

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

*[Coram: Katureebe, CJ; Tumwesigye; Kisaakye; Nshimye;
Mwangusya; Opio-Aweri; & Mwondha, JJ.S.C]*

CONSTITUTIONAL APPEAL NO. 03 OF 2009

BETWEEN

FOUNDATION FOR HUMAN RIGHTS INITIATIVE: ::: APPLICANT

AND

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

(Appeal from the Judgment of Justices of the Constitutional Court (Mukasa-Kikonyogo, DCJ, Okello, Mpagi-Bahigeine, Kitumba, & Byamugisha, JJA) dated 26th March 2008 in Constitutional Petition No. 20 of 2006).

JUDGMENT OF JUSTICE OPIO-AWERI, JSC

I have had the opportunity to read in draft the judgment of my learned sister Dr. Kisaakye, JSC. I agree with her in part. I do not agree with her on ground 3.

The background to this appeal is well laid down in the lead judgment by Dr. Kisaakye. It is therefore not necessary to reproduce it.

Ground 3 which is the basis of my disagreement reads as follows:-

“The learned Justices of the Constitutional Court erred in law in holding that section 75 (2) of the Magistrates Court Act which provides for offences triable by Magistrates Courts but are not bailable by them does not contravene Article 23 (6) of the Constitution of the Republic of Uganda”.

Section 75 (1) of the Magistrates Court Act (MCA) grants Magistrates jurisdiction to release accused person on bail when he or she is brought to Court, charged with any offence other than the offences specified in subsection (2) of section 75.

Section 75 (2) lists the specified offences as follows:-

- (a) An offence only triable by the High Court.**
- (b) The offence of terrorism and any other offence punishable by more than ten years imprisonment.**
- (c) An offence under the Penal Code Act relating to cattle rustling.**
- (d) Offence under the fire Arms Act punishable by more than 10 years.**
- (e) Repealed**
- (f) Rape contrary to section 123 of the Penal Code Act and aggravated defilement under section 129 of the Penal Code Act.**
- (g) Embezzlement, contrary to section 268 of the Penal Code Act.**
- (h) Causing financial loss, contrary to section 269 of the Penal Code Act.**
- (i) Bribery of a member of a Public body contrary to Section 5 of the Prevention of Corruption Act.**
- (j) Any other offence in respect for which Magistrates Court has no jurisdiction to grant bail.**

Learned counsel for the appellant contended that Section 75 (2) of MCA contravened the right to bail in away that it denies a Magistrates Court Powers to grant bail over offences they have powers to try. Further that since Magistrates Court have no power to hear bail application regarding offence that are a strict preserve of the High Court, then there was no reason for such suspects to appear before the Magistrates Court in the first place. Counsel emphasised that by allowing Magistrates to hear those cases while denying them right to grant bail, Section 75 (2) was a clog to an accused person's right to apply for bail.

The Attorney General conceded that the impugned provision was unconstitutional.

While considering the above point, the Constitutional Court held rightly in my view that Section 75 (2) of the MCA was not unconstitutional. They observed as follows:-

“With regard to Section 75 (2) of the MCA, it is not correct to say, on evidence before Court that it contravenes the provision of Article 23 (6). The accused right to bail is not

absolute. It has to be enjoyed within the confines of the law. There has to be a Constitutional balance of everybody's rights. Denial to grant bail does not contradict the accused's inherent right of innocence. I do not accept the argument that the limitation amount to suggestions that the accused is guilty of the offence he is charged with".

It is clear from the above observation that Section 75 (2) is not a clog to the accused's right to bail. It only states that for certain specified offences, the accused right to bail is shifted to the High Court for some purpose. It is not correct to say that because Magistrates have power to try those offences, they should also have powers to release on bail.

That is the rule of logic. Law is not necessarily about logic. It is about what society considers to be just. So if a particular offence is a threat to society, parliament can pass law to restrict it as it did with Section 75 (2) of the MCA. Under Article 79 of the Constitution, parliament has power to make laws on any matter for the peace, order development, and good governance of Uganda. Pursuant to that, parliament passed section 75 (2) of the MCA. There is a rebuttable presumption that parliament is always right while carrying out its functions. That presumption has not been rebutted.

Article 23 (6) provides for the general right to apply for bail, Section 75 (2) on the other hand simply provides for where to apply for bail in regard to specified offences. The language of the Act is plain and unambiguous and should therefore be given a literal meaning to meet the minds of the legislators. The rationale for literal rule was stated as far back in the case of **R v Judge of the City of London Court (1892)**.

"To prevent courts from delving into the political arena, in order to preserve the dichotomy between the functions of parliament and courts, the former creating the law and the latter in theory applying the law".

For the above reasons, I do not agree with my learned sister and others that the right to hear bail rights should be predicated on jurisdiction to try an offence. To say so would tantamount to

reading words into the Act and the Constitution what was not intended by the legislators and the framers of our Constitution. Indeed there are instances in the Act where the rights to grant bail are provided in respect of Capital Offences which are only triable by the High Court.

For the above reasons, and with greatest respect, I do not agree that Section 75 (2) is in conflict with article 23 (6) of the Constitution or at all.

Ground three accordingly fail.

Dated this 26th.....day of.....OCTOBER.....2018.



**JUSTICE OPIO-ÁWERI,
JUSTICE OF THE SUPREME COURT**