

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

**CORAM: (KATUREEBE, CJ, TUMWESIGYE, KISAKYE, NSHIMYE,
MWANGUSYA, OPIO AWERI, MWONDHA, JJSC)**

CONSTITUTIONAL APPEAL NO. 4 OF 2016

BETWEEN

DAVID WELSEY TUSINGWIRE APPELLANT

AND

THE ATTORNEY GENERAL RESPONDENT

(Appeal from the decision of the Constitutional Court at Kampala before Kavuma DCJ, (Dissecting) Remmy Kasule, Solome Balungi Bossa, Geoffrey Kiryabwire, L.E. Tibatemwa, JJA dated the 20th day of January, 2014)

JUDGMENT OF MWONDHA, JSC

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The appellant appealed to this Court against the whole decision and orders of the Constitutional Court as follows:-

- (1) The Learned Justices erred in law and fact when they held that the High Court (Anti Corruption Division) Practice Directions 2009 did not add the designated Magistrates to the structure and composition of the High Court Anti corruption Division but that they are just “Assistants” to the Judges.

- (2) The Learned Justices erred in law and fact when they held that the Chief Justice can under Article 133 of the Constitution and sections, 6 and 7 of the Magistrates Courts Act alter the composition structure and function of the High Court in spite of Articles 79, 126, 129, 138, 139, 150, of the Constitution which exclusively confer the exercise of legislative power to Parliament.
- (3) The Learned Justices erred in law and fact when they held that the Chief Justice can under Article 133 interfere with inclusive unlimited jurisdiction of the High Court enjoyed under Article 139 of the Constitution and simultaneously confer the said unlimited jurisdiction without any authority.
- (4) The Learned Justices erred in law and fact when they failed to adequately evaluate the evidence and held that the proceedings before and arising from designated magistrate at High Court Anti Corruption Division did not violate the right to a fair hearing under Article 28 and 44 (c) of the Constitution.
- (5) The Learned Justices erred in Law and fact when they did not properly evaluate the evidence before them and failed to make consequential orders nullifying proceedings taken before and those arising from designate Magistrates of the High Court Anti Corruption Division.

JS

The appellant asked this Court:

- (i) To allow the appeal
- (ii) To set aside orders of the Constitutional Court
- (iii) Award costs of this Court and of the Court below to him

Background:-

The brief facts of the appeal are that the Chief Justice issued the High Court (Anti Corruption Division) Practice Directions 2009 (hereinafter referred to as the impugned Directions) on the 18th August 2009. The Chief Justice acted under Articles 133 (1) (a) of the Constitution. The Anti corruption

Division of the High Court, with the objective to operate as an orderly, expeditious, efficient and cost effective forum for adjudication of corruption and corruption related cases under the Anti Corruption Act, the Penal Code Act and the Leadership Code Act or any other Law related to corruption. The High Court Anti Corruption Division was initially composed of two judges of the High Court, a Registrar and designated Magistrates, (Chief Magistrates and Magistrate Grade I) attached to it. It is located at Kololo but can operate from such other places in Uganda as the Principal Judge may determine. Designated Magistrates attached to the Anti Corruption Division of High Court have territorial jurisdiction to try offences under the laws mentioned above committed any where within the Geographical boundaries of Uganda. The Chief Justice may assign designated Magistrates to work in the High Court Anti-corruption Division without any limitation for working in any or part of a Magisterial Area.

The appellant who was the petitioner in the Constitutional Court challenged the constitutionality of the High Court (Anti Corruption Division) Practice Directions issued on the 18th August 2009 (the impugned Directions) which established the Anti Corruption Division of the High Court alleging that they were in consistent with and in contravention of the provisions of the Constitution and for that reason he was aggrieved. He was interested in and sought various declarations and orders as follows.

- (1) 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 I Magistrate as Designated magistrates in the Anti Corruption Division of the High Court distorts the Constitutional composition of Articles 2, 79, 126, 138, and 257 of the Constitution.
- (2) Direction 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 is contrary to and in contravention of Articles 2,

79, 126 (2) 133 (I) (b) and 138 of the Constitution of the Republic of Uganda.

(3) 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 exercises unlimited territorial jurisdiction currently 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.

(4) That the Criminal trials conducted by the said designated Magistrates under 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 (I) , 44 (c) and 126 of the Constitution of the Republic of Uganda.

He asked for costs of the petition and any other further declaration or Order as Court may deem fit. The Constitutional Court dismissed the petition by the majority of four Justices against one who dissented.

Representation:-

At the hearing Mr. Mulema Mukasa and Mr. Andrew Oluka represented the appellant

Mr. George Kalemera Principal State Attorney and

Ms Imelda Sarah Adong State Attorney Represented the Respondent

Ms Sarah Langa Representative of the Respondent was present.

Appellant's submissions:-

Counsel for the appellant submitted on ground I that the Constitutional Court failed to discharge its mandate under Article 137 of the Constitution to render a true and proper interpretation of the Constitution. He gave reasons as follows:-

(a) That the Constitution places very high importance on the establishment and composition of all constitutional offices and does not leave it to fertile imagination or guesswork but clearly defined under specific provisions.

(b) Examples of such offices include all constitutional offices of the Executive, Legislative, and Judiciary, statutory bodies or organs. For the case of the High Court its composition is clearly defined under Article 138 of Constitution to include the Principal Judge and other Judges only.

(c) There have been many cases where the Courts have insisted that a Constitutional office must retain its original structure and composition at all times. These include **Constitutional Petition No 30 of 2011 Gilbert Bukenya Balibaseka Vs Attorney General** **Constitution Petition No 46 of 211 and Constitutional reference No. 54 of 2011. Hon Sam Kuteesa and 2 others Vs. Attorney General** which dealt with the composition of the office of the inspectorate of Government.

(d) Article 138 does not include assignees or assistants to the membership of the High Court. According to their research they claim to have found that Assistants to judges are specifically created by the Law in Other Jurisdictions. For example in Ireland, temporary Assistant Circuit Judges are appointed under the Courts of Justice Act 1924 whereas in Bangladesh Assistant Judges are also a creature of statute. They urged that in Uganda, there are no assistant Judges in the High Court who sit in Judgment cases. 

(e) The only judicial officers who can do work in the High Court, Court of Appeal and Supreme Court are Registrars which office is created under Article 145 of the Constitution and whose duties in those Superior Courts are specified under numerous operatives legislations like the Civil Procedure Act Cap 71.

(f) The Constitutional Court erred by supporting the view that the designated Magistrates were on some kind of temporary appointment to the High Court when they were deployed to execute judicial duties in the HCACD. Temporary appointment to the High Court are in respect of Judges and not Magistrates and such appointments are done by the President not the Chief

Justice and this is on the advise of the Judicial Service Commission under Article 142 (2) of the Constitution.

(g) Counsel lastly submitted that the Constitutional Court held that by attaching the Magistrate to the High Court Anti Corruption Division, the Chief Justice did not add them to the composition of the High Court because he was merely exercising his administrative functions under Article 133 of the Constitution to ensure the proper and efficient administration of the Court. Appellant's Counsel was in agreement with the judgment of Hon. Justice Steven B. K. Kavuma DCJ where he held:-

“To attach therefore in simple English and in the context of the Petition, connotes in my view adding to, making someone available to join a group or to cause to belong to a group or organization.”

Counsel for the appellant argued that designated Magistrates were therefore made to belong by the impugned directions to the HCACD and were appointed to the High Court Anti Corruption Division. The Webster Universal English Dictionary defines the word appoint as to select for a job, to prescribe.

They were fused into what was supposed to be a Division of the High Court thereby becoming part and parcel of it, and it derogated the High Court status, the designated Magistrates being judicial officers of lower rank than judges of the High Court. Appellants Counsel contended that the designated Magistrates have nothing in common with the judges in terms of appointment, entry qualifications, disciplinary proceedings and the method of removal in case of need, yet they were to join High Court Anti Corruption Division as members thereof thereby interfering with the Constitutional set up of the Court.

(h) Counsel further argued that Magistrates are well defined judicial officers under the Constitution and Magistrates Courts Act Cap. 16, have a complete parallel jurisdiction. Cases are handled independently without being fused into another Court. Such fusion is not supported by law.

(i) Magistrates never come to the aid of the High Court in the discharge of their duties as the impugned directions would want us to believe (see S. 9 of MCA on general jurisdiction of Magistrates). On the contrary it is the High Court which can come to the aid of Magistrates Court when it exercises its supervisory powers over them among other things.

He prayed that this honourable Court allows the appeal on the 1st ground one.

Grounds 2 and 3 were submitted on together as they were inter-related because they challenge the powers of Chief Justice under Article 133. The grounds are as below:-

Counsel submitted among others that the Constitutional Court spent considerable time talking about the jurisdiction of the designated Magistrates which was not in dispute (see page 197 lines 5 – 30 of the Record of Appeal). The main thrust of appellant's Petition was not about jurisdiction of the Magistrates to try offences but rather about their appointment and membership to the High Court under the impugned Directions.

They affirmed that the Constitutional Court found albeit erroneously that under Article 133 of the Constitution, the Chief Justice has power to deploy Magistrates to a High Court. The Article 133 provides:- Administrative functions of the Chief Justice

(I) 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. Counsel further submitted that at page 191 line 21 of the Record of Appeal the lead judgment stated "In conclusion on this particular aspect therefore, I do not consider him to be usurping the powers of Parliament to make Laws. Article 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."

Counsel contended that the proper interpretation of Article 133 would lead to the conclusion that the article grants the Chief Justice Administrative and supervisory functions of Courts whose composition is specifically defined else where in the Constitution. For the case of the High Court the definition is under Article 138. According to Blacks **Law Dictionary 9th Edn. Brian A Gardner at page 1576** defines supervisor as meaning one having authority over others, a manager or overseer. Therefore the Chief Justice manages, oversees them without the power to alter. The issuance of orders /directions like the impugned Directions is not part of the supervisory functions of the Chief Justice envisaged under Article 133. The Supervision is supposed to be carried out in respect of Courts as established by the Constitution.

He argued that if the Constitution had intended to allow the supervisor to make appointments to the office or after its composition which is an impossibility under the Constitution) it would have specifically stated so. The Chief Justice, in their view, neither had direct or implied power to either appoint to or alter the composition of the High Court membership. To hold so would derogate the principle of separation of powers which reigns Supreme in the Constitution. H

He relied on the case of **Kenilorea Vs Attorney General 1986 LRC (Constitution) P 126** from the Supreme Court of Solomon Islands, a Common wealth Jurisdiction Court which emphasised the importance of the principle of separation of powers when it rejected the Parliaments attempt to restrict the unlimited jurisdiction of the High Court. It held:-

“it is important that Courts exert great care to avoid giving any impression that they have become some sort of extension to the floor of Parliament where politicians may continue to press their opposition to legislation. Any appearance of political involvement is obviously undesirable. On the other hand, it was not suggested that any motive other than the most worthy lay behind the institution of the present proceedings.”

By issuing the impugned Directions, the Chief Justice was converting his office into an extension sort of, the floor of Parliament which was undesirable and unconstitutional. The Chief Justice as the head of the Judiciary ought to have known better and avoided giving a wrong impression. He submitted that if the Court had read Articles 133 and 79 harmoniously with Article 139 of the Constitution, it would have recognized that under Article 79 only Parliament has powers to make provisions having the force of law and not read such import in Article 133 which does not confer any legislative functions. In the end Court didn't promote the intention and spirit of the Constitution. It instead promoted an administrative act by the Chief Justice which is ultra vires his authority under Article 133.

Counsel referred to **H.W.R. Wade on Administrative Law 6th Edn. P. 41** cited with approval in the case of **Bukenya Church Ambrose Vs Attorney General Constitutional Petition No 26 of 2010**. The Chief Justice was found to have acted without authority in creating Directions under Article 50. It was stated

“Any administrative act or order which is ultra vires or outside jurisdiction is void in law i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorisation and it is not within the powers given by the Act, it has no legal leg to stand on.”

Directive 10 provides:-

“The designated Magistrate attached to the Division shall have territorial jurisdiction to try offences specified in paragraph 8 committed anywhere within the Geographical Boundaries of Uganda. He submitted that the Magistrates Court Act in S. 31 provides for the jurisdiction of Magistrates which it states shall be territorial and limited in nature. Under S.2 of MCA the Chief Justice in consultation with the minister in gazzeting the Magisterial areas in 2007 as per the instrument at page 64 of the Record of Appeal.

He argued that, the Court didn't show that Article 133 was clothed in language that authorizes the Chief Justice to expand the territorial jurisdiction of Magistrates or language which granted the Chief Justice powers to usurp the Authority of Parliament to provide for the functions of Court under Article 150 of the Constitution.

The Court placed heavy reliance on the provisions of S.6 and 7 of the Magistrates Court Act (MCA) where the Chief Justice can authorize a Magistrate Court to sit outside the local limits of its designated jurisdiction which meant that the Chief Justice had powers to grant unlimited territorial jurisdiction to Magistrates in HCACD. They quoted S.6 and 7 as hereunder

S.6 of MCA "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 areas by the Chief Justice.

S. 7 of MCA Place of sitting

A Magistrate Court

- (i) May be held at any place within the locality limits of its jurisdiction.
- (ii) It is appears to the Chief Justice that the interest of Justice so require may be held with the authorization of the Chief Justice at any place outside the local limits of its jurisdiction designated in the authorisation, and shall be held in such building as the Chief Justice may from time to time assign as the Court house.

Counsel further submitted that when the appellant filed his petition in the Court he was not principally raising a question as to the interpretation of the impugned directions in relation to the Magistrate Courts Act but he was asking the Court to interpret the impugned Directions in relation to the Constitution.

He agreed with the dissenting judgment of the Court at page 244 from line 16 of the record. It stated

“By providing in Directions 10 (Supra) conferring unlimited territorial jurisdiction to the designated Magistrate, the Chief Justice bestowed on them territorial jurisdiction that he had no legal authority to confer to them. Such unlimited territorial jurisdiction is conferred only to judges of the High Court by Article 139 of the Constitution and S. 14 of the Judicature Act Cap 13”

Under Sec. 6 of the MCA, magistrates have compartmentalized territorial jurisdiction within or in part of each magisterial areas where they get assigned. He went further to say that he was aware that Magistrates appointed as such under the Act are deemed to and have jurisdiction in each and every Magisterial Area in Uganda among other things. By conferring unlimited territorial jurisdiction to designated Magistrates in the High Court Anticorruption Division, direction made by the Chief Justice invoking Article 133 (a) of the Constitution in effect, created a territorial jurisdiction in which all the Magisterial Areas in which Uganda is divided were consolidated into one, which makes the Directions inconsistent and in contravention with the Constitution. He invited this Court to agree with the dissenting judgment, so that these grounds succeed.

Grounds 4 and 5

These were also submitted on together Counsel for the appellant argued that they were inter-related and concerned proceedings before the designated Magistrates

- (a) the violation of a right to a fair hearing under Articles 28 and 44 of the constitution.
- (b) The nullification of the proceedings concluded by the designated Magistrates

Ground 4

The Learned Justices erred in law and fact when they failed to adequately evaluate the evidence and held that the proceedings before and arising from designated Magistrate at High Court Anti Corruption Division did not violate the right to a fair hearing under Article 28 and 44 (c) of the Constitution.

Ground 5

The Learned Justices erred in law and fact when they did not properly evaluate the evidence before them and failed to make consequential orders nullifying the proceedings taken before and those arising from the designated Magistrates of the High Court anti Corruption Division.

Counsel submitted that at page 181 lines 10 – 13 of the record of Appeal the Court spelt out some of the principles of Constitutional interpretation to include:-

(a) 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-intio

(b) A non derogable Article confers absolute protection and should be enforced by all government and non government organs and individuals.

But the decision handed down by the Court did not follow the above principles of Constitutional interpretation because it decimated a non derogable right to a fair hearing and allowed nullity proceedings to continue ... etc

Court under Article 25 7 (I) (d) of the Constitution means a Court of Judicature established by or under authority of the Constitution. For a High Court to be established under the authority of the Constitution it must be composed and structured in accordance with Article 138. Without such composition a Court cannot administer judicial power under Article 126 because competence is a pre condition for any Court to administer judicial powers. He argued that the question to be asked is not whether there was a judicial officer present to hear the case when it was called at the HCACD, but whether the judicial officer who was present to hear the case when it was called at the HCACD was the right officer in the right case when it was called. He contended that the judicial officer (Magistrate who was present when the case was called for hearing at the HCACD had no locus or mandate to sit in the HCACD and administer justice. That was the gist of the appellant's case.

He further submitted that the learned Justices erred when they found that the issuance of judgments by the designated Magistrates in the HCACD is a matter of mislabeling.

He submitted that this Court follows its earlier decision by allowing the appeal on the ground that the right to a fair hearing is not accorded to accused persons under HCACD as presently constituted and that all proceedings by and before Magistrates in the HCACD are a nullity.

The appellant filed a rejoinder in which he submitted that he produced two judgments of the HCACD at pages 50 and 58 of the record of Appeal. One of them was by H.W. Emmanuel Baguma, Principal Magistrate Grade I and the other by Justice P. K. Mugamba. Both judgments show they were handed down by the High Court and this presupposes the High Court as created under Article 138. In addition the Counsel for the appellant argued that , the judicial officers signing the judgments as above stated, the bail bond forms (page 49) and the order page 59, depict what the Court by description claims to be, whereas not in law. He Counsel submitted that this cannot be waved away but it goes to the foundation of the HCACD created by the impugned Directions.



He contended that the exercise of Magisterial judicial powers is done under geographical Magisterial areas as per section 161 of MCA not in High Court Division.

It was further submitted that since no evidence has been adduced to the effect that the designated Magistrate are part and parcel of the High Court, it goes without saying that an appeal from a designated Magistrate in the same Division is made to the same Court (to judge) and is null and void.

He added that because of the infusion of designate Magistrates to the structure of Classic High Court rendered the Anti Corruption Division of the High Court incompetent and that incompetence is at the core of justice and the right to a fair hearing as argued earlier.

He prayed that the appeal is allowed, the order of the Constitutional Court be set aside and costs of this Court and the Court below be awarded to the appellant.

Respondent's submissions

The respondent opposed the appeal and prayed that:-

This Court confirms the majority decision of the Constitutional Court in its entirety that the Chief Justice in making the HCACD Practice Directions 2009 did so strictly in accordance with the Constitution and the appellant has not illustrated any evidence to the contrary.

He submitted on the first three grounds of appeal together as hereunder:-

Counsel for the respondent contented that the appellant has in no way illustrated to Court any single instance where the designated Magistrates purport to sit and determine matters as High Court Judges, nor has any evidence been adduced to show an instance where the designated Magistrate sits in appellate capacity in the Anti Corruption Division of the High Court.

Counsel further submitted that the inclusion of designated Magistrates in the HCACD was in no way an amendment of Article 138 of the Constitution that provides:-

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.**

The Chief Justice in passing the Directions was alive to the above provisions of the Constitution and as a result differentiated between the designated Magistrates and the Judges of the High Court together with their roles. They are available to assist the High Court Judges in execution of their duties. Direction 5 (2) provides that “ a 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.” On the issue of jurisdiction, counsel

submitted that Direction 8 (i) provides that the division shall have jurisdiction to try an offence under Anti Corruption Act, the Penal Code Act, the leadership Code Act or any other Law related to corruption. He further submitted that the powers being exercised by the designated Chief Magistrate and Magistrate Grade I in the HCACD is strictly in accordance with the powers granted to them under the principal legislation i.e. Magistrate Courts Act Cap 16 and do not in any way distort the Constitutional composition of the High Court and of the Anti Corruption and function. It was submitted that S.51 of the Anti Corruption Act No 6 of 2009 provides among other things that jurisdiction to try an offence under this Act shall be exercised only by the High Court, a Magistrate's Court presided over by a Chief Magistrate or a Magistrates Court provided over by Magistrate Grade I. Section 161 of the MCA provides for a Criminal jurisdiction of the Magistrates. It provides inter alia that a Chief Magistrate may try any offence other than an offence in respect of which the maximum penalty is death. While a Magistrate Grade I may try any offence other than an offence of which the maximum penalty is death or imprisonment for life.

Counsel submitted that the appellant's evidence by way of his affidavit at pages 10 to 13 and 31 to 34 of the Record of Appeal and his affidavit in rejoinder have in no way illustrated to Court what he alleged as above stated. He prayed that Court finds that evidence in support of the 1st ground is insufficient to come to the conclusion that the designated Magistrates and the Chief Magistrate in the HCACD are exercising their powers as judicial officers of the High Court of Uganda.

On the ground that directions 2, 8, and 10 providing for appointment and exercise of Judicial duties by the designated Magistrates being contrary to Articles 2, 79, 126, 133, 138, 139, and 150 of the Constitution, it was submitted that section 7 (I) (b) of the MCA Cap. 16 provides " if it appears to the Chief Justice that the interest of justice so require may be held, with a written authorization of the Chief Justice, at a place outside the local limits of its jurisdiction designated in the authorisation and shall be held in such building as the Chief Justice may from time to time assign as the Court

House. It was under that authorisation that matters are being handled by the designated Chief Magistrate and designated Magistrate I at the HCACD. It was further argued that the Chief Magistrate and Magistrate Grade I in the HCACD are lawfully carrying out their duties as provided for in S.6 of the Magistrates Courts Act. Again the appellant did not adduce evidence to show that the Chief Justice did not authorize them through the impugned Directions. Section 6 of the MCA reproduced supra provides among others that under the Act every Magistrate appointed under it "shall be deemed to have been appointed to and have jurisdiction in each and every Magisterial area or to a part of any magisterial area by the Chief Justice."

He submitted that the Chief Justice did not appoint designated Magistrates to the HCACD as Counsel for the appellant submitted. The directions were very clear. Paragraph 14 and 16 of the affidavit in support of the answer to the petition at page 28 of the record of Appeal show how a designated Magistrate presides over the pre-indictment proceedings in the Division and then referred to the High Court in accordance with S. 169 of MCA. He prayed that Court finds that there's no evidence led by the appellant to prove allegation on directions 2, 8, and 10 to the effect that they were inconsistent and in contravention of Articles 2, 79, 126, 133, 138, 139, and 150. The Chief Justice acted within his powers to assign and designate Magistrates to assist in the workings of the Court within their criminal jurisdiction. He urged Court to resolve it in the negative.

On the ground that the designated Magistrates are exercising unlimited territorial jurisdiction contrary to Articles 133 and 139 of the 1995 Constitution, it was submitted that there was no evidence to show that this was so. The annexures to the affidavit in support of the petition and rejoinder at pages 10,13, 31, and 34 of the record of appeal were cause lists and proceedings of the Anti Corruption Division of the High Court in Kololo. Those do not illustrate how designated Magistrates were exercising the unlimited territorial jurisdiction as alleged. They only show that the designate Magistrates are actually located in the premises HCACD is

premised and handle matters in accordance within their Local limits of jurisdiction.

It was further argued that the submission by Counsel for the appellant cannot stand to the effect that the designated Magistrates are exercising unlimited territorial jurisdiction. In light of the provisions of S. 6 of the MCA. they have jurisdiction in each and every Magisterial area provided the Chief Justice authorize them in writing as he did.

On the ground that the Learned Justices erred in law and fact when they failed to adequately evaluate the evidence and held that the proceedings before and arising from designated Magistrates at High Court Anti Corruption Division did not violate the right to a fair hearing under Article 28 and 44 (c) of the constitution, Counsel for the respondent after reproduced Article 28 of the Constitution which constitute a right to a fair hearing, he argued that there was no evidence to show that these provisions were infringed upon by the Practice Directions 2009.

Counsel for the appellant submitted that the documents attached to the supplementary affidavit in support of the allegation were witness summons and judgments of respective Courts which cannot be seen to illustrate that designated Magistrate are purporting to be judges of the HCACD. He implored this Court to accept to take judicial notice of S. 106 of the Evidence Act that puts the burden of proof in Civil Proceedings when a fact is especially within the knowledge of that person, on that person who alleges to know those facts. Rule 12 (I) of the Constitutional Court Petitions and References provides that **(all evidence at the trial in favour or against shall be by way of affidavits filed in Court.)**

He cited the case of **Phillip Karugaba Vs. Attorney General Constitutional Petition No. 11 of 2002** at page 20, where it was held that the petitioner has the burden to show that the rule is clearly inconsistent and incompatible with the principles laid down in the constitution....'

The Constitutional Petition No 14 of 2011 Advocate Coalition and for Development and Environment Vs. Attorney General was cited too, in which was held:

“it is trite law that Courts of law act on credible evidence adduced before them and do not indulge in conjecture attractive reasoning or fanciful theories “

Misc. Criminal Application No 495 of 2003 Meme Vs Republic and Another at page 6 and 20 was cited also for the remark that “Corruption is a global issue with far reaching economic and social effects. It is only through the concerted and coordinated efforts of every one, 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 have a role to play. It was concluded in our view that an attack so broadly aimed should not lend itself to the Court concurrence. Firstly because Counsel has a duty to prosecute the case only the basis of the specific grievances of his client. Secondly, because of the legislative mandate of Parliament which is clearly spelt out in S. 30 of the Constitution ought in principle to be given fulfillment of Parliament legislative mandate necessarily entails the establishment of new institutions of implementation.” He prayed that this Court adopts the same conclusion and dismiss the appeal.

Consideration of the appeal

The Appellant raised five grounds of appeal as already reproduced in this judgment.

The 1st ground was that, “the learned Justices erred in law and fact when they held that Practice Directions 2, 8 and 10 of the High Court (Anti Corruption Division) Practice Directions did not add the designated Magistrates to the structure and composition of the High Court but they are just assistants to the judges.

The impugned Directions 2, 8 and 10 are reproduced here below:-

Direction 2. – Interpretation – Court means the High Court or a Court presided over by designated

Magistrate

- Corruption – has the same meaning as defined in the Anti Corruption Act
- Designated Magistrate – means a Chief Magistrate or Magistrate Grade I attached to the Anti Corruption Division
- Division – means the Anti Corruption Division of the High Court as established in paragraph 3 of the legal Notice.
- Judge – means a Judge of the Division
- Magisterial Area- has the same meaning as it has in the Magistrates Courts Act
- Registrar means – a Registrar of the Division

Direction 8 Jurisdiction

- (1) The Division shall have jurisdiction to try any offences 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 (I) 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 falling under its jurisdiction from a Magistrate Court to the Division.

Direction 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.
- (2) In accordance with Section 6 of the Magistrates Court's Act the Chief Justice may assign Magistrates to work in the Division without any limitation to working in any or part of the Magisterial Area.

Pertinent to the above is **Direction 4** which provides for the objectives of the Practice Directions “ The Division shall operate as an orderly, expeditious, efficient and cost effective forum for adjudication of Corruption and Corruption related cases.

Direction 7 Location: - The Division shall initially be located in Kampala but may operate in such places in Uganda as the Principal Judge may determine.

Principles of Constitutional Interpretation

These have been laid down in several decided cases by this Court and other Courts in some other Common wealth Jurisdictions and legal literature of persuasive authority.

- (i) 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 its inconsistency (see Article 2 (2) of the Constitution. Also see **Presidential Election Petition No. 2 of the 2006 (SC) Rtd Dr. Col. Kiiza Besigye v. Y. K. Museveni**
- (ii) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either effect animated by the object of the legislation intends to achieve **see Attorney General v. Silvation Abuki Constitutional Appeal No. 1988 (SC)**
- (iii) The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness (see **P. K. Ssemwogere and Another v. Attorney General Constitution Appeal No I of 2002 (SC) and the Attorney General of Tanzania v. Rev Christopher Mtikila (2010) EA 13**
- (iv) A Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive liberal and flexible

interpretation keeping in view the ideals of the people , their social economic and political cultural values so as to extend the benefit of the same to the maximum possible. See **Okello Okello John Livingstone and 6 others v. The Attorney General and Another Constitutional Petition No I of 2005, South Dokata v. South Carolina 192, USA 268. 1940.**

- (v) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.
- (vi) Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it. (See **Attorney General v Major David Tinyefunza Constitutional Appeal No. I of 1997 (SC)**)
- (vii) The history of the country and the legislative history of the Constitution is also relevant and useful guide to Constitutional Interpretation see (**Okello John Livingstone and 6 others v. Attorney General and Another** Supra.
- (viii) The National objectives and Directive principles of state policy are also a guide in the interpretation of the Constitution. Article 8A of the Constitution is instructive for applicability of the objectives. SS

Bearing in mind the above principles, I note that there were basically three points of grievance in the petition:-

- (1) That the designated Magistrates as per Direction 10 Supra were granted territorial jurisdiction and were appointed as judges by the Chief Justice to have concurrent, unlimited jurisdiction in any part of a Magisterial area. This was inconsistent and in contravention of Articles 138 and 139 of the Constitution.
- (2) That the designated Magistrates having been located at the HCACD and infused with the HCACD distorted the structural composition of the High Court as provided in Article 138 of the Constitution.
- (3) That because of the two foregoing the HCACD was incompetent as a Court and so the proceedings arising there from were a nullity.

I have carefully read and considered both Counsel for the appellant and respondent submissions, I have equally perused the majority judgment of the Constitutional Court, the dissenting judgment and the record of proceedings.

Taking into account the principle of Constitutional Interpretation No.5 herein

“Where words or phrases are clear and unambiguous, they must be given their primary, plain or natural meaning. The language used must be construed in its natural and ordinary sense.

I considered the appellant’s submissions and evidence on record. It was clear that the Practice Directions have an objective in Direction 4 and it is in respect of handling specific laws relating to corruption. The laws namely Anti Corruption Act 2009, the Penal Code Act and Leadership Code Act arise from the relentless effort being taken in our country towards the fight against Corruption to make it a high risk offence. The contents of Section 6 and 7 of the Magistrates Courts Act speak for themselves and should be understood in their natural and ordinary meaning. If not, the 6th principle herein should be adopted to the effect that where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous a liberal, general of purposeful interpretation should be given to it. JS

S.6 of the Magistrates Courts Act provides

“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 a part of any Magisterial area by the Chief Justice.

S.7 provides – Place of sitting

(I) A Magistrates Court

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

(b) if it appears to the Chief Justice that the interest of Justice so require may be held with the written authorisation of the Chief Justice at any place outside the local limits of its jurisdiction designated in the authorisation and shall be held in such building as the Chief Justice may from time to time assign as the Court house.

(2) Notwithstanding subsection I if a Magistrate Court sits in any building or place within the local limits of jurisdiction for the transaction of legal business the proceedings shall be as valid in every respect as if they had been held in Court house assigned for that purpose.

Article 129 provides:-

(1) The judicial power of Uganda shall be exercised by the Courts of Judicature which shall consist of the following:-

- (a) Supreme Court
- (b) The Court of Appeal
- (c) The High Court of Uganda
- (d) Such subordinate Courts as Parliament may by law establish

....

(2)

(3) Subject to the provisions of this Constitution, Parliament may make provision for the jurisdiction and procedure of the Courts.

Article 133 provides for the Administrative functions of the Chief Justice as here under:-

(1) 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.

The Magistrate Courts Act is an Act of Parliament which facilitates the Chief Justice in his/her responsibility of administering and supervising of the Courts in Uganda. It is my view that the Practice Directions were made under the Chief Justice's exercise of his administrative and supervisory function as per Article 133 (I) (b) of the Constitution.

The word designated does not mean a fresh appointment in the context of the impugned Practice Directions or Magistrates Court Act. The word Designated according to **the Blacks Law Dictionary 9th Edn. Means designee, a person who have been designated to perform some duty or carry out some specific role.** It cannot infer a fresh appointment as Counsel for the appellant alluded to it. Sections 6 and 7 don't in any way take away the exclusive unlimited jurisdiction of the High Court as provided under Article 138 of the Constitution Article 133 of the Constitution provides. The Chief Justice

(I) (a)

(b) "may issue orders and directions to the Courts necessary for the proper and efficient administration of justice"

The Practice Directions of the Anti Corruption Division 2009 is not an Act of Parliament but it is common knowledge that it is subject to the same principles of interpretation as other laws. Principle (2) here in is instructive

"In determining the constitutionality of a legislation its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the Constitutionality of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve."

The National objectives and Directive Principles of State Policy in our Constitution provides:-

- (i) The following objectives and principles shall guide all organs and agencies of state, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law

and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

Principle 26 of the National Objectives above provides:-

- (a) All public offices shall be held in trust for the people.
- (ii) All persons placed in positions of leaders and responsibility shall in their work be answerable to the people.
- (iii) All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices.

Article 8A - National interest.

- (1) Uganda shall be governed based on the principles of National interest and common good enshrined in the national objectives and directive principles of state policy
- (2) Parliament shall make relevant Laws for purposes of giving full effect to clause (I) of this Article.

The impugned Practice Directions of the High Court Anti Corruption Division (HCACD) has the objective in direction 4 of operating as an orderly, expeditious, efficient and cost effective forum for adjudication of corruption and Corruption related cases. Bearing in mind these provisions above and the principles of Constitutional interpretation as above stated, it cannot be inconsistent with Article 138 and 139 of the Constitution.

What is provided in Direction 8 is to ensure that the above purpose is achieved in respect of those offences stipulated by the Anti Corruption Act, Penal Code Act, leadership Code Act and other laws related to corruption. Needless to say that the **Anti Corruption Act 2009** is an encompassing legislation which provides in the long title for **“the effectual prevention of Corruption in both the Public and the Private Sector, it repealed the Prevention of Corruption Act in and consequently amended the Penal Code Act, the Leadership Act and provides for other related matters.**

Expeditionness and cost effectiveness are at the core of the Directions therefore. This is obviously is in line with Article 8A supra.

I am unable to fault the learned Justices of the Constitutional Court as I did not find anywhere in the judgment that they found that designated magistrates are Assistant judges in the HCACD. At page 18 of the judgment the Court recorded the following:-

“I recall that a number of Magistrates of various grades have been assigned as personal assistants to the Chief Justice, Deputy Chief Justice and Principal Judge.”

I hasten to point out that that kind of assignment does not have the same meaning as designated Magistrates attached to the Division for obvious reasons. I however, take it that it was given as an example for comparing and contrasting, the two positions though they are not similar at all. Be that as it may, there is no designation like Assistant Judges in Uganda. I found the submissions therefore of Counsel for the appellant on this point misplaced and not material in this case.

When sections 6, 7 and 161 of the Magistrates Courts Act, Articles 133 (I) (b), 138 and 129 of the Constitution are read together with the Practice Directions 2, 8 and 10 are not inconsistent with or in contravention of the Constitution. So in my first ground fails.

For clarity S. 5, 6 and 6 of the Magistrates Courts Act reproduced supra:-

Section 161 of the Magistrate's Courts Act:-

Criminal jurisdiction of magistrates

- (1) Subject to this section, a Magistrates 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 I may try any offence other than the offence in respect of which the maximum penalty is death or life imprisonment.

(c)

(d)

Article 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 protect to the democratic governance of Uganda.

Article 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) In adjudicating cases of both a civil and criminal nature the Court shall subject to the law apply the following principles -
 - (a) Justice shall be done to all irrespective of their social or economic status.
 - (b) Justice shall not be delayed
 - (c) Adequate compensation shall be awarded to victims of wrongs
 - (d) Reconciliation between parties shall be promoted and
 - (e) Substantive justice shall be administered without undue regard to technicalities.

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Article 138 High Court of Uganda

(1) The High Court of Uganda shall consist of

(a) 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.

Article 150 Power to make laws relating to Judiciary:

(1) Subject to the provisions of this Constitution Parliament may make laws providing for structures, procedures and functions of the judiciary.

(2) Without prejudice to clause (1) of this Article Parliament may make laws for regulating and facilitating the discharge by the President and the Judicial Service Commission of their functions under the chapter.

In their submissions Counsel for the appellant argued that the Constitutional Court erred when it ignored the clear meaning of Article 138 of the Constitution and gave more importance to Article 133.

It is a cardinal principle of Constitutional Interpretation that:

“the entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining each other. This is the rule of harmony, rule of completeness and exhaustiveness” See **PK Semwogerere and another Vs Attorney General constituency Appeal No. I of 2002 (SC)** and the **Attorney General of Tanzania Vs Rev Christopher Mt. Kila [2010] EA 13.**

Article 133 (1) (b) of the Constitution when it provided for the administrative functions of the Chief Justice for the proper and efficient administration of justice, didn't have to provide that by legal Notice and or

Practice Directions the Chief Justice may issue orders or directions. It is my well considered view that neither was it necessary to provide that the parliament by law shall prescribe how the Chief Justice was to exercise his or her administrative functions. It would not be tenable or sustainable for apparent reasons one of which is that the Constitution is a document which is supposed to be for the current and the future generations.

If the Constitution provided so, it would be rigid and difficult to interpret and would be subjected to frequent amendments whenever an occasion arose.

Most importantly in my view also it would be contrary to the **Sui Generis Rule** which essentially means "in a class of its own. The constitution stands on a very different footing from other legislation for the most part (but not always) though the principles of interpretation are the same to a large extent. It is the only reason why all other laws are subjected to it and why they are declared null and void if inconsistent with it. Ref. Article 2 of our Constitution. It is also the reason why the language used is much broader and encompassing than that used in other statutes. It is intended to cover rights and freedoms for all people without discrimination because it is made for present generations and those unborn. H

The case of **Unity Dow v Attorney General of Botswana [1992] LRC (Const) 623 at page 668** it was remarked

“ the Constitution is the Supreme Law of the land and is meant to serve not only this generation but yet unborn. It cannot allow to be a lifeless museum piece. On the other hand Courts must breath life into it as occasion may arise to assure the healthy growth of the state through it. We must not shy away from the basic fact that while particular construction of a Constitutional provision may be able to meet the designs of the society of a certain age ... it is the primary duty of Judges to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider society governed by acceptable concepts of human dignity.”

The Constitution should be able to serve for a long time while accommodating the new changes the world has to offer without derogating from the original framers intent. This was further witnessed in Hunter v. Southern Inc [27] “A Constitution must be capable of growth and development over time to met social, political and historical realities often unimagined by its framers”

Through the above case is only persuasive itlau convinced by the remarks that it is the position and good case law. Counsel for the appellant submitted in respect of Directions 10 of the impugned Practice Directions that it extended the territorial jurisdiction of the designated Magistrates when **S.31 of the Magistrates Courts Act** provides that the jurisdiction of the Magistrates shall be territorial and limited in nature.

S. 31 of the Magistrates Courts Act provides for
General authority of Magistrates Courts as follows:-

“Every Magistrate’s Court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Uganda or which according to law may be dealt with as if it has been committed within Uganda and to deal with the accused person according to its jurisdiction.”

This provision is not in favour of this appeal. On the contrary when this provision is read together with the earlier referred to provisions, it just confirms that the Directions are legally supported by the Constitution and other legislations and therefore not inconsistent with the Constitution.

Counsel for the appellant further submitted that under Section 2 of the Magistrates Courts Act the Chief Justice consulted the Minister and Magisterial areas were gazetted in 2007 as per the instrument at page 64 of the Record of Appeal.

I am unable to accept learned counsel for the appellant reasoning that the Chief Justice Supervisory function envisaged in Article 133 was supposed to be carried out in respect of the Courts as established by the Courts implying that the HCACD was not a Court. Learned Counsel didn't submit on how the Chief Justice can put in effect clause (I) (b) of Article 133. In my view Article 133 (I) (b) answers the question "how".

I find the case of **Kanilorera v. Attorney General [1995] Constitution 126** from the Supreme Court of Solomon Islands a Commonwealth jurisdiction cited by Counsel for the appellant, not persuasive and also not material to the facts of this case. It was emphasizing the issue of the doctrine of separation of powers, when the Court rejected the Parliament's attempt to restrict the unlimited jurisdiction of the High Court. It is highly distinguishable since the doctrine of separation of powers doesn't arise in my view in this case.

My conclusion is that the impugned Practice Directions were not inconsistent or in contravention of the Constitution. Accordingly grounds 2 and 3 fail.

Grounds 4 and 5 were submitted on together, since they both concerned proceedings in the designated Magistrates Court.

Learned Counsel for the appellant submitted that the learned Justices, found that the HCACD composed of Judges and Magistrates, was not a High Court as envisaged under Article 138 of the Constitution and therefore was not a competent Court. He argued that Court should have found that no fair hearing could be served at the HCACD. He further submitted that Article 257 (I) (d) of the Constitution means a Court of Judicature established by or under the authority of the Constitution Article 138 of the Constitution gives the composition and structure of the High Court. He argued that with such composition a Court cannot administer judicial power under Article 126 of the Constitution.

All through this judgment I have been addressing the issue of competence of Court indirectly answering the questions whether the purpose and effect of implementation of the impugned Practice Directions were inconsistent with the provisions already stated above of the Constitution. The questions were resolved in the negative. It can't be acceptable therefore at this point to conclude that the High Court Anti Corruption Division was not a competent Court. Besides Article 257 (I) (d) of the Constitution is clear. For emphasis it provides Court means **a Court of Judicature established by or under authority of the Constitution**. I have to quickly add that the impugned Practice Directions did not establish a Court of judicature within the meaning of Article 257 (I) (d) of the Constitution. The objective of the Directions are clear.

My understanding of this provision is that the Constitution can directly establish a Court or by its provisions it can provide for taking certain actions by Parliament or bodies or designated person which is an exception under Article 79 of the Constitution. That was the case in the instant case as Article 133 (I) (b) of the Constitution. The act of making orders and directions was given under the authority of the Constitution. See article 79 Supra of the Constitution **The principle of Constitutional Interpretation namely "where several provisions 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.**

In **Constitutional Appeal No 3 of 2006 (SC Attorney General v. Susan Kigula and others (SC)**. It was stated:-

"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

“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 and rule competence and exhaustiveness and the rule of paramountcy of the Constitution. See Also Paul Semwogerere v. Attorney General Constitutional Appeal No. 1 of the 2002 (SC) unreported.

The affidavit evidence adduced by the appellant obviously fell short of revealing that the designated Magistrates were having concurrent jurisdiction with the judges of the Division. I have reproduced S. 161 of the Magistrate Courts Act (MCA) which provides for the Criminal jurisdiction of Magistrates. The two judgments and summons provided as evidence were perused I found that there was nothing which could be construed as to be derogation from the right to a fair hearing. What was true is that the documents heads were High Court Anti corruption Division, but the body and substance showed that each judicial officer was within his or her jurisdiction as seen on the signatures thereon. The other evidence adduced by way of annexures attached in rejoinder were still witness summons and judgments of the Court. When signing they were signing as Magistrates which is within their jurisdiction and powers as judicial officers (Magistrates under the Magistrates Court Act). I accept submissions of Counsel for the respondent that Section 106 of the Evidence Act Cap 6, the burden of proof was not discharged by the appellant. It follows that Rule 12 (I) of the Constitutional Court Petitions and References was not complied with.

The headings or titles of the documents are a question of form which doesn't go to the root of the substance of the contents. I find no merit in the submissions by Counsel for the appellant on ground 4 and 5 therefore. There was no evidence of breach of the provisions of the Constitution as alleged by the appellant. There was no derogation of the right to a fair

In the result since all the grounds have no merit the appeal fails and it is dismissed forthwith. The Constitutional Court's decision and judgment are upheld. I would order that each party bears its own costs.

Dated at Kampala this ^{05th} day of ^{May} 2016

YH
05/05/2017

Faith Mwendha
.....
Hon. Lady Faith Mwendha
JUSTICE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

[**Coram:** Katureebe CJ, Tumwesigye, Kisaakye, Nshimye, Mwangusya,
Opio Aweri, & Mwendha, JJSC]

CONSTITUTIONAL APPEAL NO: 04 OF 2016

BETWEEN

DAVID WELSEY TUSINGWIRE APPELLANT

AND

THE ATTORNEY GENERAL RESPONDENT

{Appeal from the decision of the Constitutional Court at Kampala before Kavuma DCJ, (Dissenting) Remmy Kasule, Solome Balungi Bossa, Geofrey Kiryabwire, L.E.Tibatema, JJA dated the 20th day of January, 2014.}

JUDGMENT OF KATUREEBE, CJ

I have had the benefit of reading in draft the judgment of my learned sister, Mwendha, JSC as well as the judgment, in draft, of my learned brother Mwangusya, JSC.

I agree with them that this appeal should fail and also concur in the order that each party should bear its own costs.

As the majority of the members of the Court agree, the appeal is, by majority of 6 to 1, hereby dismissed. The decision of the Constitutional Court is upheld. Each party shall bear its own costs.

Delivered at Kampala this ^{05th}.....day of ^{May}.....2017.


Bart M. Katureebe
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

**(CORAM:KATUREEBE, CJ; TUMWESIGYE; KISAKYE; NSHIMYE;
MWANGUSYA; OPIO-AWERI; MWONDHA; JJ.S.C)**

CONSTITUTIONAL APPEAL NO 04 OF 2016

BETWEEN

DAVIS WESLEY TUSINGWIRE::::::::::::::::::::: APPELLANT

AND

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

[Appeal from the decision of the Constitutional Court at Kampala (Kavuma DCJ, Kasule, Bossa, Kiryabwire, Tibatemwa, JJA) dated 20th January, 2014 in Constitutional Petition No. 2 of 2013]

JUDGMENT OF TUMWESIGYE, JSC

I have had opportunity of reading in draft the judgment of my sister, Justice Faith Mwendha, JSC, and I agree with her conclusion that the appeal should be dismissed. I wish to make a few observations on some of the issues raised in this appeal. The background facts of this appeal have been ably laid out in the lead judgment of this appeal and I do not have to reproduce them here.

I will begin my observations by first giving the context in which the High Court (Anti Corruption Division) Practice Directions, 2009, were issued by the Chief Justice before going on to discuss some of the issues raised in this appeal. The Constitution enjoins courts to exercise power in conformity with the law and with the values, norms and aspirations of the people. (See Article 126(1) of the Constitution). Integrity is one of the values courts have a responsibility to promote. Objective XXVI (iii) of the National Objectives and Directive Principles of State Policy of the Constitution gives the state the duty to expose, combat and eradicate corruption and abuse of power especially by those holding public offices. The judiciary as a state organ has an important role to play in this effort.

Various laws have been passed by Parliament to combat corruption and abuse of public office, and the most comprehensive of these laws is the Anti Corruption Act, 2009. Immediately following the passing of this law, the Chief Justice issued the High Court (Anti Corruption Division) Practice Directions, 2009, whose purpose is stated as being to ensure an “orderly, expeditious, efficient and cost effective forum for adjudication of corruption and corruption related cases” by the judiciary.

The appellant’s complaint is that the High Court (Anti Corruption Division) Practice Directions, 2009, is unconstitutional because it distorts the structure and composition of the High Court Anti Corruption Division by including in paragraph 5(2) of the Practice

Directions “such number of magistrates as may be designated by the Chief Justice to assist in the work of the Division”. Another of the appellant’s complaint is that these designated magistrates are given territorial jurisdiction to try corruption and corruption related offences “committed anywhere within the geographical boundaries of Uganda”. So, counsel argued, the magistrates are given unlimited territorial jurisdiction as if they are High Court judges which is contrary to Article 139 of the Constitution.

The Chief Justice, according to the appellant’s counsel’s argument, does not have power to alter the composition and structure of the High Court or to change the territorial jurisdiction of the designated magistrates even under Article 133 of the Constitution and, therefore, the magistrate’s courts so designated are acting unconstitutionally and incompetent, and accordingly, their decisions are null and void. Counsel further argued that such incompetent courts cannot be capable of giving any person a fair hearing which violates Article 28(1) of the Constitution.

Counsel for the appellant did not contest the fact that the designated magistrates are exercising their power in accordance with their jurisdiction to try criminal offences. The complaint is that their power should not be exercised in a structure called High Court Anti Corruption Division. Even the papers on which their judgments, criminal summons, bail bond and orders are written are titled “High Court Anti Corruption Division” which shows that the

designated magistrates claim to be part of and are fused with the High Court, counsel for the appellant argued.

My view is that counsel for the appellant's argument on the composition and structure of the High Court Anti Corruption Division is about form and not substance. A person does not become a judge merely because he or she sits in a building designated as a High Court. He or she becomes a judge because he or she is appointed as one and exercises the jurisdiction of a judge in accordance with the Constitution and the law.

Similarly, a person who is appointed as a magistrate remains a magistrate whether or not he or she sits in a building designated as a High Court. In many High Court circuits in Uganda judges and magistrates sit in the same building. What is important is that the jurisdiction of each judicial officer is strictly observed and respected. The appellant's counsel agrees that designated magistrates in the Anti Corruption Division adhere to their proper jurisdiction when trying offences that are brought before them.

This appeal, in my view, originates from the appellant's failure to appreciate the bigger constitutional purpose for which the High Court (Anti Corruption Division) Practice Directions, 2009, was issued and the national values that informed its making. The Constitution attaches great importance to the combating and eradication of corruption as evidenced by Objective No. XXVI(iii) of the National Objectives and Directive Principles of State Policy of

the Constitution. These Objectives are justiciable and in interpreting the Constitution they have to be taken into account. See the case of **Centre for Health, Human Rights and Development vs. Attorney General**, Constitutional Appeal No. 01 of 2013. The issuance of the High Court (Anti Corruption Division) Practice Directions by the Chief Justice must be viewed in this context.

I am unable to appreciate learned counsel for the appellant's argument that the High Court (Anti Corruption Division) Practice Directions distorts the structure and composition of the High court Anti corruption Division. The composition of the High court is based on Article 138(1) of the Constitution which provides that the High Court shall consist of (a) the Principal Judge; and (b) such number of judges of the High Court as may be prescribed by Parliament. How do the Practice Directions in issue interfere with the above set up or even fetter the High Court Anti Corruption Division from exercising its constitutional mandate?

The jurisdiction of the High Court Anti Corruption Division like any other High Court is contained in Article 139(1) of the Constitution and section 14 of the Judicature Act. The impugned Practice Directions do not in any way interfere with this jurisdiction.

It is not the appellant's claim that the designated magistrates referred to in paragraph 5 of the Practice Directions have usurped or encroached on the powers of the High Court Anti Corruption

Division in the execution of its mandate. The appellant's counsel concedes that both the High Court and the designated magistrates are adhering to their jurisdiction in trying the cases that are brought before them.

Further, I am unable to see how the Chief Justice has usurped the legislative power of Parliament under Article 79 of the Constitution by issuing the impugned Practice Directions. Posting magistrates to assist the High Court Anti Corruption Division in its work is, in my view, not a matter that falls under Article 179 of the Constitution as it does not confer any jurisdiction to the magistrates but is rather an administrative function that falls under Article 133. This Article gives the Chief Justice power to issue orders and directions for the proper and efficient administration of justice, and in this specific case the impugned practice Directions refers to the **administration** of the High Court Anti Corruption Division.

On the issue of the territorial jurisdiction of the designated magistrates, it is true that paragraph 10 of the Practice Directions in issue provides that "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". I do not agree, however, that this paragraph can be interpreted to mean the Chief Justice giving any different or new jurisdiction to the designated magistrates.

Under section 31 of the Magistrates Courts Act a magistrate's court can try "an offence committed within Uganda" by "any person who is within the local limits of its jurisdiction". The impugned Practice Directions, on the other hand, provides that the designated magistrates shall have jurisdiction to try offences specified in paragraph 8 "committed anywhere within the geographical boundaries of Uganda".

With respect, I do not see any significant difference in the two statutory formulations relating to the jurisdiction of magistrates to try offences where one formulation says "committed within Uganda" and the other says "committed anywhere within the geographical boundaries of Uganda".

Furthermore, s.6 of the Magistrates court deems every magistrate to have been appointed to and to have jurisdiction in each and every magisterial area though he or she may be assigned to any particular magisterial area. My understanding of this provision is that from the time a magistrate is appointed he or she is given power to exercise jurisdiction anywhere in Uganda though he or she may be localized in a particular area.

Considering the two sections (s.6 and s.31 of MCA) my view is that the issue raised by the appellant that the Practice Directions gives the designated magistrates unlimited geographical jurisdiction does not bear any issue of constitutional importance. I see the appellant's counsel's argument as a case of attaching unnecessary

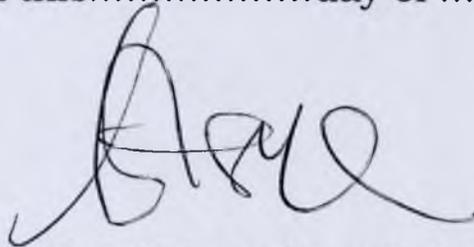
significance to minor differences in the formulation of the two laws while being totally oblivious of the greater constitutional aim of fighting corruption for which the impugned Practice Directions were designed and issued. Furthermore, it is stretching the argument to absurdity for the appellant to claim that by the designated magistrates purportedly exercising unlimited geographical jurisdiction they are thereby interfering with the unlimited jurisdiction of the High Court as conferred by Article 139(1) of the Constitution.

It is my view that the designated magistrates in the High Court Anti Corruption Division are exercising their jurisdiction in accordance with the law and their competence as a court should not be doubted or questioned. This being the case, the question of their not being able to give an accused person who appears before them a fair hearing on account of their alleged incompetence does not arise.

In conclusion, it is my respectful view that there is nothing in this appeal that warrants the declaring of the High Court (Anti Corruption Division) Practice Directions, 2009 as unconstitutional, or to declaring the proceedings which have been conducted, and judgments which have been delivered, by the designated magistrates to be declared null and void.

Accordingly, this appeal should fail and the decision of the Constitutional Court should be upheld. I agree with the proposed order that each party should bear its own costs.

Dated at Kampala on this.....^{05th}.....day of May..... 2017.



Justice Jotham Tumwesigye
JUSTICE OF THE SUPREME COURT

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

**CORAM: (KATUREEBE, CJ, TUMWESIGYE, KISAKYE, NSHIMYE,
MWANGUSYA, OPIO AWERI, MWONDHA, JJSC)**

CONSTITUTIONAL APPEAL NO. 4 OF 2016

BETWEEN

DAVID WELSEY TUSINGWIRE APPELLANT

AND

THE ATTORNEY GENERAL RESPONDENT

(Appeal from the decision of the Constitutional Court at Kampala before Kavuma DCJ, (Dissenting) Remmy Kasule, Solome Balungi Bossa, Geoffrey Kiryabwire, L.E. Tibatemwa, JJA dated the 20th day of January, 2014)

JUDGMENT OF MWANGUSYA, JSC

I have had the opportunity of reading in draft the judgment of Faith Mwendha, JSC and I am in agreement with her conclusion that the appeal should be dismissed with an order that each party bears its own costs.

I will, however, by way of emphasis make a few observations on the status of the designated Magistrates in the structure and composition of the High Court Anti Corruption Division and whether or not the trial conducted by these Magistrates derogates an accused person's right to a fair hearing before an independent and competent Court established by Law contrary to Articles 2, 28(I), 44(c) and 126 of the Constitution of the Republic of Uganda.

The back ground to the case is well laid out in the judgment of Justice Faith Mwendha and I needn't repeat it.

On the status of the designated Magistrates the appellant, in ground one of the appeal faults the Constitutional Court for having held that the High Court (Anti Corruption Division) Practice Directions 2009 did not add the designated Magistrates to the structure and composition of the High Court Anti Corruption Division but that they are just "Assistants" to the judges.

In his submission on this ground Counsel for the appellant argued that the designated Magistrates were fused into what was supposed to be a Division of the High Court when they have nothing in common with the Judges in terms of appointment, entry qualifications, disciplinary proceedings and the method of removal in case of need yet they were to join High Court Anti Corruption as members thereby interfering with the Constitutional set up of the Court. Counsel strengthened his argument with a passage from the dissenting judgment of Kavuma, DCJ who described the designated Magistrates as follows:-

"To attach, therefore, in simple English and within the context of the Petition, connotes, in my view, adding to, making someone available to join a group, or to cause to belong to a group or an organization. The designated Magistrates were, therefore, by the impugned directions made to belong to the HCACD. The Webster's Universal English Dictionary defines the word appoint as "to select for a job, to prescribe." They were fused into what was supposed to be a Division of the High Court thereby becoming part and parcel of it and derogating the High Court status. That clearly distorted the composition of the intended High Court Division, the designated Magistrates being judicial officers of lower ranks than that of judges of the High Court. They have nothing in Common with such judges in terms of appointment, entry qualifications, disciplining proceedings, and method of removal in case of need, yet they were made to join the HCACD as members thereof. To

attach Magistrates to the High Court is to interfere with the Constitutional set-up of that Court.”

The Counsel for the appellant seems to have been influenced by the dissenting judgment of the DCJ which with respect, I find inaccurate. The designation of the Magistrates has nothing to do with their appointment, entry qualifications, disciplinary proceedings and method of removal etc. These are persons already appointed Magistrates. They are deployed in the Anti Corruption Division where they exercise their jurisdiction and not that of a High Court Judge. Their deployment does not make them Assistant Judges. They remain Magistrates and the practice Direction does not fuse the jurisdiction of the Judges in the Division and that of the designated Magistrates. The appellant adduced evidence of judgment by His Worship Baguma a Principal Grade one Magistrate and one of Justice P. K. Mugamba, exercising his appellate jurisdiction which His Worship Baguma cannot exercise much as he is a designated Magistrates in the Division. A High Court Judge also retains his or her unlimited jurisdiction to try any matter while the jurisdiction of designated Magistrates does not change merely because he or she is deployed in the Anti Corruption Division. The judges exercise their jurisdiction under the Trial on indictments Act while the Magistrates exercise theirs under the Magistrates Courts Act. There is absolutely no fusion and no evidence was adduced of a single accused person whose rights to a fair trial were derogated by the ‘dual’ jurisdiction system created by Directive.

On the question of derogation of an accused person’s right to a fair trial, the petition cites Article 2 of the Constitution which is on the Supremacy of the Constitution, Article 28(I) of the Constitution which provides that **“in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law”** and Article 44 (c) which provides that **notwithstanding anything in the Constitution there shall be no derogation from the enjoyment of the right to a fair, hearing.**

One of the Cardinal rules of Constitutional interpretation is that in interpreting the Constitution the rule of harmony and completeness requires that Constitutional provisions should not be looked in isolation. Rather, the Constitution should be looked at as a whole with no provision destroying another but supporting each other.

The petitioner cited Article 28 sub Article I of the Constitution but to understand the import of the article itself sub-article 3 has to be considered.

Article 28 (3) of the Constitution which was not referred to by the petition provides as follows:-

“(3) Every person who is charged with a criminal offence shall:-

- (a) Be presumed to be a innocent until proved guilty or until that person has pleaded guilty.**
- (b) Be informed immediately in a language that the person understands, of the nature of the offence.**
- (c) Be given adequate time and facilities for preparation of his or her defence.**
- (d) Be permitted to appear before the Court in person or at that persons own expenses by a lawyer of his or her choice;**
- (e) In the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the state;**
- (f) Be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;**
- (g) Be afforded facilities to examine witnesses and to obtain the attendance of the witness before the Court.”**

There was no evidence that any of these rights were violated and to me there would be no derogation of an accused person's rights to a fair trial when he

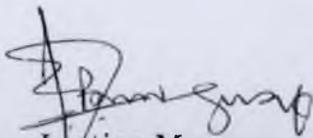
or she is produced before a judge or designated Magistrate in the Anti Corruption Division and all his or her rights under the sub article are fully observed and with the freedom to challenge the trial in case of infringement.

The other area I wish to put emphasis is the Chief Justice's Administrative functions under Article 133 (I) of the Constitution to issue orders and directions to the Courts necessary for the proper and efficient administration of justice.

In ground three of the memorandum of appeal the complaint is that the Learned Justices erred in law and fact when they held that the Chief Justice can interfere with inclusive unlimited jurisdiction of the High Court enjoyed under Article 139 of the Constitution and simultaneously confer the said unlimited jurisdiction without authority.

The suggestion here is that the Chief Justice conferred unlimited jurisdiction to the designated Magistrates which is not correct. The designated Magistrates are not different from other Magistrates with jurisdiction to try corruption related offences and to me the practice Direction does not confer unlimited jurisdiction to the designated Magistrates in the trial of corruption related cases. There should be a clear distinction between the judges and the Magistrates in the Division because while the judges retain their unlimited jurisdiction to try any offence the Magistrate's jurisdiction remains limited to their jurisdiction as already noted in this judgment. I also wish to observe that the directive was more to the managerial aspect of the trial of corruption related to offences than conferring jurisdiction because the directive does nothing of the sort.

Dated at Kampala this^{05th}..... day of ^{May}..... 2017



Hon. Justice Mwangusya Eldad
JUSTICE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: KATUREEBE CJ, TUMWESIGYE, KISAAKYE, NSHIMYE, MWANGUSYA,
OPIO- AWERI, MWONDHA, JSC.

CONSTITUTIONAL APPEAL NO.04 OF 2016

BETWEEN

DAVID WELSEY TUSINGWIRE:.....APPELLANT

AND

ATTORNEY GENERAL:..... RESPONDENT

[Appeal from the decision of the Constitutional Court at Kampala before Kavuma DCJ, (Dissenting) Remmy Kasule, Solome Balungi Bossa, Geoffrey Kiryabwire, L.E. Tibatemwa, JJA dated the 20th day of January 2014]

JUDGMENT OF A.S. NSHIMYE, JSC.

I have had the benefit of reading the lead judgment of Hon Lady Justice Faith Mwendha JSC.

I agree with it and the order as to costs. Corruption is a fast growing vice in our country with far reaching social, political and economic negative consequences.

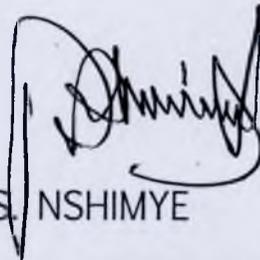
The High Court Anti-Corruption Division was therefore created to combat the said sinister vice. It was necessary to put in place such adjudicative structure and system that would facilitate in faster trials

and disposals of corruption cases so that the disease is not allowed to grow in a stagnant breeding environment.

In my opinion, like the Constitutional Court found, the Chief Justice as the head of the Judiciary rightly and justifiably in the circumstances acted constitutionally to create a special Court that would suppress the emerging and worrying corruption tendencies.

The Chief Justice acted constitutionally when he issued The High Court (Anti-Corruption Division) practice directions on 18th October, 2009 and put in the same premises courts of different levels of jurisdiction to conveniently deal with cases of corruption in Uganda without delay.

Dated at Kampala, this ----- day of ----- 2017.



A.S. NSHIMYE

JUSTICE OF SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

Coram: (Hon. Justice Katureebe CJ, Tumwesigye, Kisakye, Nshimye,
Mwangusya, Opio-Aweri, Faith Mwendah, JJSC) .

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CONSTITUTIONAL APPEAL NO. 4 OF 2016

*(Appeal from the decision of the Constitutional Court at Kampala before Hon. Justice Kavuma DCJ,
(Dissenting) Remmy Kasule, Solome Balungi Bossa, Geoffrey Kiryabwire, L.E. Tibatemwa, JJA, dated 20th day
of January, 2014)*

DAVID WELSEY TUSINGWIREAPPELLANT

VERSUS

THE ATTORNEY GENERALRESPONDENT

20

JUDGMENT OF JUSTICE AWERI-OPIO, JSC

I have had the benefit of reading in draft the judgment of my learned sister, Lady Justice Faith Mwendah, JSC. I agree with her conclusion that the appeal be dismissed with costs. Clearly when the Chief Justice issued the High Court (Anti-Corruption Division). Practice Direction 2009, he was acting constitutionally in support of the efforts to combat corruption. At the time of issuing the impugned Direction, corruption was of a particular concern in this country and the state came up with the Anti-Corruption Act 2009 to fight the vice.

30

The purpose of the Direction was stated as being to ensure an
"orderly, expeditious, efficient and cost effective forum for

adjudication of corruption and corruption related cases “ by the Judiciary”.

10 In his wisdom, the learned Chief Justice designated the Division to include Magistrates to hear corruption and corruption related cases expeditiously, efficiently, orderly and effectively. Common sense principle of law is that Justice must be expeditious, effective and efficient. In my view, the Learned Chief Justice issued the above direction under Article 126 of the Constitution to conform with the Anti-Corruption Act to fight corruption which is against the values, norms and aspirations of the people of Uganda. In doing that, there were no structural changes in the jurisdiction of the Magistrates designated.

20 In conclusion therefore, I find that the Practice Direction of the Anti-Corruption Court was issued constitutionally under Article 133 (a) and (b) of the Constitution which gives the Chief Justice administrative and supervisory powers over all Courts in Uganda, including powers to issue Orders and Directions to the Courts necessary for the proper and efficient administration of Justice in this Country .

Dated at Kololo this.....05th.....day of.....May.....2017



Justice Opio-Aweri
Justice of the Supreme Court.