judgment of the Hon Lady Justice Solomy Balungi Bossa JA/CC in draft to which I fully agree and adopt and have nothing more useful to add.

Read in Court on the **20th day of December, 2013.**

Hon Justice Geoffrey Kiryabwire

Justice of the Court of Appeal/Constitutional Court

JUDGMENT OF JUSTICE PROF. LILLIAN TIBATEMWA EKIRIKUBINZA, JA/CC

I have carefully read the Judgment, the draft, of Honourable Lady Justice Solomy Balungi Bossa. I agree with the judgment, the reasoning and conclusions therein.

Dated at Kampala this **20th December, 2013**

Prof. Lillian Tibatemwa Ekirikubinza,

Justice of the Court of Appeal/Constitutional Court