THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 0044 OF 2015

1. RTD. CPT. AMON BYARUGABA
2. HASIBU KASIITA
3. MATHIAS RUGIRA & 167 ORS

WHOSE NAMES ARE ANNEXED HEREUNDER:::::::::PETITIONERS

VERSUS

ATTORNEY GENERAL::RESPONDENT

CORAM: HON. MR. JUSTICE RICHARD BUTEERA, DCJ
HON. MR. JUSTICE KENNETH KAKURU, JCC
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. LADY JUSTICE MONICA K. MUGENYI, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

This Petition for constitutional interpretation was brought under the provisions of Article 137 (3) (a) and (b) of the 1995 Constitution. The Petition challenges as unconstitutional, the exercise of jurisdiction by Military Courts to try civilians for criminal offences. It also alleges that the nature of trial proceedings in Military Courts does not ensure to accused civilian persons charged before those courts, the several minimum fair trial safeguards guaranteed under the 1995 Constitution which is also unconstitutional.

Background

Mr. Amon Byarugaba, is stated to be a retired former captain in the former National Resistance Army (NRA), now Uganda Peoples Defence Forces (UPDF). In 2003, after he had retired from active military service, he was charged in the General Court Martial (GCM), a military Court. Mr. Hasibu Kasiita, is stated to be a civilian, who in 2002, was charged in the GCM for the offence of murder. It is alleged that his trial took 9 years to be concluded after which he was convicted and sentenced to 10 years imprisonment. Mr. Mathias Rugira is stated to be a civilian who was tried in the GCM for an

unspecified offence. The Petition is stated to also have been brought on behalf of 167 other petitioners. These 167 persons, who are unascertained in the Petition, are all stated to be civilians who have in the past been tried in the GCM.

The respondent, is the Cabinet Minister responsible for, interalia, representing the Government in courts or any other legal proceedings to which the Government is a party, and is sued in that capacity.

The petitioners recognize that certain provisions of the Uganda Peoples Defence Force Act, 2005 ("UPDF Act") give Military Courts jurisdiction to try civilians for criminal offences in some instances. However, they allege that those provisions are unconstitutional. They say that the 1995 Constitution, in Article 209 thereof, spells out the functions of the UPDF, and those functions do not include trying civilians for criminal offences. The petitioners contend that the most basic objective of the UPDF is to preserve and defend the sovereignty and territorial integrity of Uganda, which means that trying civilians is outside the constitutional mandate of the UPDF.

The petitioners also allege that even assuming that the Military Courts can be said to have jurisdiction to try civilians for criminal offences, there are several doubts as to whether Military Courts are capable of implementing the minimum fair trial guarantees required under the 1995 Constitution. For example, the petitioners allege that a Military Court is incapable of being the "independent and impartial court" for trying civilians envisaged under Article 28 (1). Paragraph 2 of the Petition states:

> **"2. Your humble petitioners contend that military courts exercise judicial power and may impose any lawful sentence in law including death and yet they are not independent contrary to the guarantees of a fair trial in Article 28 (1) of the Constitution. The lack of independence of Military Courts arise from:**
>
> **a) The members of the court lack security of tenure because ss. 194 & 197 of the Uganda Peoples Defence Forces Act, 2005 provide that the members of the military court shall be appointed for a period of one year and the court can dissolve anytime at the discretion of the convening authority.**

b) **The members of the military court are appointed by the High Command as per the provision of S. 196(1) of the UPDF Act, 2005 and the Chairperson of the High Command is the President who being a politician may convene the court to achieve a political (partisan) objective.**

c) **The members of the military court exercise their jurisdiction in obedience to the command orders of the convening authority.**

d) **Military courts are not separate from the executive but are an extension of the executive arm of government.**

e) **Military courts try cases investigated by the military and prosecuted by the military contrary to natural justice, that an accuser should not be a judge in his cause."**

At paragraph 3 of the Petition, the petitioners allege that Military Courts are ill-suited for trying civilians in criminal cases because "military courts are empaneled by non-lawyers with grave difficulty in appreciating complex issues of evidence." At paragraph 7, the petitioners allege that the nature of criminal trials in Military Courts is such that civilian accused persons charged before those Courts are only allowed military lawyers whose allegiance is to the military. Such lawyers do not act in the best interests of their clients. In addition, military lawyers are only appointed for a period of 1 year, which prejudices the accused persons' defence.

Further, the petitioners allege that the legal framework governing Military Courts restricts the right to appeal, to only persons sentenced to death or life imprisonment, which is unconstitutional.

The petitioners also allege that, if the provisions of the UPDF Act conferring on Military Courts the jurisdiction to try civilians are upheld, the application of Section 119 (1) (g) of the Act should be restricted to extend only to civilians who are jointly charged, alongside other people subject to military law, when such persons have committed offences against national security. The petitioners contend that the current application of the said provision which sees civilians charged before Military Courts for allegedly aiding Military officers in committing "civilian offences" should be prohibited by this Court.

The petitioners also allege that Section 119 (1) (h) of the UPDF Act contravenes Article 28 (12) of the 1995 Constitution given that it allows for the charging and conviction of civilians of the offence of unlawful possession of weapons and ammunition ordinarily the monopoly of UPDF, an offence which is unknown under the law.

In view of the above allegations, the petitioners pray for the following declarations and orders:

"**1. That this Court declares as follows:**

a) That military courts have no jurisdiction to try civilians for civil offences.

b) That S. 119 (1) (g) of the UPDF Act only applies when a civilian aids and abets a person subject to military law in the commission of an offence [against national security] prescribed in the UPDF Act.

c) That s. 119 (1) (g) does not apply to a civilian who is charged with aiding and abetting a person subject to military law in the commission of a civil offence.

d) That s. 119 (1) (h) does not create nor extend any jurisdiction to military courts to try civilians.

e) That charging a person with committing an offence under s. 199 (1) (h) is unconstitutional as it amounts to creating an offence outside an Act of Parliament.

f) That military courts are not independent and impartial courts as required by Article 28 (1) of the Constitution.

2. That this Court orders as follows:

a) That all civilians being tried for civil offences before military courts should be transferred to civil courts if the DPP is interested in pursuing criminal charges against those civilians.

b) That all civilians who were convicted by military courts for civil offences and are serving sentences should have their convictions set aside and the DPP if interested in pursuing criminal charges against them, may do so.

c) **Petitioners No. 2 to 168 whose applications for habeas corpus were refused on account of the unconstitutional application of S. 119 (1) (g) & (h) of the UPDF Act, those applications are allowed with costs and the DPP if interested, may pursue criminal charges against the petitioners in civil courts.**

d) **That the respondent should pay the costs of this Petition."**

The 1st petitioner deponed an affidavit in support of the Petition, setting out the evidence for the petitioners. This evidence will be considered later in this Judgment.

The respondent opposed the petition. In the Answer, the respondent contended that not only does the Petition disclose no cause of action against the respondent, but it also discloses no questions for constitutional interpretation, and ought to be struck out. The respondent also contends that some of the questions presented in the Petition are res-judicata, having been previously considered by this Court. These included the questions as to whether the provisions of Section 119 (1) (g) and (h) of the UPDF Act are inconsistent with Articles 28 (1), 126 (1) and 210 of the 1995 Constitution.

On the substance of the Petition, the respondent's case is that Military Courts including the Field Court Martial, which form part of the Military Court system are lawfully established, are independent in execution of their duties and that trials in Military Courts adhere to the fair trial and due process safeguards as required by the 1995 Constitution.

The evidence in support of the respondent's Answer, which will be considered, is set out in the affidavit of Mr. Bafirawala Elisha, a Senior State Attorney in the respondent's Chambers.

Representation

At the hearing, Mr. Kwemara Kafuzi, learned counsel, appeared for the petitioners. Mr. Geoffrey Wangolo Madete, learned Senior State Attorney in the respondent's Chambers, appeared for the respondent. The 1st Petitioner was in Court.

Court gave the parties a schedule for filing written submissions, which was only adhered to by the Petitioners. No written submissions were filed for the respondent.

I have carefully studied the Petition and the accompanying documents, the Respondent's Answer and the accompanying documents; considered the petitioner's submissions and conferencing notes, and the law and authorities relied on. Where necessary, I have considered other relevant law and authorities although not cited.

Counsel for the Petitioners proposed the following issues to guide in determining the Petition:

> "1. **Whether the Military Courts have jurisdiction to try civilians for civil offences.**
>
> 2. **Whether charging a person with an offence under Section 119 (1) (h) of the UPDF Act is unconstitutional as it creates an offence outside an Act of Parliament.**
>
> 3. **Whether military courts are not independent and impartial Courts as required by Article 28 (1) of the 1995 Constitution.**
>
> 4. **Whether the petitioners are entitled to any remedies?"**

The case for the petitioners as I understand it is twofold. First, the petitioners assert that the 1995 Constitution does not allow for the Military Courts to exercise jurisdiction to try civilians for criminal offences, as they currently do. Second, the petitioners contend, that, even assuming that the Military Courts are allowed jurisdiction to try civilians for criminal offences under the 1995 Constitution, the Military Courts are ill-suited to accord a fair trial to civilians charged before them. I will consider the case for the petitioners below.

In proceeding to do so, I am mindful that the respondent raised an objection that the Petition discloses no questions for constitutional interpretation and/or that the Petition discloses no cause of action against the respondent. I would overrule this objection because the two aspects of the petitioners' case identified above raise questions for constitutional interpretation in the terms of Article 137 of the 1995 Constitution, which provides as follows:

"The constitutional court.

137. Questions as to the interpretation of the Constitution.

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—

(a) grant an order of redress; or

(b) refer the matter to the High Court to investigate and determine the appropriate redress."

In my view, the allegations concerning the jurisdiction of Military Courts to try civilians for criminal offences, require this Court to assess whether such exercise of jurisdiction and the UPDF Act which allows it, violates provisions of the 1995 Constitution. This satisfies Article 137 (3) (a) of the 1995 Constitution. As for the allegations relating to the inability of trials in Military Courts to ensure that accused persons get the minimum fair trial guarantees enshrined under the 1995 Constitution, these satisfy the limb in Article 137 (3) (b). Therefore, in my view, this Petition discloses questions for constitutional interpretation. This Court has the jurisdiction to try it, and the Petition also discloses a cause of action against the respondent, who being the representative of Government in legal proceedings, is answerable for the acts of Government being challenged in this Petition.

I also find the claims that this Petition is res-judicata to be misconceived. At paragraph 11 of the respondent's Answer, it is stated:

"That in further response to paragraph 5 the respondent shall aver and contend that the issue of whether section 119 (1) (g) and (h) of the UPDF Act is inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution has already been dealt with by the Constitutional Court in Constitutional Petition No. 18 of 2015 [correct year is 2005] and is therefore res judicata."

It is my view, however, that issue 1 in this case, requires this Court to consider a broad question on whether the Constitution gives Military Courts jurisdiction to try civilians, which was not the primary concern in the **Uganda Law Society case (supra)** and other similar cases which considered narrower, albeit, related questions. I would therefore overrule the respondent's res judicata claim and proceed to determine the merits of the Petition.

Military Courts' jurisdiction to try civilians for criminal offences

According to the **Black's Law Dictionary, 8th Edition** jurisdiction refers to a court's power to decide a case or issue a decree. In **Attorney General vs. Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997, Wambuzi, C.J stated:**

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is Constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is unlimited"

In our constitutional framework, the power to administer justice, by interalia, trying criminal cases, is as a general rule, vested exclusively in the Courts established under the 1995 Constitution. **Article 126 (1)** states:

"Administration of justice.

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."

The Courts for purposes of Article 126 (1) are those established under Article 129 of the 1995 Constitution, which provides:

> **"The courts of judicature.**
>
> **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, including qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.**
>
> **(2) The Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court.**
>
> **(3) Subject to the provisions of this Constitution, Parliament may make provision for the jurisdiction and procedure of the courts."**

Upon proper construction of the above provisions, taking into account their plain meaning, it becomes clear that the framers of the 1995 Constitution intended that, as a general rule, only the Courts spelt out under Article 129 (1) would be involved in the administration of justice for civilians. These Courts are the Supreme Court, the Court of Appeal, the High Court as Superior Courts of record. The framers of the 1995 Constitution also permitted Parliament to create such subordinate Courts as it would deem fit. Accepting, as I do, that this is the true construction of Article 129 of the 1995 Constitution, it is, in my view, incontrovertible that Military Courts are not Courts of judicature in terms of Article 126 (1) and 129 (1), and that as a general rule, such Military Courts have no role in the administration of justice for civilians. They are neither Superior Courts nor subordinate Courts.

It must be noted that parliament, under the UPDF Act, 2005 created Military Courts. It did so pursuant to Article 210 of the 1995, for the long title to the UPDF Act states, interalia, that it is:

"An Act to provide for the regulation of the Uganda Peoples' Defence Forces in accordance with Article 210 of the Constitution..."

I will go into discussion of Article 210 later, but before doing so, and in the interest of setting the context, it is necessary to start by analyzing Article 208 and 209. Article 208 which provides for establishment of the UPDF states:

"Uganda Peoples' Defence Forces.

208. Uganda Peoples' Defence Forces.

(1) There shall be armed forces to be known as the Uganda Peoples' Defence Forces.

(2) The Uganda Peoples' Defence Forces shall be nonpartisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution.

(3) Members of the Uganda Peoples' Defence Forces shall be citizens of Uganda of good character.

(4) No person shall raise an armed force except in accordance with this Constitution."

Article 209 sets out the functions of the UPDF:

"209. Functions of the defence forces.

The functions of the Uganda Peoples' Defence Forces are—

(a) to preserve and defend the sovereignty and territorial integrity of Uganda;

(b) to cooperate with the civilian authority in emergency situations and in cases of natural disasters;

(c) to foster harmony and understanding between the defence forces and civilians; and

(d) to engage in productive activities for the development of Uganda."

Article 210 permits Parliament to make laws to regulate the UPDF. It provides:

"210. Parliament to regulate the Uganda Peoples' Defence Forces.

Parliament shall make laws regulating the Uganda Peoples' Defence Forces and, in particular, providing for—

(a) the organs and structures of the Uganda Peoples' Defence Forces;

(b) recruitment, appointment, promotion, discipline and removal of members of the Uganda Peoples' Defence Forces and ensuring that members of the Uganda Peoples' Defence Forces are recruited from every district of Uganda;

(c) terms and conditions of service of members of the Uganda Peoples' Defence Forces; and

(d) the deployment of troops outside Uganda."

The following points are worth noting. First, the framers of the 1995 Constitution intended to establish an armed force, whose chief function is to defend the sovereignty of Uganda. Secondly, the framers, also allowed the UPDF to exercise additional functions, but these functions did not extend to the field of administration of justice for civilians. Thirdly, the framers permitted Parliament to make laws for regulation of the UPDF, but these laws, when made under Article 210, could only relate to the functions of the UPDF, and not purport to venture into a realm of functions which could not be exercised by the UPDF. Fourthly, Parliament was authorized to make a law to regulate the discipline of members of the armed forces. The Military Courts may be linked to discipline of members of the armed forces, not to the discipline of civilians.

Yet Parliament, when purporting to proceed under Article 210, created Military Courts and gave them judicial powers to try non-members of the armed forces. The petitioners assert that exercising judicial powers to try civilians is outside the constitutional mandate of the UPDF as set out under Article 209 (1). Counsel for the petitioners submitted that under the 1995 Constitution Military Courts have no jurisdiction to try civilians. He contended that it was improper that the 1st petitioner, who was not in active military service at the time, and therefore a civilian, was in 2003, tried for murder, an offence created under the Penal Code Act, Cap. 120. Counsel further contended that it was also improper that the 2nd petitioner who had never been a military officer was charged and tried for murder before a military court. Counsel contended that the 1st and 2nd petitioners, exemplify, the

situation for so many civilians who are improperly tried by Military Courts, and prayed that this Court declares that the 1995 Constitution did not vest Military Courts with jurisdiction to try civilians.

The respondent's case is that Military Courts are lawfully established in accordance with the 1995 Constitution, and vested with jurisdiction to try civilians.

I have already set out the relevant constitutional provisions, which, in my view, establish that only Courts of Judicature, established under the 1995 Constitution have a role in administration of justice with regards to civilians. Military courts are not part of the Courts of judicature for trying civilians envisaged under the 1995 Constitution.

It should be noted that the power of Parliament to legislate is not unlimited. It is subject to limits imposed under the Constitution. Article 79 (1) of the 1995 Constitution provides:

> **"79. Functions of Parliament.**
>
> **(1) <u>Subject to the provisions of this Constitution</u>, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda."**

In the present case, the 1995 Constitution places limits on Parliament's legislative power with regards to establishment of courts of judicature to try civilians to the circumstances stipulated under Article 129 (1), namely power to establish a subordinate court of judicature. The other courts of judicature were established by the framers and listed under Article 129 (1), and these are the Supreme Court, the Court of Appeal and the High Court. In my view, Article 129 (1), sets out an exclusive list of courts which may exercise judicial power with regards to civilians. Therefore, for that purpose, Parliament has no power to establish a court under another provision of the 1995 Constitution. Certainly, it could not proceed to do so under Article 210, which concerns the UPDF, for the framers of the 1995 Constitution never intended for the UPDF to be vested with judicial functions in respect to civilians.

Therefore, the question whether Military Courts have jurisdiction to try civilians, must be answered in the negative. Military courts are not courts of

judicature for civilians, and therefore, they may not exercise judicial power to try civilians.

What then is the true nature of the "Military Courts" established under the UPDF Act? I will consider the relevant provisions and attempt to reach an answer. I observe that the framers of the 1995 Constitution intended to vest Parliament with powers to establish organs to maintain the discipline of members of the armed forces. See: Article 210. Thus, when Parliament established the Military Courts, it can only be said to have done so out of concern for the discipline of members of the UPDF and nothing else.

Indeed, the general texture of the UPDF Act, gives the impression that Parliament enacted the relevant provisions in the said Act to govern matters of discipline of members of the armed forces. Here is why. Under Section 118 of the UPDF Act, Parliament established a code of conduct for members of the UPDF. The provision states:

> **"118. Code of Conduct for the Defence Forces.**
>
> **(1) There shall be a Code of Conduct for the purpose of guiding and disciplining members of the Defence Forces, as set out in the Seventh Schedule to this Act.**
>
> **(2) The Minister may, after consultation with the Defence Forces Council, by statutory instrument, amend the Seventh Schedule to this Act."**

Under the UPDF Act, Parliament provided for military law and persons to whom it was to be applied, which is mainly members of the armed forces. This is also consistent with the 1995 Constitution. Section 119 of the Act provides:

> **"119. Persons subject to military law**
>
> **(1) The following persons shall be subject to military law—**
>
> **(a) every officer and militant of a Regular Force;**
>
> **(b) every officer and militant of the Reserve Forces and any prescribed force when he or she is—**
>
> **(i) undergoing drill or training whether in uniform or not;**
>
> **(ii) in uniform;**

(iii) on duty;

(iv) on continuing full time military service;

(v) on active service;

(vi) in or on any vessel, vehicle or aircraft of the Defence Forces or any defence establishment or work for defence;

(vii) serving with any unit of a Regular Force; or

(viii) present, whether in uniform or not, at any drill or training of a unit of the Defence Forces;

(c) subject to such exceptions, adaptations, and modifications as the Defence Forces Council may by regulations, prescribe, a person who under any arrangement is attached or seconded as an officer or a militant to any Service or force of the Defence Forces;

(d) every person, not otherwise subject to military law, who is serving in the position of an officer or a militant of any force raised and maintained outside Uganda and commanded by an officer of the Defence Forces;

(e) every person, not otherwise subject to military law, who voluntarily accompanies any unit or other element of the Defence Forces which is on service in any place;

(f) every person, not otherwise subject to military law, while serving with the Defence Forces under an engagement by which he or she has agreed to be subject to military law;

(g) every person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of a service offence; and

(h) every person found in unlawful possession of—

(i) arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or

(ii) other classified stores as prescribed.

(2) A person mentioned in paragraph (e) of subsection (1) who, while accompanying a unit or other element of the Defence Forces, is alleged to have committed a service offence shall, for the purposes of this Act be treated as if he or she were a militant of the rank of private unless he or she holds from the commanding officer of the

unit or other element of the Defence Forces that he or she so accompanies, or from any other officer prescribed by regulations, a certificate revocable at the pleasure of the officer who issued it or of any other officer of equal or higher rank, entitling that person to be treated as an officer of a particular rank.

(3) A person who holds such a certificate shall be treated as an officer of that rank in respect of any offence alleged to have been committed by him or her while holding that certificate.

(4) Every person subject to military law by virtue of paragraphs (d), (e) and (f) of subsection (1), shall, for the purposes of preparation, practice or execution of any plan, arrangement or manoeuvre for the defence or evacuation of any area in case of an attack, be under the command of the commanding officer of the unit or other element of the Defence Forces which he or she is accompanying, or with which he or she is serving.

(5) That commanding officer shall, for the purposes referred to in subsection (4) be deemed to be a superior officer of that person; but nothing in this section shall be construed as requiring any such person to bear arms or to participate in any active operations against the enemy.

(6) Every person mentioned in paragraph (f) of subsection (1) who, while serving with a unit or other element of the Defence Forces under an engagement, is alleged to have committed a service offence shall, for the purposes of this Act be treated as a militant of the rank of private unless by the terms of his or her engagement he or she is entitled to be treated as if he or she were an officer or a militant of higher rank, in which case he or she shall be treated in accordance with the rank prescribed in his or her engagement.

(7) For the purposes of this Act, the "commanding officer" in relation to any person mentioned in subsection (2), (3), (4) or (5) means the commanding officer of the unit or other element of the Defence Forces that that person accompanies, or in whose custody he or she is, or in which that person is serving, as the case may be.

(8) Every person who commits a service offence while subject to military law may be liable to be charged, dealt with and tried for that offence notwithstanding that he or she has ceased to be subject to military law since the commission of the offence.

(9) Every person who, since he or she committed a service offence has ceased to be subject to military law shall, for the purposes of trial, be considered to have the status and rank which he or she held immediately before he or she ceased to be subject to military law.

(10) Subject to subsections (11) and (12), a person who commits a service offence, may only be tried within the Service in which he or she was commissioned or enrolled.

(11) A person who is attached or seconded to a Service other than the Service in which he or she was commissioned or enrolled, or embarked on a vessel or aircraft of a Service other than the Service in which he or she was commissioned or enrolled, may be tried either within that other Service or within the Service in which he or she was commissioned or enrolled depending on the circumstances and nature of the offence.

(12) A person serving in the circumstances specified in paragraph (d) of subsection (1) who, while so serving commits a service offence, may be tried within the Service or Force in which his or her commanding officer is serving.

(13) For the purposes of this section, but subject to such limitations as may be prescribed, a person accompanies a unit of the Defence Forces which is on service if he or she—

(a) participates with that unit in the carrying out of any of its movements, manoeuvres, duties in a disaster or warlike operations;

(b) is accommodated or provided with rations at his or her own expense or otherwise by a unit of the Defence Forces in any place designated by the President;

(c) is embarked on a vessel or aircraft of a unit of the Defence Forces; or

(d) is a dependant staying with an officer or a militant serving beyond Uganda with that unit."

In my view, however, to the extent that, Parliament under Section 119 (1) (h) and 119 (1) (g), extended application of military law to persons not members of the military, it acted unconstitutionally. This is because Article 210 of the 1995 Constitution, under which Parliament derived authority to enact the UPDF Act, expressly provides that Parliament may only move under

that provision to legislate on matters concerning members of the armed forces. Therefore, the impugned provisions of Section 119 (1) (h) and 119 (1) (g) of the UPDF Act, are to that extent inconsistent with the 1995 Constitution and therefore null and void.

It will be observed that in enacting the UPDF Act, Parliament also intended to promote discipline in the army by prohibiting certain conduct by members of the UPDF. This is within the powers vested in Parliament under Article 79 (1) authorizing it to make laws for, interalia, ensuring orderliness in the country and under Article 210 which authorizes Parliament to make laws to regulate the discipline of members of UPDF. In **R vs. Genereux [1992] R.C.S 259**, the Supreme Court of Canada (per Lamer, C.J) held that military law is primarily concerned with the public interest of maintaining discipline and integrity in the armed forces. Under Part VI of the UPDF Act, Parliament lists the offences established under the Act. The majority of the offences, such as, cowardice in action (section 120), breaching concealment (Section 121), failure to protect war materials, et cetera, relate to discipline in the armed forces.

In view of the above, the reasonable interpretation is that in creating the Military Courts, Parliament intended to set up a disciplinary tribunal or Court for the UPDF in accordance with Article 210 of the 1995 Constitution. Such tribunals can only be concerned with matters of discipline within the army, and with members of the UPDF. They cannot try civilians who are not members of the UPDF. Indeed, Katureebe, JSC (as he then was) in the case of **Attorney General vs. Joseph Tumushabe, Supreme Court Constitutional Appeal No. 3 of 2005** aptly observed that the Court Martial (military courts) is set up as part of the disciplinary mechanism for the UPDF under Article 210 (b) of the 1995 Constitution. I agree. Therefore, military courts may continue as intended by the framers of the 1995 Constitution, that is, as disciplinary tribunals for members of the UPDF. They may no longer try civilians.

The other challenge contained in the Petition, is made against Section 119 (1) (h) of the UPDF Act. The petitioners claim that the said provision has been based on to level charges against civilians in Military Courts, yet it neither creates nor describes any offence known under any other law. The

petitioners adduce no evidence to prove the claim that the said Section 119 (1) (h) has been used to found changes against anyone in the Military Courts. It is well established that an offence is only such, if it is defined and the penalty for it prescribed by law. **See: Article 28 (12) of the 1995 Constitution.** Section 119 (1) (h) does not purport to define an offence, but rather purports to describe who may be subject to military law. The said provision cannot be relied on as the basis of a competent to establish an offence.

All in all, issue 1, whether Military Courts have jurisdiction to try civilians for criminal offences, must be answered in the negative. The manner of resolution of the issue renders it unnecessary to consider the other issues relating to whether civilians would receive a fair trial in military courts, as it would be academic to do so.

As to the remedies available to the petitioners, in addition to the declarations they sought, which will be summarized shortly, this Court has to determine the appropriate orders to make in relation to; First, civilians who have been charged and are still awaiting trial in Military Courts, and relatedly those whose trials in the Military Courts have been partially completed. Secondly, the validity of convictions and sentences passed on civilians in Military Courts prior to the date of this judgment.

The petitioners propose that this Court orders that civilians who have been charged and are awaiting trial in Military Courts, and those whose trials have been partially completed, should have their cases transferred to civilian Courts and taken over by the Director of Public Prosecutions. In my view, this Court is obligated to make this order, which flows from the finding that Military Courts have no jurisdiction to try civilians. I would therefore order that cases in which civilians have been charged before the Military Courts but have not been tried, and those in which trial has been partially completed, should immediately be transferred to a competent civilian Court of Judicature.

As for the convictions and sentences passed on civilians in Military Courts prior to the date of this decision, I observe that this Court has in the recent decision of **Bob Kasango vs Attorney General [2021] UGCC 2** endorsed

the principle that prospective annulment, rather than retrospective annulment should be applied in cases where there has been a finding of unconstitutionality. Prospective annulment is where an impugned act or omission is nullified from the date of the judgment in which the said act or omission is declared unconstitutional, going forward. Retrospective annulment is where an impugned act or omission is nullified from the date of the judgment, and also going back to an earlier time when the impugned act or omission was committed. Kiryabwire, JCC held in that decision, that the doctrine of prospective annulment supports a decision not to nullify earlier acts done by a person in exercise of a then lawful mandate which has now been declared unconstitutional. In the **Kasango case (supra)**, this Court applied the doctrine of prospective annulment.

In the present case, Military Courts were exercising a lawful mandate under the UPDF Act, when they tried, convicted and sentenced several civilians for criminal offences prior to the date of this decision. Considering that this Court has only found that mandate unconstitutional in this case, it follows that applying the principle of prospective annulment, the relevant convictions and sentences rendered prior to this decision shall remain valid. However, any trial, conviction or sentencing of a civilian in a Military Court henceforth shall be rendered null and void ab initio.

In conclusion, I would allow the Petition and make the following declarations and orders:

a) I would declare that the exercise of jurisdiction by Military Courts to try civilians for criminal offences is unconstitutional. Under the 1995 Constitution, trying civilians is the role of civilian Courts of Judicature, which do not include Military Courts. Military Courts are intended as disciplinary Courts for the UPDF to serve the public interest of maintaining discipline among the members of the UPDF.

b) I would declare that the UPDF Act, 2005, to the extent that it may be understood as conferring jurisdiction on Military Courts to try civilians is unconstitutional and therefore null and void to that extent.

c) I would order that criminal cases in which civilians have been charged before the Military Courts but are pending trial, or have been partly tried,

should immediately be transferred to a competent civilian Court of Judicature, and taken over by the Director of Public prosecutions.

d) I would order that the convictions and sentences of civilians which arose from criminal cases tried by Military Courts prior to the date of this Judgment are valid. However, in future, any trial of civilians by Military Courts, and any decision that may be taken at such trials to convict and/or sentence civilians shall from the date of this judgment be invalid and null and void ab initio.

e) The 1st petitioner, the only one of the petitioners who prosecuted this Petition, shall be paid the costs of this Petition.

Dated at Kampala this ..... 15th ..... day of..... Dec .....2021.

.....

Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 044 OF 2015

1. **RTD. CAPTAIN AMON BYARUGABA**
2. **HASIBU KASITA**
3. **MATHIAS RUGIRA & 167 OTHERS**
   WHOSE NAMES ARE ANNEXED HEREUNDER.....PETITIONERS

VERSUS

ATTORNEY GENERAL..... RESPONDENT

[*CORAM: Buteera, DCJ; Kenneth Kakuru, Geoffrey Kiryabwire, Elizabeth Musoke, & Monica Mugenyi, JJCC*]

JUDGMENT OF MR. JUSTICE RICHARD BUTEERA, DCJ

I have had the opportunity of reading in draft the lead Judgment prepared by my learned sister, Musoke, JCC. I respectfully do not agree with the reasons and conclusion in the Judgment.

I have also had the benefit of reading in draft the dissenting Judgment prepared by my learned sister, Mugenyi, JCC. I agree with her entirely and have nothing more useful to add.

Since Kakuru and Kiryabwire, JJCC, agree with the lead judgment of Musoke, JCC, it is, therefore, the majority decision of this Court that the Petition is allowed. This Court makes the declarations and orders as set out in the judgment of Musoke, JCC.

Dated at Kampala this ....15th..... day of .....Dec..... 2022

Richard Buteera
Deputy Chief Justice

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 0044 OF 2015

1. **RTD. CPT. AMON BYARUGABA**
2. **HASIBU KASIITA**
3. **MATHIAS RUGIRA & 167 ORS**

WHOSE NAMES ARE ANNEXED HEREUNDER.....PETITIONERS

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM: **HON. MR. JUSTICE RICHARD BUTEERA, DCJ**
HON. MR. JUSTICE KENNETH KAKURU, JCC
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. LADY JUSTICE MONICA MUGENYI, JCC

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned sister The Hon Lady Justice Elizabeth Musoke JA.

I agree with her that this petition ought to succeed for the reasons she has ably set out in her well reasoned and researched Judgment.

I also agree with the declarations and orders she has proposed. I have nothing useful to add.

Dated at **Kampala** this.....15th..... of .....Dec.....2021.

.....

Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0044 OF 2015

1. **RTD. CPT. AMON BYARUGABA**
2. **HASIBU KASIITA**
3. **MATHIAS RUGIRA & 167 ORS**

WHOSE NAMES ARE ANNEXED HEREUNDER::::::::::::::::::::PETITIONERS

VERSUS

ATTORNEY GENERAL::RESPONDENT

CORAM: **HON. MR. JUSTICE RICHARD BUTEERA, DCJ**
HON. MR. JUSTICE KENNETH KAKURU, JCC
HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. LADY JUSTICE MONICA MUGENYI, JCC

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

I have had the opportunity of reading the draft Judgment of the Hon. Lady Justice Elizabeth Musoke, JCC.

I agree with her Judgment and I have nothing more useful to add.

Dated at **Kampala** this.....15th.....day of .....Dec.....2022.

.....

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC

THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: BUTEERA, DCJ; KAKURU, KIRYABWIRE, MUSOKE AND MUGENYI, JJCC

CONSTITUTIONAL PETITION NO. 44 OF 2015

1. **RTD. CPT. AMON BYARUGABA**
2. **HASIBU KASITA**
3. **MATHIAS RUGIRA & 167 OTHERS** ..... **PETITIONERS**

VERSUS

ATTORNEY GENERAL ..... **RESPONDENT**

JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. I have had the benefit of reading in draft the judgment of my sister, Hon. Lady Justice Elizabeth Musoke in this matter. I do abide the conclusions therein that pertain to the two preliminary points of law raised by the Respondent: first, that the Court's jurisdiction is not properly invoked and, secondly, that the matter is *res judicata*.

2. In complete agreement with the lead judgment, I find that the Petition does on the face of it present questions for constitutional interpretation, not least being the constitutionality of section 119(1)(g) and (h) of the Uganda Peoples Defence Forces (UPDF) Act, 2005 vis-à-vis Articles 208 and 209 of the Constitution, and the constitutionality of criminal trials in the military courts in Uganda under the same Act vis-à-vis Article 28(1) and (12) of the Constitution. It seems to me that the Petitioners essentially challenge a provision of that Act of Parliament and the military court trials that operate thereunder. This, to my mind, would fall squarely within the ambit of Article 137(3)(a) of the Constitution.

3. I do also agree that the matter before the Court is not *res judicata* given that, contrary to the dictates of section 7 of the Civil Procedure Act (CPA), Cap. 71, the parties in **Uganda Law Society v. Attorney General, Constitutional Petition No. 18 of 2005** vis-à-vis the present petition are clearly different. Section 7 of the CPA states:

> **No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.**

4. Furthermore, whereas the broad question as to the compliance of sections 119(1)(g) and (h) of the UPDF Act with Articles 28(1), 126(1) and 210 of the Constitution has since been settled by this Court in **Uganda Law Society v. Attorney General** (supra), the Petition before the court presently *inter alia* raises

the constitutionality of those legal provisions within the context of specific facets of the notion of fair trial under Article 28(1) of the Constitution.

5. I do, nonetheless, deem it necessary to highlight my opinion on the constitutionality of military courts' jurisdiction in Uganda.

B. **Factual Background**

6. In a nutshell, it is the Petitioners' case that the military courts in Uganda exercise judicial power in contravention of the right to fair trial guaranteed in Article 28(1) of the Constitution given the absence of the independence necessary for such a judicial function.

7. The independence of the military courts is questioned on account of the lack of security of tenure illustrated by their 1-year tenure under sections 194 and 197 of the Uganda Peoples Defence Forces (UPDF) Act; as well as their appointment under section 196 of the same Act by the Chairperson of the High Command, a purportedly partisan politician to whom the members of the court are subservient. It is thus proposed that military courts are but an extension of the Executive branch of government where the military sits as a judge in its own causes in so far as cases before these courts are investigated and prosecuted by it (the military). To compound matters, legal aid in military courts is opined to be provided by military lawyers who are not governed by the Advocates Act and owe allegiance to the military and not their clients.

8. The constitutional right to a fair trial is further alleged to have been infringed on account of military courts being presided over by non-lawyers with inadequate grasp of complex legal and evidential issues; as well as the curtailed right of appeal under military law, such right being restricted under Rule 20 of the UPDF (Court Martial Appeal Court) Regulations to sentences of death or life imprisonment.

9. In addition, the military courts are considered to violate the right to a fair trial in so far as they wrongfully exercise criminal jurisdiction over civilians. As stated earlier herein, that issue was settled in **Uganda Law Society v. Attorney General** (supra). However, the present Petition introduces a new facet to this question, to

wit, the consistency (or lack of it) of the trial of civilians for civil offences contrary to its constitutional mandate under Article 209(1) of the Constitution to preserve and defend Uganda's sovereignty and territorial integrity. It is the Petitioners' view that whereas section 119(1)(g) of the UPDF Act does authorize military courts to try civilians that aid and abet a person that is subject to military law in the commission of '*service offences*', military courts have wrongfully applied that statutory provision to civilians who aid and abet persons subject to military law to commit *civil offences*.

10. Furthermore, in contravention of Article 28(12) of the Constitution that disallows trial of a person for an unknown offence, military courts are faulted for charging civilians with the unknown offences of being found in unlawful possession of weapons and ammunition that are ordinarily the preserve of the UPDF or commission of offences with the use of such weapons and ammunition.

11. In any event, it is proposed that the military may only cooperate with civilian authority in emergency situations, therefore imposing military law in peaceful times contravenes Article 208 of the Constitution.

12. Pursuant thereto, the Petitioners seek the following remedies (reproduce ed verbatim):

I. That this court declares as follows:-

(a) That military courts have no jurisdiction to try civilians for civil offences.

(b) That s. 119(1)(g) of the UPDF Act only applies when a civilian aids and abets a person subject to military law in the commission of an offence [against national security] in the UPDF Act.

(c) That s. 119(1)(g) does not apply to a civilian who is charged with aiding and abetting a person subject to military law in the commission of a civil offence.

(d) That s. 119(1)(h) does not create or extend any jurisdiction to military courts to try civilians.

(e) *That charging a person with committing an offence under s.119(1)(h) is unconstitutional as it amounts to creating an offence outside an Act of Parliament.*

(f) *That military courts are not independent and impartial courts as required by Art. 28(1) of the Constitution.*

II. *That this court orders as follows:-*

(a) *That all civilians being tried for civil offences before military courts should be transferred to civil courts if the DPP is interested in pursuing criminal charges against those civilians.*

(b) *That all civilians who were convicted by military courts for civil offences and are serving sentences should have their convictions set aside and the DPP if interested in pursuing criminal charges against them, may do so.*

(c) *Petitioners No. 2 to 168 whose applications for habeas corpus were refused on account of the unconstitutional application of s.119(1)(g) and (h) of the UPDF ACT, those applications are allowed with costs and the DPP if interested, may pursue criminal charges against the petitioners in civil courts.*

(d) *That the Respondent should pay the costs of this petition.*

13. On the other hand, the Respondent opposes the Petition and denies any violation of Article 209 of the Constitution by section 119(1) of the UPDF Act. It is argued that military courts do have jurisdiction to try civilians that either aid and abet a person subject to military law in the commission of a service offence or are found in unlawful possession of classified stores. It is further argued that section 119(1)(h) of the UPDF Act does not create offences but merely delineates persons that are subject to military law; white section 197 of the UPDF Act confers unlimited jurisdiction on the General Court Martial to try civil offences within the confines of section 179 of the same Act.

14. The Petitioners proposed the following issues for determination:

I. *Whether the Military Courts have jurisdiction to try civilians for civil offences.*

II. *Whether charging a person with an offence under section 119(1)(h) of the UPDF Act is unconstitutional as it creates an offence outside an Act of Parliament.*

III. *Whether the military courts are not independent and impartial courts as required by Article 28(1) of the 1995 Constitution.*

IV. *Whether the petitioners are entitled to any remedies.*

C. **Determination**

15. I consider it necessary to briefly address the question raised by the Respondent as to whether in fact the Constitutional Court has previously pronounced itself on the all the matters in contention in the Petition, given that if it did render its interpretation of the constitutional provisions in issue presently then the present Petition would be improperly before the Court. This question arises under *Issue No. 3* hereof as para-phrased below, to which I now revert.

Issue No. 3: *Whether or not the military courts are independent and impartial courts as required by Article 28(1) of the Constitution*

16. I carefully considered the judgment in **Uganda Law Society v. Attorney General** (supra) against the matters in contention before the Court presently. The issues as framed in that case were as follows:

1. *Whether acts of security agents at the premises of the High Court on the 16th November, 2005 contravened Articles 23(1) and (6), 28 (1) and 128 (1) (2) (3) of the Constitution.*
2. *Whether the concurrent proceedings in the High Court Case No. 955/2005 and Court Case No. UPDF/Gen/075/2005 in the General Court Martial against the accused contravened Articles 28 (1) and 44 (c) of the Constitution and inconsistent with Articles 28 (9) and 139 (1) of the Constitution.*
3. *Whether Section 119 (1) (g) and (h) of the UPDF Act is inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution.*

4. *Whether the joint trial of civilians and members of the UPDF in Military Court for offences under the UPDF Act is inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution.*
5. *Whether the trial of the accused before the General Court Martial on a charge of terrorism contravenes Article 22 (1) 28 (1) and 126 (1) of the Constitution.*
6. *Whether the trial of the Accused for the offence of terrorism, and unlawful possession of firearms before the General Court-Martial is inconsistent with Articles 28(1), 120(1), 3(b) and (c), 126 (1) and 210 of the Constitution.*

17. The final orders of the Constitutional Court on the foregoing issues are as follows:

On issue No.1

By a majority of four to one the acts of security agents at the premises of the High Court on the 16 November, 2005 contravened Articles 23(1) (6) and 128 of (1) (2) (3) of the Constitution. j

On issue No. 2

a) By a majority of three to two the effect of concurrent proceedings in both the High Court and General court Martial where both courts have jurisdiction is not inconsistent with Articles 28(9) and 139(1) of the Constitution as the General Court Martial is not subordinate to the High Court but equivalent to it.

b) By a majority of four to one the concurrent proceedings in the High Court. Case No. 955/2005 and Court. Case No. UPDF/Gen/075/2005 in the General Court Martial against the accused contravened Articles 28(1) and 44(c) of the Constitution as the General Court Martial had no jurisdiction to try the charges preferred against the accused in the said court.

On issue No. 3

By a majority of 3 to two section 119(1) (g) and (h) of the UPDF Act is not inconsistent with Articles 28(1), 126(1) and 210 of the Constitution.

On issue No. 4

By a majority of 3 to two the joint trial of civilians and members of the UPDF in Military Court for offences under the UPDF Act is not inconsistent with Articles 28(1), 126(1) and 210 of the Constitution.

On issue 5

By a majority of 4 to one, the trial of the 23 accused persons before the General Court Martial on charges of terrorism contravenes Articles 22(1) 28(1) and 126(1) of the Constitution.

On issue No. 6

By a majority of 4 to one the trial of the accused for the offence of terrorism, and unlawful possession of firearms before the General Court Martial is inconsistent with Articles 28(1), 120(1, 3(b) and (c) and 210 of the Constitution.

18. The Constitutional Court's findings on *Issues 2(b), 5* and *6* were the subject of appeal in **Attorney General v. Uganda Law Society (2009) UGSC 2**,[1] but the Appeal was dismissed. On the other hand, Issues 2(a) and 4 were the subject of a cross appeal in the matter. The main thrust of the challenge to *Issue No. 2(a)* was the finding of the majority in the Constitutional Court that the General Court Martial '*was equivalent to the High Court in status of jurisdiction to try civilians not subject to military law, jointly with persons subject to military law on charges arising from the UPDF Act; and that such joint trial is not inconsistent with Articles 28(9) and 139(1) of the Constitution.*' The Supreme Court upheld its decision in **Attorney General v. Joseph Tumushabe, Constitutional Appeal No. 3 of 2005** that the General Court Martial is subordinate to the High Court and allowed the cross appeal, without expressly pronouncing itself on the constitutionality (within the ambit of Articles 28(1), 126 and 210) of the joint trial of civilians and members of UPDF by the General Court Martial for offences prescribed under the UPDF Act.

19. It thus becomes apparent that the question in **Uganda Law Society v. Attorney General** (supra) as to whether section 119(1)(g) and (h) of the UPDF Act was inconsistent with Articles 28(1), 126(1) and 210 of the Constitution for subjecting civilians not employed by, or voluntarily or otherwise officially connected with the UPDF to military courts, military law and discipline, had been answered in the negative. It was neither appealed nor cross appealed and therefore remains good law. Quite clearly, the question that is in contention in the present Petition, as to the military courts' jurisdiction over civilians *per se* was addressed in that decision. I therefore find that no new question for constitutional interpretation is raised in that regard and would, accordingly, decline to entertain it.

20. The Petition does also challenge the constitutionality of military courts vis-à-vis Article 208 of the Constitution. In the Petitioners' estimation, the military may only cooperate with civilian authority in emergency situations, therefore imposing

[1] also reported as Constitutional Appeal No. 1 of 2006

military law in peaceful times contravenes Article 208 of the Constitution. I am respectfully unable to agree. That constitutional provision simply creates the armed forces known as the UPDF and spells out its aspirational values, before finally prohibiting the creation of an armed force outside the confines of the Constitution. Consequently, in so far as the decision in **Uganda Law Society v Attorney General** (supra) settles the constitutionality of military courts as they function currently, the proposed restriction of the said courts to emergency situations becomes moot. In any case, it most certainly does not violate the provisions of Article 208 that simply creates the UPDF.

21. I am alive to this Court's decision in **Michael Kabaziguruka v. Attorney General, Constitutional Petition No. 45 of 2016**, that is now pending before the Supreme Court on appeal. The majority decision therein did, in a sense, revisit the question that was settled in **Uganda Law Society v. Attorney General** (supra) as described hereinabove. However, given that the matter is pending reconsideration on appeal, I shall say no more about it. It will suffice to observe that, until the apex court has pronounced itself on the inter-related issues raised in **Michael Kabaziguruka v. Attorney General** (supra), **Uganda Law Society v Attorney General** (supra) remains good law for present purposes.

22. Be that as it may, the Petition does qualify its challenge to the military courts' jurisdiction over civilians with the assertion that the said courts violate the right to a fair trial that is enshrined in Article 28(1) of the Constitution. This allegedly manifests in their members being persons with a non-legal background; the appointment of those members by the Executive to which they are purportedly subservient; their short tenure of office; the investigation and prosecution of the matters before them by the military; the provision of legal aid services by the same military, and the curtailed right of appeal under Rule 20 of the UPDF (Court Martial Appeal Court) Regulations.

23. The notion of a fair hearing is spelt out in Article 28(1) of the Constitution as '**a fair, speedy and public hearing before an independent and impartial court or tribunal established by law**.' In the matter before the Court presently, the speediness or public nature of hearings before the courts-martial is not under

challenge. The Petition simply equates their composition, the appointment and tenure of their presiding officials, as well as the procedural regimen under which they function, to an unfair and thus unconstitutional trial. It becomes necessary, in my view, to contextualize the nature of courts-martial or military courts prior to the interrogation of the above contestations.

24. In **Attorney General v. Joseph Tumushabe** (supra), interpreting Article 126(1) of the Constitution, the Supreme Court recognized the special nature of courts-martial in the following terms (per Mulenga, JSC):

> Although courts martial are a specialized system to administer justice in accordance with military rule, 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 complimentary to the civilian courts, hence the convergence at the Court of Appeal.

25. That observation resonates with the definition of special courts in **Raphael Baranzira & Another v. The Attorney General of Burundi, EACJ Reference No. 15 of 2014** as '**bodies within the judicial branch of government that generally address only one area of law or have specifically defined powers**.' In that case, the EACJ approbates the following distinction of special courts vis-à-vis typical civil courts:

> Special courts differ from general-jurisdiction courts in several other respects besides having more restricted jurisdiction. ... if there is a trial or hearing, it is usually heard more rapidly than in a court of general jurisdiction. Special courts usually do not follow the same procedural rules that general-jurisdiction courts follow; often special courts proceed without the benefit or expense of attorneys or even law-trained judges.

26. On that basis, the regional court quite compellingly negated the contention in that case that the rule of law had been contravened simply because there was no provision for appeals from a special court to the apex court of a country. In recognition of the special nature of courts-martial, I am similarly disinclined to abide the proposition in this case that the restriction of the right of appeal under Rule 20 of the UPDF (Court Martial Appeal Court) Regulations to sentences of death or life imprisonment would *ipso facto* constitute a contravention of the right to a fair hearing as encapsulated in Article 28(1) of the Constitution.

27. As was observed in **Attorney General v. Major General David Tinyefuza, Constitutional Appeal No 1 of 1997** (per Mulenga, JSC), military laws are designed specially in the interest of national security. The case of **Attorney General v Joseph Tumushabe** (per Katureebe, JSC as he then was) supplemented that function with the observation that military courts are set up as *part of* the disciplinary mechanism of the UPDF. These propositions of the law echo the recognition by the US Supreme Court in **O'Callahan v. Parker, 395 U.S. 258 (1969) at 259, 261 – 262** of the differential nature of courts-martial processes when it held that '**Art. I, § 8, cl. 14, of the Constitution recognizes that military discipline requires military courts in which not all the procedural safeguards of Art. III trials need apply...**'

28. Whereas, admittedly, **Raphael Baranzira & Another v. The Attorney General of Burundi** (supra) and **O'Callahan v. Parker** (supra) are by no means binding upon this Court, I do find them most persuasive on the matters under consideration presently. It would appear, therefore, that considerations of national security and the discipline attendant thereto do justify the retributive justice that is characteristic of courts-martial. To permit protracted appeals on each and every penalty meted out by them would defeat the ends of military discipline in the interests of national security. It thus seems to me that a civilian that runs afoul of section 119(1) of the UPDF Act would unfortunately subject himself/ herself to the limitations on appeal that abide the special nature of military trials.

29. Similarly, with respect, I do not share the Petitioners' views on judges with a legal background as a pre-requisite for a fair hearing in special courts such as courts-martial. Article 14 of the International Convention on Civil and Political Rights (ICCPR) is instructive on this. Clause (1) thereof provides as follows:

> **In the determination of any criminal charge against him, ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary**

in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; *(my emphasis)*

30. To begin with, there is no evidence on record in this case that the composition of the persons that constitute Uganda's General Courts-Martial are persons of non-legal background. Secondly, no attempt has been made by the Petitioners to demonstrate the legal complexities of section 119(1)(g) and (h) of the UPDF Act so as to warrant the General Courts-Martial's composition of only persons with a legal background, or render incompetent a courts-martial comprised of persons with a non-legal background. The emphasis in Article 14 of the ICCPR would appear to be on an accused person's right to legal representation rather than equating the competence of a tribunal to persons with a legal background. *See Article 14(3)(b) and (d) of the ICCPR.*

31. With regard to the appointment and tenure of the persons that serve on the courts-martial, and the military's investigation, prosecution and provision of legal aid; the crux of the matter is that civilians that fall within the ambit of military law are subject to courts-martial processes and procedure on *as is* basis. The practice of the United States courts-martial practice is fairly instructive on this. US courts-martial operate under a federal law enacted by the US Congress, the Uniform Code of Military Justice (UCMJ). Article 2(a)(8), (9), (10), (11) and (12) of the UCMJ mandates US courts-martial to try specified categories of civilians under some circumstances. In principle, therefore, the submission of civilians to military law and trial in specified circumstances is not an alien concept in national statecraft. The circumstances under which this may arise cannot be identical with each nation state but they must of necessity be spelt out succinctly in a public law. Such clarity should address considerations of the *void-for-vagueness* doctrine as espoused in **Kolender v. Lawson (1983), United States Supreme Court, No. 81-1320** (per Justice O'Connor) as follows:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

32. Turning to the Petition before the Court, courts-martial are special courts that are set up '**to address specific issues of concern to a country**.' *See* ***Raphael Baranzira & Another v. The Attorney General of Burundi*** *(supra)*. In the case of courts-martials in Uganda, as observed by the Supreme Court in **Attorney General v. Major General David Tinyefuza** (supra) and **Attorney General v. Joseph Tumushabe**, that concern is national security and military discipline. Similarly, in **O'Callahan v. Parker, 395 U.S. 258 (1969) at 259, 263 - 265**, the US Supreme Court considered the courts-martial in that country to have been set up to preserve military discipline in accordance with military traditions and processes. It held:

> A court-martial (which is tried in accordance with military traditions and procedures by a panel of officers empowered to act by two-thirds vote presided over by a military law officer) is not an independent instrument of justice, but a specialized part of an overall system by which military discipline is preserved.

33. To that extent, a trial in a special military court would of necessity be premised on investigations and prosecution by the military itself. That would not of itself render the process unconstitutional. In the exceptional circumstances where civilians are inadvertently subject to military trials within the confines of section 119(1) of the UPDF Act, they would abide the military investigations and prosecution attendant thereto in the interests of national security. In my judgment, it might be untenable for material on national security that is in the possession of the military to be shared with civilian investigators and prosecutors. In the absence of proof, therefore, I find no merit in the assertion that the investigation and prosecution of matters before military courts by military persons renders the said courts an extension of the Executive branch of government. In the same vein, it seems to me that a legal aid service that is well versed with military processes may be more astute for purposes of courts-martial than those with a legal background.

34. Similarly, the appointment of the courts-martial members is approached from the premise that the right to a fair trial undoubtedly requires judges to be impartial, having neither a stake nor an interest in the cases they adjudicate, and no prejudices or biases about cases or the parties. *See* *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,*

Practitioner's Guide No. 1, International Commission of Jurists, p. 26. The same literature posits that the appointment of judges by the Executive branch of government would not be incompatible with the independence of the judiciary, provided that certain safeguards are in place.[2]

35. However, in **Raphael Baranzira & Another v. The Attorney General of Burundi** (supra), it was observed that '**the question of judges' partiality might largely hinge on perception but, once subjected to a judicial process …., must be duly established by cogent and credible evidence**.' I would respectfully agree. The partiality of judges is a question of fact that must, in my view, be established as such. Likewise for military courts. In the absence of sufficient proof thereof, it cannot be suggested that military courts are, by the fact of the military chain of command alone, necessarily so subservient to their appointing authority as to perpetuate injustice in the execution of their mandate. It would thus be speculative to draw the conclusion *ipso facto* that members of military courts are partial on that premise alone.

36. In the result, I am unable to agree with the Petitioners that the courts-martial are neither independent nor impartial as required by Article 28(1) of the Constitution. I would resolve *Issue No. 3* in the negative.

Issues 1 & 2: *Whether the Military Courts have jurisdiction to try civilians for civil offences & Whether charging a person with an offence under section 119(1)(h) of the UPDF Act is unconstitutional as it creates an offence outside an Act of Parliament.*

37. The Petitioners propose that section 119(1)(h) of the UPDF Act does not confer jurisdiction upon military courts in Uganda to try civilians. I must respectfully beg to disagree. That legal provision speaks for itself. It is couched in terms that render it applicable to '*every person*' – military officers and militants that are subject to military law, as well as persons not otherwise subject to military law.

[2] Ibid. at pp. 42, 43.

38. In addition, it is the Petitioners' view that whereas section 119(1)(g) of the UPDF Act does authorize military courts to try civilians that aid and abet a person that is subject to military law in the commission of '*service offences*' (which they interpret to be offences under national security and/ or under the UPDF Act), military courts have wrongfully applied that statutory provision to civilians who aid and abet persons subject to military law to commit *civil offences*. This *modus operandi* is opined to contravene the Ugandan military's constitutional mandate under Article 209(1) of the Constitution to preserve and defend Uganda's sovereignty and territorial integrity.

39. A service offence is defined under the interpretation section of the UPDF Act as '**an offence under this Act or any other Act for the time being in force, committed by a person while subject to military law**.' Meanwhile, section 119(1)(g) of the UPDF Act defines persons subject to military law to include '**every person, not otherwise subject to military law, who aids and abets a person subject to military law in the commission of a service offence**.'

40. In like measure, section 179(1) of the UPDF Act recognizes civil offences as service offences in the following terms:

> **A person subject to military law, who does or omits to do an act—**
> **(a) in Uganda, which constitutes an offence under the Penal Code Act or any other enactment;**
>
> **(b) outside Uganda, which would constitute an offence under the Penal Code Act or any other enactment if it had taken place in Uganda,**
>
> **commits a service offence and is, on conviction, liable to a punishment as prescribed in subsection (2).** *(My emphasis)*

41. In the instant case, the Petitioners portend that they were charged with the offences of treason, misprison of treason and murder before the General Court Martial. Undoubtedly, these are offences under sections 23, 25 and 188 of the Penal Code Act, Cap. 120. It thus becomes apparent that they would constitute service offences under section 179 of the UPDF Act and would be legally triable under section 119(1)(g) of the same Act.

42. This then begs the question as to whether indeed the trial of those service offences under that section of the UPDF Act is a violation of Article 209 of the Constitution. I reproduce Article 209 below.

> **The functions of the Uganda Peoples' Defence Forces are—**
>
> **(a) to preserve and defend the sovereignty and territorial integrity of Uganda;**
>
> **(b) to cooperate with the civilian authority in emergency situations and in cases of natural disasters;**
>
> **(c) to foster harmony and understanding between the defence forces and civilians; and**
>
> **(d) to engage in productive activities for the development of Uganda.**

43. With tremendous respect, I am afraid I find no violation of that constitutional provision in the legally recognized trial in military courts of persons that have by their activities inadvertently subjected themselves to the jurisdiction thereof. I do not find such trial to foster disharmony and misunderstanding between the defence forces and civilians, as seems to be the inference herein; neither do I find it to hamper the sovereignty and territorial integrity of Uganda. It will suffice to observe here that the facts of this case are that the First Petitioner was in the General Court Martial sentenced to a term sentence of one (1) year for an offence that under the Penal Code Act before the civilian courts carries a potential death sentence. In the result, I would resolve *Issue No. 1* in the negative.

44. Relatedly, under *Issue No. 2*, it is the Petitioners' contention that there is a tendency by the military court to charge civilians with civil offences and add the phrase '*with a firearm which is the monopoly of the UPDF*' so as to bring the offence within the confines of section 119(1)(h) of the UPDF Act. In their view, such an offence is neither recognized under the Penal Code Act nor under the UPDF Act.

45. With the greatest respect, I am hard-pressed to appreciate how clarifying the weapon used in an offence of murder removes that offence from the ambit of the Penal Code Act. It seems to me that should the weapon so used conform to such

arms, ammunition or equipment as are ordinarily the preserve of the UPDF, it would certainly fall within the ambit of section 119(1)(h) of the Constitution.

46. In any event, it is argued for the Respondent that section 119(1)(h) of the UPDF Act does not create an offence, as alleged by the Petitioners, but simply delineates persons that may be subject to military law. I agree. That is indeed the import of the sub-title to Part V of the Act, under which that statutory provision lies. Consequently, the question of the provision's compliance with Article 28(12) of the Constitution does not arise. I therefore find no merit in *Issue No. 2*.

D. **Conclusion**

47. Having held as I have on the three substantive issues as framed, I would decline to grant the Declarations and Orders sought in the Petition.

48. I take due cognizance of the general rule that costs should follow the event, unless a court for good reason decides otherwise. Given the importance of the interpretative function of this Court to national governance, I am of the view that unless a Petition is absolutely incongruous and vexatious, condemning a Petitioner to costs would impede that vital duty. In my view, therefore, meritorious constitutional petitions would fall within the exception to that general rule.

49. Consequently, the upshot of my consideration hereof is that I would dismiss the Petition with no order as to costs.

Dated and delivered at Kampala this 15th **day of** Dec **, 2022.**

Monica K. Mugenyi

Justice of the Constitutional Court