IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI CJ. TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE OKELLO JJ.S.C. & OGOOLA AG.J.S.C.

CONSTITUTIONAL APPEAL NO. 3 OF 2005

BETWEEN

ATTORNEY GENERAL::APPELLANT

AND

JOSEPH TUMUSHABE::RESPONDENT

[Appeal from decision of the Constitutional Court (Mpagi-Bahigeine, Engwau, Twinomujuni, and Kitumba JJ.A; Byamugisha J.A. dissenting) at Kampala dated 8th June 2004, in Constitutional Petition No.6 of 2004.]

JUDGMENT OF MULENGA J.S.C.

This appeal arises out of a public interest litigation, which the respondent instituted in the Constitutional Court by petition under Article 137(3) of the Constitution, alleging that the detention of 27 persons named in the petition (the detainees) by the Uganda Peoples Defence Forces (UPDF), was inconsistent with and in contravention of provisions of the Constitution. In the petition, the respondent sought diverse declarations and orders for redress. The appeal is against the judgment of the Constitutional Court for holding that the General Court Martial is a subordinate court and granting a declaration that the detainees were entitled to be released on bail upon completing 120 days on remand in custody.

Background

Apparently, the detainees (whose names I need not reproduce in this judgment since they are not parties to this appeal and no issue turns on their identity), were arrested in the Democratic Republic of Congo (the DRC) in March 2003 and were handed over to the UPDF, which took them into custody. After learning of their arrest from the media, the respondent who describes himself in his affidavit in support of the petition as a citizen concerned with observance of human rights, sought in vain to know the location where the detainees were held. Eventually, he joined with relatives of 22 of the detainees in an application to the High Court for issue of a *Writ of Habeas Corpus* directing the appellant and the UPDF Army Commander to produce the detainees. On 11th April 2003, the High Court issued the writ returnable on 17th April 2003. The writ was returned on the due date with information –

- that three of the persons named in the writ were not detained; and
- that the rest, who, together with others not named in the writ numbered 25, were charged before the General Court Martial on 16th April 2003 with the offence of treason contrary to section 25 of the Penal Code Act and were remanded in custody at Makindye Military Police Prison.

On 15th May 2003, the respondent on behalf of the 25 detainees filed Miscellaneous Application No.63 of 2003, seeking redress for violation of the detainees' fundamental human rights and freedoms. In a decision dated 6th November 2003, the High Court (Ntabgoba P.J.) ordered -

- ***that the 25 detainees be allowed contact with their lawyers, relatives and friends…;***
- ***that each of the 25 detainees is awarded shs.10m/- for violation of [his] human rights; and***
- ***that each of the 13 civilian detainees ….. is awarded additional shs.7m/- for being detained other than in a civilian prison."***

Notwithstanding the aforesaid orders of the High Court the detainees remained in military detention by virtue of the order of the General Court Martial that they be remanded in custody.

Application for bail

On 30th April 2004, about 400 days after the detainees were charged before the General Court Martial and remanded in custody, their advocates wrote to the Chairman of the General Court Martial forwarding the detainees' bail application and requesting for an urgent hearing of the application in May. However, it was not until 2nd July 2004 that the application was heard. On 22nd July 2004, the General Court Martial delivered its ruling in which it dismissed the application, observing, *inter alia,* that bail is discretionary and not mandatory.

Petition to Constitutional Court

Meanwhile, on 22nd June 2004, when the bail application was still pending hearing in the General Court Martial, the respondent petitioned the Constitutional Court as indicated earlier in this judgment. The substance of the petition was captured in paragraphs 2 and 3 of the petition, which without reproducing all the detainees' names therein read thus –

"2. The act of the Uganda Peoples Defence Forces and its General Court Martial of keeping on remand DR. JULIUS MUHUMUZA [and 26 others] ***and refusing or neglecting to hear their bail application and/or releasing them on bail and thereby maintaining them in custody for a period exceeding 360 days done under the provisions of S. 15, 77(3) and 81 of the Uganda Peoples Defence Forces Act, Cap. 307, is inconsistent with and contravenes article 21(1), (2) and (3) and article 23(6) (a) of the Constitution of the Republic of Uganda 1995.***

3. That Article 23(6) (b) and (c) of the Constitution of the Republic of Uganda 1995 in as far as it grants bail rights to only persons triable only by the High Court and Subordinate courts discriminates against persons on trial by Military Court Martial and is accordingly inconsistent with and contravenes article 21(1) (2) and (3) and 23(6) (a) of the Constitution of Uganda 1995."

In answer to the petition, the respondent pleaded that the holding of the detainees in custody was on authority of a lawful court order made under provisions of sections 15, 77(3) and 81 of the UPDF Act and consequently was not inconsistent with, and did not contravene Article 23(6) (a) of the Constitution. Secondly, the respondent pleaded that Article 23(6) (a) did not discriminate against persons on trial by military courts. Further, the respondent contended that the allegation in the petition that provisions of Article 23(6) (b) and (c) were inconsistent with Article 21(1) (2) and (3) was not justitiable.

Both the petition and the answer thereto were supported by affidavit evidence. There was no substantial dispute on the material facts save that the respondent adduced affidavit evidence denying the allegation that the General Court Martial had refused and/or neglected to hear the detainees' bail application and explaining why the hearing of the application and the

commencement of the trial were delayed. As it turned out, however, this was a non-issue, since the General Court Martial disposed of the bail application before the petition came up for hearing. Accordingly, only three issues were framed for determination by the Constitutional Court, namely –

> ***"1. Whether Article 23(6) (c) of the Constitution applies to proceedings before the General Court Martial.***
> ***2. If not, whether this would amount to discrimination contrary to Article 21(1) and (2) of the Constitution.***
> ***3. Is the petitioner entitled to any relief?"***

By a majority of 4 to 1, the Constitutional Court answered issue no.1 in the affirmative and issue no.2 in the negative. The decision on issue no.1 was based on the finding that the General Court Martial is a subordinate court for purposes of the provisions of Article 23(6) of the Constitution. Conversely in her minority judgment, Byamugisha J.A., concluded that Article 23(6) of the Constitution was not applicable to proceedings in military courts because in her view, they were not subordinate courts for purposes of that Article.

Grounds of Appeal and Counsel's submissions

The appeal was brought on the following two grounds, namely that –

> ***"The learned Justices of the Constitutional Court erred in law in declaring that***
> ***1. the General Court Martial is a subordinate court;***
> ***2. the [detainees] were entitled to be released on bail after 120 days from the date they were remanded in custody by the General Court Martial.***

Counsel on both sides filed written submissions in support and opposition of the grounds of appeal, respectively. In the submissions for the appellant, counsel asks this Court to uphold the minority judgment in the lower court

and reiterates the reasons therein to support the appeal. Furthermore, counsel places reliance on the subsequent decision in ***Uganda Law Society vs. Attorney General,*** Constitutional Petition No. 18/05, in which the Constitutional Court, by a majority of 3 to 2, held that it had wrongly decided the petition in the instant case, and held that after all, the General Court Martial is not subordinate to the High Court. Counsel invites this Court to hold likewise. I should at the outset point out that the decision in the ***Uganda Law Society case*** (supra) is subject of Constitutional Appeal No. 1 of 2006: ***Attorney General vs. Uganda Law Society,*** which was due for hearing in the same session as this appeal but was by consent of both parties adjourned to a date to be fixed by court. In my opinion, therefore, it would be pre-emptive to consider it as a precedent, and for that reason I will say no more about it.

Counsel argues that far from being subordinate to the High Court, the General Court Martial has concurrent jurisdiction with and is therefore equivalent to the High Court. The basis of the arguments in support of that proposition is that the system of military courts established by an Act of Parliament (the UPDF Act) is very distinct from, and parallel to, the system of the courts of judicature established by the Constitution, although the two systems converge at the Court of Appeal. To illustrate that the General Court Martial is not subordinate to the High Court, counsel stresses two points, namely –

- that the General Court Martial has concurrent jurisdiction with the High Court in that it may try a person subject to military law for a service offence, even if the person is on trial in a civil court for a Penal Code offence arising from the same facts; and

- that whereas, pursuant to Article 139(2) of the Constitution, an appeal from any court lower than the High Court lies to the High Court, an appeal from the General Court Martial does not lie to the High Court but to the Court Martial Appeals Court.

Further, in reply to the respondent's submissions, counsel for the appellant argues that the General Court Martial and other military courts are not "courts of judicature" within the meaning of Article 129 of the Constitution, but specialised courts established by Parliament under its powers to make laws for regulating UPDF.

Counsel for the respondent on the other hand argues that the Constitution specifies in Article 129 only three superior courts of record established by it, which include the High Court. Under the same Article, Parliament is empowered to create subordinate courts but not other superior courts. Secondly, counsel points out that although the UPDF Act, which established the General Court Martial, vests unlimited original jurisdiction in that court, the jurisdiction is limited to that Act and to only persons that are subject to military law, and is therefore not comparable to the much wider jurisdiction of the High Court that applies to all matters. Thirdly, the concurrent original jurisdiction of the General Court Martial and the High Court over such offences as treason; and the fact that appeals from the General Court Martial lie to the Court Martial Appeals Court rather than to the High Court, do not make the General Court Martial a superior court. Lastly learned counsel points out that section 199(2) (a) of the UPDF Act provides for the head of the Court Martial Appeals Court, to which appeals from the General Court Martial lie, to be an Advocate qualified to be appointed as a judge of the High Court, thus placing that court at the level of the High Court.

Consideration of issues

I am constrained to observe that in their written submissions, learned counsel over emphasise the status of the General Court Martial vis a viz the High Court at the risk, if not the expense, of obscuring the core object of the petition. With due respect, this is also true to a large extent of the judgments of the learned Justices of the Constitutional Court. The object of the petition was not to seek a declaration on the status of the General Court Martial but rather to seek a declaration that the failure of that court to release the detainees on bail was inconsistent with, and a contravention of the Constitution. The apparent digression appears to have originated from the framing of issues at the commencement of the trial. The petition alleged that the detention complained of was inconsistent with and contravened specified articles of the Constitution and sought a declaration to that effect. The overall defence was that the detention was not inconsistent with and did not contravene the Constitution because it was in pursuance of a lawful court order. It is those pleadings that ought to have been subject of the main issue, yet they did not at all feature among the framed issues. Instead, what was framed as the main issue was *"Whether article 23(6) (c) of the Constitution applies to proceedings before the General Court Martial"*!

While I recognise that this was a relevant sub-issue to be considered, in my opinion it ought not to have obscured, as it did, the substantial question that arose from the pleadings, which was whether failure to release the detainees on bail after the constitutional time limit for remand in custody was unconstitutional. It is the inaccurate framing of issues that led to unnecessary disentanglement of sub-issues that is reflected in the leading judgment of

Twinomujuni J.A., where, upon concluding that paragraph (b), and not paragraph (c), of Article 23(6) was applicable to proceedings in the General Court Martial, the learned Justice of Appeal went on to say –

> ***"I am aware that issue No.1 above is specifically about article 23(6)(c) of the Constitution. However, this petition is about the applicability of article 23(6)(b) and (c) of the Constitution to the General Court Martial. They were pleaded and there is a prayer that we hold that certain acts of the respondent contravene them."***

By similar distortion, the appellant's complaint in the first ground of appeal is that the Constitutional Court erred in declaring that the General Court Martial is a subordinate court, when no such declaration was prayed for, let alone granted, though the court did hold that the General Court Martial is a subordinate court. The two declarations prayed for were –

> ***(a) A declaration that the act of the General Court Martial of the Uganda Defence Forces of keeping DR. JULIUS MUHUMUZA*** [and 26 others] ***in custody for a period exceeding 360 days without entertaining their bail application and releasing them on bail, done under the provisions of Ss. 15, 77(3) and 81*** [of] ***the Uganda Defence Forces Act, Cap.307, is inconsistent with and contravenes articles 21(1) (2) and (3) and 23(6) (a) of the Constitution of the Republic of Uganda.***
>
> ***(b) A declaration that article 23(6) (b) and (c) of the Constitution of the Republic of Uganda 1995 in as far as it grants bail rights to persons only on trial by the High Court and Subordinate courts and not to those under trial by Military Courts Martial contravenes article 21(1) (2) and (3) and 23(6) (a) of the Constitution of Uganda 1995."***

The court granted only the first declaration and declined to grant the second. In the words of Mpagi-Bahigeine J.A., the learned presiding Justice, the court's pronouncement on the matter was –

"We allow only declaration (a) that the detainees mentioned in the petition are entitled to be released on bail after completion of 120 days in custody - [Article 23(6)(b)].
The petitioner did not succeed as regards declaration (b)."

By necessary implication, the majority decision and declaration was that the act of detention complained of, namely the detention after expiry of the maximum remand period in custody, was inconsistent with and contravened article 23(6) (b). I will consider this appeal in that context.

Article 23(6) of the Constitution is concerned with the right to bail. In the leading judgment, Twinomujuni J.A., said –

"The right to bail is a fundamental right guaranteed by article 23(6) of the Constitution. Its basis is to be found in article 28 of the Constitution which states that an accused person is to be presumed innocent until he/she is proved or he/she pleads guilty. It also provides that an accused is entitled to a fair and speedy trial before an independent and impartial court or tribunal established by law. Those two principles are part of the right to a fair hearing which is declared to be inviolable by article 44 of the Constitution. The idea is that a person presumed to be innocent and who is entitled to a speedy trial should not be kept behind the bars for unnecessarily long before trial."

While I do not question the relationship of the said two principles to the right to bail, I am constrained to stress that the genesis of the right to bail is the protection of the right to liberty. The right to liberty is among the universally recognised fundamental human rights and freedoms, which every individual human being is entitled to enjoy. It is among the rights that our Constitution proclaims in Article 20 (1) to be ***"inherent and not granted by the State."*** In clause (2) of the same Article the Constitution commands ***"all organs and agencies of the Government and all persons"*** to respect, uphold and promote those individual rights and freedoms. However, the right to

liberty is not absolute. Like other rights and freedoms, it is subject to a general limitation prescribed in Article 43 of the Constitution, to the effect that no person shall, in the enjoyment of any of the rights or freedoms, prejudice the rights or freedoms of others or the public interest. Furthermore, in Article 23, the very article that provides for the protection of the right to liberty, the Constitution sets out a list of circumstances under which derogation from that right is permissible. A close look at the list (under Article 23(1) (a) to (h)) reveals that they are specific circumstances where enjoyment of the right to liberty by the concerned individual would most likely be prejudicial to the right or freedom of others or to the public interest. So far as is relevant to the facts of this case, Article 23 of the Constitution provides –

> ***"23. <u>Protection of personal liberty.</u>***
>
> ***(1) No person shall be deprived of personal liberty except in any of the following circumstances –***
>
> ***(a) – (b)***
>
> ***(c) for the purpose of bringing that person before a court .... upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda;***
>
> ***(d) – (h) ....***
>
> ***(2) - (3) ....***
>
> ***(4) A person arrested or detained –***
>
> ***(a) ....***
>
> ***(b) upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda,***
>
> ***shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.***
>
> ***(5) ....***

(6) Where a person is arrested in respect of a criminal offence –

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;

(b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;

(c) in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

(7) – (8) ....

(9) The right to an order of habeas corpus shall be inviolable and shall not be suspended."

It is noteworthy, however, that even where derogation is permissible, it is not permanent or indefinite. The individual deprived of the enjoyment of the right retains the right to reclaim the liberty, through the right to the order of *habeas corpus,* which is inviolable, and through the right to apply for release on bail. When a detained person is produced in court on an order of *habeas corpus* the court has to determine if the detention is lawful and if it finds it to be unlawful, it must order for the release of the detainee. In the case of a person accused of a criminal offence applying for release on bail pending trial, the court's principal consideration is whether such release is likely to prejudice the pending trial and in that connection, the court has discretion whether to grant or reject the application. However, subject to the classification of offences specified in paragraphs (b) and (c) of Article 23(6), where an accused person applying for bail has been on remand in custody

before trial or committal for trial, as the case may be, for 120 or 360 days respectively, the court has no discretion except in regard to the reasonable conditions to impose. The accused person is entitled to be released forthwith.

To my understanding, the purpose and effect of the provisions in paragraphs (b) and (c) of Article 23(6) is not to identify or distinguish the courts empowered to grant bail there-under or the courts to which the provisions apply. The purpose and effect of the provisions is to set maximum periods for which persons awaiting trial for criminal offences can be kept on remand in custody. The provisions specify different periods for mandatory release on bail in respect of two classes of criminal offences, namely offences triable by the High Court only, which are also known as indictable offences, and offences that are triable by both the High Court and by subordinate courts. In my opinion the reason for that differentiation is not difficult to discern. More time is required for pre-trial procedure for criminal cases to be tried in the High Court than for criminal cases to be tried in the subordinate courts. Pre-trial procedure in respect of cases of indictable offences involves preparation of a summary of the case on an indictment and submission of the same to the Magistrate's court for committal proceedings at the end of which the accused person is committed for trial by the High Court. On the other hand, there are no pre-trial proceedings in respect of cases to be tried in a subordinate court. The framers of the Constitution must have had that difference in contemplation when they prescribed the different maximum periods for which persons awaiting trial can be held on remand in custody.

It is clear to me that clause 6 of Article 23 applies to every person awaiting trial for criminal offence without exception. Under paragraph (a) of that

clause, every such person at any time, upon and after being charged, may apply for release on bail, and the court may at its discretion, grant the application irrespective of the class of criminal offence, for which the person is charged. Under paragraph (b), if such person is on charge for an offence triable by the High Court as well as by a subordinate court, and has spent 120 days on remand in custody, the grant of bail is mandatory, while under paragraph (c) the mandatory bail is applicable after the person has spent 360 days on remand in custody. (I should mention in passing that the provisions have since then been amended reducing the periods to 60 and 180 days respectively).

The proposition that a person awaiting trial in the General Court Martial is, in respect of bail, governed only by provisions of the UPDF Act, and not by the constitutional provisions, is based on wrong premises and is untenable. That proposition, which the appellant heavily relies on, is premised on the assertion that article 23(6) does not apply to military courts and is encapsulated in the minority judgment of Byamugisha J.A., where she said –

> ***"To summarise what I have said, the General Court Martial or any court martial is not a court of judicature established by or under the authority of the 1995 Constitution. It is also not a court subordinate to the High Court within the meaning set out in the Constitution. In other words,*** [they are] ***not part of the courts of judicature. It goes without saying that the provisions of article 23(6) with regard to grant of bail either immediately on being arraigned or after 120 or 360 days do not apply to the courts martial. If the framers of the Constitution had wanted the article to apply to military courts I have no doubt in my mind they would have stated so expressly. I think the omission was deliberate".***

With due respect, however, the opposite conclusion can be asserted with equal, or even more force, namely that if the framers of the Constitution had wanted the article not to apply to military courts, they would undoubtedly have stated so expressly, as was done in article 137(5) in respect of the Field Court Martial. In that article it is provided that a question as to the interpretation of the Constitution arising in proceedings before any court, except the Field Court Martial, shall be referred to the Constitutional Court. The framers of the Constitution deliberately directed the provisions in Article 23(6) to everybody that happens to be on criminal charge and so had no reason to particularise any category.

But more significantly, I should stress that the Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the Constitution. The Constitution also commands the Government, its agencies and all persons, without exception, to uphold those rights. The General Court Martial is not exempted from the constitutional command to comply with the provisions of Chapter 4 or of Article 23(6) in particular, nor is a person on trial before a military court deprived of the right to reclaim his/her liberty through the order of *habeas corpus* or application for mandatory bail in appropriate circumstances.

I should also comment on three other arguments advanced in support of the assertion that article 23(6) does not apply to military courts, namely that –

- courts martial are not courts of judicature established by or under the authority of the 1995 Constitution;

- Parliament established courts martial as organs of the UPDF, with special bail provisions applicable to persons on trial in them; and
- the military courts and the civilian courts operate in two distinct and parallel systems, though they converge at the Court of Appeal.

The statement in the foregoing excerpt from the minority judgment that the General Court Martial or any court martial is not a court of judicature established by or under the authority of the Constitution, is a stark contradiction of, and difficult to reconcile with the general observation the learned Justice of Appeal made on courts martial earlier in her minority judgment. She said –

> ***"They are for all intents and purposes courts of law and they administer justice like civil courts. They are set up to deal with a specific institution – the military. They are designated to deal with the internal affairs of the military. They have concurrent jurisdiction with civil courts. Their jurisdiction is essentially penal and disciplinary. In this country the courts martial were set up by the Uganda Peoples Defence Forces Act (Cap 307)."***

And subsequently she concluded –

> ***"The point I have tried to make is to show that military and civil courts are both courts of law. They are parallel to each other and converge at the Court of Appeal level. The difference is that they deal with different fact situations."***

Although I do not agree that the military courts are parallel to the civilian courts, I find these earlier statements by the learned Justice substantially correct. Her point of departure appears to be when the learned Justice of Appeal noted, first, that prior to the 1995 Constitution there were only two courts of judicature which were saved by Article 265 (now 266) and, secondly, that the courts martial were established by the UPDF Act enacted in 1992, before that Constitution came into force. From that she deduced that the courts matial were not established by or under the authority of the

Constitution. Although she rightly noted that the UPDF Act (Cap.305) which set up those courts was saved by Article 273 (now 274) of the Constitution, she does not appear to have appreciated the import of the article where it provides that the existing law so saved ***"shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution."*** In order to bring the 1992 UPDF Act in such conformity, it is necessary to construe the provisions establishing the courts martial there-under as if they were enacted by Parliament under the authority of the Constitution. In the same way, the 1970 Magistrates Courts Act is brought in such conformity by construing its provisions establishing the magistrates' courts as if Parliament enacted the provisions under the authority of the Constitution.

That construction is necessary because of two fundamental provisions of the Constitution. First, the Constitution provides in Article 126(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".*** (Emphasis is added)

This principle embraces all judicial power exercised by civilian and military courts. While Parliament established the courts martial as organs of UPDF, the authority to vest them with judicial power must be construed as derived from this constitutional principle, for only ***"courts established under this Constitution"*** have mandate to exercise judicial power. Therefore, although courts martial are a specialised system to administer justice in accordance with military law, they are part of the system of courts that are, or are deemed to be, established under the Constitution to administer justice in the

name of the people. In my view, they are not parallel but complementary to the civilian courts, hence the convergence at the Court of Appeal level.

The second fundamental provision is the establishment of the courts of judicature in Article 129 (1), whereby the Constitution establishes superior courts directly and authorises Parliament to establish subordinate courts. The article reads –

> ***"129. The courts of judicature.***
> ***(1) The judicial power of Uganda shall be exercised by the courts of judicature which shall consist of –***
> ***(a) the Supreme Court of Uganda;***
> ***(b) the Court of Appeal of Uganda;***
> ***(c) the High Court of Uganda; and***
> ***(d) such subordinate courts as Parliament may by law establish..... "*** (Emphasis is added)

Clause (2) classifies the first three named courts as superior courts and clause (3) authorises Parliament to provide for jurisdiction and procedure.

To my understanding, the classification between superior and subordinate courts in Article 23 only relates to the modes of establishment of the courts, namely "courts established by the Constitution" being the superior courts, and "courts established by Parliament under the authority of the Constitution" being the subordinate courts. The classification does not relate to the appellate hierarchy of courts. Thus, for example, notwithstanding the definition of subordinate court in Article 257 as a court subordinate to the High Court, in Article 139(2), which is concerned with the appellate hierarchy, it is provided that appeals which lie to the High Court are from ***"decisions of any court lower than the High Court"*** not decisions of subordinate courts. It appears to me that in this context, the word "subordinate" was not used as synonymous with the word "lower"; so that

not all subordinate courts are necessarily lower than the High Court in the appellate hierarchy.

Under clause (3) of Article 129, Parliament has discretion, subject to the provisions of the Constitution only, to make provision for the jurisdiction and procedure of courts. There is no provision of the Constitution that restricts Parliament in the exercise of that discretion from vesting in a subordinate court jurisdiction over some matter, which is also within the jurisdiction of the High Court. Indeed that concurrency of jurisdiction is acknowledged in Article 23(6) (b). In that regard therefore, Parliament may in its discretion place a subordinate court in the appellate hierarchy at the same level as the High Court. Thus, for example, under section 15 of the Nonperforming Assets Recovery Trust Act (Cap. 95), appeals from decisions of the Tribunal established under that Act lie to the Court of Appeal. That does not render the Tribunal a superior court. Similarly decisions of the Court Martial Appeal Court, like those from decisions of the High Court, lie to the Court of Appeal, rendering the Court Martial Appeal Court of the same level, in the appellate hierarchy of courts, as the High Court. It follows that the General Court Martial (from which, appeals lie to the Court Martial Appeal Court), is both a subordinate court within the meaning of Article 129(1) (d), and lower than the High Court in the appellate hierarchy of courts.

In the result, I find no merit in the 1st ground of appeal and would dismiss it.

In the 2nd ground of appeal, the appellant contends that the Constitutional Court erred in declaring that the accused persons (detainees) were entitled to

be released on bail after 120 days on remand in custody. The submissions in support of the contention revolve on the assertions that the General Court Martial is not a subordinate court and that the detainees, being charged before a military court, were entitled to apply for bail only in accordance with the provisions of the UPDF Act. The bottom line of the arguments is that the provisions in Article 23(6) are parallel to the provisions in the UPDF Act, as to bail, and that because the latter do not include provision for mandatory release on bail, persons charged under the Act do not come under the ambit of Article 23(6) of the Constitution. With due respect, this is a fundamental error. It is tantamount to construing provisions of the Constitution as subject to provisions of the UPDF Act rather than the reverse. By virtue of the supremacy of the Constitution, which is enshrined in Article 2, its provisions have binding force on all authorities and persons, and except through amendment under Chapter 18, Parliament has no power to remove or modify that application in respect of any authority or person. The UPDF Act does not, and could not remove the application of Article 23 to persons charged before military courts. Indeed, as I said earlier in this judgment, that Act has to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution.

In view of my findings in respect of the 1st ground, I find no merit in this ground also and would dismiss it. The detainees were remanded in custody for more than 120 days while awaiting trial for the offence of treason, which offence is triable by the General Court Martial, a subordinate court, as well as by the High Court. Under Article 23(6) (b) it was mandatory to release them on bail, irrespective of the provisions of the UPDF Act concerning

bail. Failure to release them on bail after expiry of the said period was inconsistent with and contravened Article 23(6) (b) of the Constitution.

In the result, I would dismiss the appeal with costs of the appeal to the respondent.

With regard to costs in the court below, the Constitutional Court ordered each party to bear its costs. Much as costs are in the discretion of the court, however, I am constrained to observe in passing, that the reason, which the court gave for making that order, namely that all grounds advanced in support of the petition were successfully defended and that the petition succeeded on a ground not advanced by the petitioner, is another illustration of how the core issue, on which in essence the respondent succeeded, was obscured. Since there was no appeal against the order on costs, however, I need say no more on the matter.

DATED at Mengo this 9th day of July 2008.

J.N. Mulenga,
Justice of Supreme Court.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA, OKELLO JJ.SC. AND OGOOLA AG. JSC)

CONSTITUTIONAL APPEAL NO 3 OF 2005

BETWEEN

ATTORNEY GENERAL :::::::::::::::::::::::::::::::::: APPELANT

AND

JOSEPH TUMUSHABE :::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the decision of the Constitutional Court at Kampala (Mpagi-Bahigeine, Engwau, Twinomujuni and Kitumba JJ.A, Byamugisha J.A. dissenting) dated 8 June 2004 in Constitutional Petition No.6 of 2004]

JUDGMENT OF ODOKI, CJ,

I have had the benefit of reading in draft the judgment of my learned brother, Mulenga JSC and I agree with it and the orders he has proposed.

As other members of the Court also agree, this appeal is dismissed with costs in this Court. The parties will bear their own costs in the Constitutional Court as ordered by that Court.

Dated at Mengo this ..... day of .....2008.

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, OKELLO AND OGOOLA, AG. JJ.SC.)

CONSTITUTIIONAL APPEAL NO. 3 OF 2005

BETWEEN

ATTORNEY GENERAL :::::::::::: APPELLANT

AND

JOSEPH TUMUSHABE :::::::::::: RESPONDENT

[Appeal from a decision of the Constitutional Court at Kampala (Mpagi-Bahigeine, Engwau, Twinomujuni and Kitumba, JJA, Byamugisha, JA dissenting) dated 8th June, 2004 in Constitutional Petition No. 6 of 2004]

JUDGMENT OF TSEKOOKO, JSC:

I have had the benefit of reading in draft the judgment of my learned brother, Mulenga, JSC. I agree with his reasoning, conclusions and with the proposed orders that the appeal be dismissed with costs to the respondent.

Delivered at Mengo this 9th day of July 2008.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

Mr. I. Byaruhanga holding a brief for Mr. Wakibiri — for Resp.
Ms S. Kayondo for Respondent

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE,OKELLO J.J.S.C., AND OGOOLA, AG.JJ.S.C

CONSTITUTIONAL APPEAL NO. 3 OF 2005

BETWEEN

ATTORNEY GENERAL ..... **APPELLANT**

AND

JOSEPH TUMUSHABE.....**RESPONDENT**

(Appeal from the judgment and decision of the Constitutional Court (Mpagi –Bahigeine, Engwau, Twinomujuni and Kitumba, J.J.A, with Byamugisha, J.A, dissenting, dated 8th June, 2004 in Constitutional Petition No 6. of 2004)

JUDGMENT OF KANYEIHAMBA, J.S.C

I have had the benefit of reading in draft, the judgment of my learned brother, Mulenga, J.S.C, and I agree with him that this appeal ought to be dismissed with costs.

Dated at Mengo this.....9th.....**day of**.....July.....**2008**

G.W.KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THS SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, OKELLO, JJ.SC. & OGOOLA Ag. J.S.C).

CONSTITUTIONAL APPEAL NO. 3 OF 2005

BETWEEN

ATTORNEY GENERAL:::::::::::::::::::::::::::::::::::::: APPELLANT

AND

JOSEPH TUMUSHABE:::::::::::::::::::::::::::::::::::::: RESPONDENT.

[Appeal from decision of the Constitutional Court (Mpagi-Bahigeine, Engwau, Twinomujuni and Kitumba JJ.A; Byamugisha J.A dissenting) at Kampala dated 8th June 2004, in Constitutional Petition No. 6 of 2004].

JUDGMENT OF BART KATUREEBE, JSC.

I have had the benefit of reading in draft the Judgment of my learned brother, Mulenga, JSC, and I agree with him that this appeal must be dismissed for the reasons he has given.

I only wish to add for emphasis that the arguments by the Appellant seem to be based on a fundamental fallacy, namely that the provisions of the UPDF Act with regard to Courts Martial and bail are superior to the provisions of the Constitution. Article 2 of the Constitution is clear that the ***"Constitution***

is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or 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 23(6) of the Constitution applies to a person arrested in respect of a criminal offence and provides for the manner through which that person may be granted bail, whether by the High Court or a subordinate court. For the appellant to argue that these clear provisions of the Constitution do not apply to persons arrested in respect of a criminal offence and charged before a Court Martial, is to distort the letter and spirit of the Constitution. If the Court Martial is not a court created under the Constitution, then the question must arise: under what authority is it created?.

Article 129(2) of the Constitution provides for the superior courts, i.e The Supreme Court, the Court of Appeal and the High Court. It provides further that these ***"shall each have all the powers of such a court."*** Other courts described by the Constitution as subordinate, may be set up by Parliament. Furthermore Article 129(3) provides:

> ***"Subject to the provisions of this Constitution, Parliament may make provision for the jurisdiction and procedure of the courts."***

The Court Martial is set up as part of the disciplinary mechanism for the UPDF under article 210(b) of the Constitution, and its jurisdiction is set out in the UPDF Act.

From these provisions, it is clear that Parliament may indeed provide for concurrent jurisdiction for the High Court and a subordinate court in certain matters. Article 23(b) of the Constitution itself provides for cases where an offence ***"is triable by the High Court as well as surbodinate court"***. Indeed, the General Court Martial, in criminal matters in respect of persons subject to military law, has concurrent jurisdiction with the High Court. But concurrent jurisdiction per se in limited matters, does not make the General Court Martial equivalent to the High Court which the Constitution has created as a superior court with unlimited jurisdiction in all matters.

One important aspect of the powers of the High Court as a superior court is the power to make the prerogative orders of Certiorari, Prohibition and Mandamus. These cannot be granted by Courts Martial. For instance, under section 34(b) of the Judicature Act where a prisoner is detained in any prison and is required before a Court Martial, it is the High Court that may grant a writ of *habeas corpus ad testificandum.*

By analogy, in England, from where we have adopted some of our military law, the superior courts do exercise some supervision over courts martial. Paragraph 57 of Halsbury's Laws of England, Vol. 41 on the Royal Forces, states:

> ***57. "Appeal and prerogative orders: Courts Martial, like the inferior civil courts, are subject to the supervision and control***

of the civil courts of higher degree, both by way of appeal to the Courts Martial Appeal Court and in a limited manner through the prerogative orders of certiorari, and prohibition obtained on judicial review."

There can be no doubt that the General Court Martial, although vested with concurrent jurisdiction in many criminal matters with the High Court over persons subject to military law, is a subordinate court in terms of the constitution of Uganda. It was unfortunate, as Mulenga, JSC has put it, that the above argument whether the General Court Martial is subordinate to the High Court unduly obscured the more fundamental issues regarding the rights of accused persons with regard to bail under the Constitution.

In the circumstances I concur that this appeal be dismissed with costs.

Dated at Mengo this .....9th.....day of .....July.....2008.

Bart M. Katureebe
Justice of the Supreme Court

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI, CJ, TSEKOOKO, MULENGA, KANYEIHAMBA KATUREEBE, OKELLO, JJ.SC. & OGOOLA, AG. JSC.

CONSTITUTIONAL APPEAL NO. 03 OF 2005

B E T W E E N

ATTORNEY GENERAL: :::::: :::::: :::::: :::::: APPELLANT

A N D

JOSEPH TUMUSHABE: :::::: :::::: :::::: :::::: RESPONDENT

(An Appeal from the decision of the Constitutional Court (Mpagi-Bahigeine, Engwau, Twinomujuni and Kitumba, JJA; Byamugisha, JA, dissenting) dated 8th June 2004, at Kampala in Constitutional Petition No. 6 of 2004)

JUDGMENT OF G. M. OKELLO, JSC:

I have had the opportunity to read in draft the judgment prepared by my learned brother Justice Mulenga, JSC. I fully agree with his reasoning, conclusions and the orders he proposed. I have nothing useful to add.

Dated at Mengo this: 9th *day of:* July *, 2008.*

G. M. OKELLO
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: ODOKI CJ, TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, OKELLO, JJ.SC. & OGOOLA, AG. JSC.

CONSTITUTIONAL APPEAL NO. 03 OF 2005

B E T W E E N

ATTORNEY GENERAL: .... APPELLANT

AND

JOSEPH TUMUSHABE: .... RESPONDENT

(An Appeal from the decision of the Constitutional Court (Mpagi-Bahigeine, Engwau, Twinomujuni and Kitumba, JJA; Byamugisha, JA, dissenting) dated 8th June 2004, at Kampala in Constitutional Petition No. 6 of 2004)

JUDGMENT OF JAMES OGOOLA, AG. JSC.

I have had the opportunity to read in draft the judgment prepared by my learned brother Justice Mulenga, JSC. I fully agree with his reasoning, his conclusions, and the orders that he has proposed. I have nothing useful to add.

Dated and Delivered at Mengo, this: ---------- 9th day of: ---------- July ----------, 2008.

JAMES OGOOLA
AG. JUSTICE OF THE SUPREME COURT