

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 042 OF 2016

[CORAM: Buteera, DCJ; Musota, Kibeedi, Mulyagonja & Mugenyi, JCC]

AGABA JOHN PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

JUDGMENT OF RICHARD BUTEERA, DCJ

10 Introduction

This Petition was brought under Article 137 (3) (4) & (7) of the Constitution and The Constitution Court (Petitions & References) Rules, 2005 (S.I. 91 of 2005), where in the petitioner alleged infringement of his fundamental rights and a breach of the Constitution of the Republic of Uganda due to the acts and/ or omissions of the Judicial Service Commissions Disciplinary Committee. The Petition was supported by the affidavit of John Agaba, the Petitioner.

Declarations and orders sought

That:

- 20 i) The act and/ or conduct of the Judicial Service Commission Disciplinary Committee of retiring your petitioner in public interest based on a complaint which had already been determined by the said Disciplinary Committee infringed the Petitioner's right to a fair hearing and is inconsistent with and in contravention of Article 2, 20, 21, 28, 42, 44 and 147 of the Constitution of the Republic of Uganda.
- 25 ii) The act and/ or conduct of the Judicial Service Commission's Disciplinary Committee of preferring charges against your Petitioner in respect of an act or omission involving delay and/ or alleged failure of delivering Judgment in a criminal case, a common judicial practice

which by itself does not constitute a criminal/ disciplinary offence is inconsistent with and in contravention of Articles 2, 20, 28, 42 and 44 of the Constitution of the Republic of Uganda.

5 iii) The act and/ or conduct of the Judicial Service Commission of lifting the judicial immunity accorded to judicial officers and holding the Petitioner personally liable for a judicial act and/ or omission in the discharge of his judicial work is inconsistent with and in contravention of Article 2, 20, 28, 42, 44, 128 (4), 173 of the Constitution of the Republic of Uganda.

10 iv) An act and/ or conduct of the Judicial Service Commission of passing the sentences of severe reprimand and/ or retirement in public interest without notice and hearing from your Petitioner is inconsistent with and in contravention of Article 28, 42 and 44 of the Constitution of the Republic of Uganda.

15 v) An order to quash and expunge from the Public records the charges and disciplinary proceedings instituted by the Disciplinary Committee of the Judicial Service Commission.

20 vi) An order to quash the decision retiring your Petitioner in public interest, and the Petitioner be reinstated to his job as a Judicial Officer and confirmed as a Chief Magistrate as determined by the Judicial Service Commission Disciplinary Committee.

25 vii) An order be made requiring the Petitioner to be paid his salary from the time his employer stopped payment of his salaries till reinstatement to his job as a Judicial Officer.

30 viii) General damages be ordered to be paid for inconvenience, mental anguish and injury occasioned to your Petitioner.

ix) Costs of the Petition.

x) Any other or further orders as court may deem fit.

Background

The Petitioner was a judicial officer, having been appointed to the bench in 1993 as a Magistrate Grade One. He rose to the position of Acting Chief Magistrate. In 2003, while serving as the Acting Chief Magistrate at Kasese, he handled a
5 defilement case. He was transferred from that station before delivering judgment in the matter. Kamugisha Arthur, father of the defilement victim, made a complaint to the Judicial Service Commission regarding the delayed judgment.

The Disciplinary Committee of the Judicial Service Commission preferred charges against the Petitioner, conducted a hearing, found him guilty, and
10 recommended that he is sentenced to a severe reprimand. The Judicial Service Commission, however, decided to retire him in public interest.

Grounds of the Petition

The grounds upon which the Petition was premised were laid down in the Petitioner's affidavit, wherein he averred, *among other things*, that:

- 15 • Throughout the proceedings and consequent ruling, the mindset of the Judicial Service Commission Disciplinary Committee (JSCDC) was set as though the Petitioner had handled a defilement case, whereas the matter before the Petitioner was a case of indecent assault. This wrong mindset of the Disciplinary Committee (DC) biased it in its decision against the
20 Petitioner.
- In its ruling, the JSCDC the Petitioner to be sentenced to a SEVERE REPRIMAND. They also recommended that he should be confirmed in the position of Chief Magistrate.
- The Petitioner is aggrieved in being charged and tried as this violates his
25 Constitutional immunity as a Judicial officer.
- That the above notwithstanding, barely a month later, the Judicial Service Commission (JSC) did sit and decide to retire the Petitioner in public interest.

- That the Petitioner was not given any notice, and/ or any hearing in the proceedings that led to his being retired in public interest, nor the JSCDC recommendation for a sentence of severe reprimand.
- That as a result of being retired in public interest, the Petitioner lost a job- his only source of livelihood as a judicial officer. He has been denied his trade and profession as a Chief Magistrate.
- That the acts and/ or omissions of the JSC complained of in this Petition are all inconsistent and in contravention of the provisions of the Constitution and are causing the Petitioner to suffer infringement of his fundamental rights and are a breach of the Constitution of the Republic of Uganda.

Response to the Petition

In response to the Petition, an affidavit dated 24th August 2021, was sworn by one Julius Mwebembezi, the Registrar to the Judicial Service Commission. He averred, that:

- That a complaint was lodged against the petitioner in September 2008 to the Commission, by *Mr Kamugisha Arthur* arising out of *Criminal Case KAS/00/CR/0175/2002- Uganda v Mwirimubi Brian* against the petitioner, that the judgment therein had been unreasonably delayed from 2003 to 2008 to their detriment;
- That by a letter dated 27th April 2011, the Commission summoned the petitioner to respond to the allegations;
- That by a letter dated 9th May 2011, the petitioner responded and stated that '*no judgment has ever been read*';
- That the complaint was fully investigated and the petitioner was charged with acting in contravention of the code of Judicial conduct contrary to Regulation 23 (j) of the Judicial Service Commission Regulations, 2005, for failing to deliver a Judgment within the stipulated time as spelt out under Principle 6 of the Uganda Code of Judicial Conduct.

- That the matter was then set down for disciplinary hearing from the 23rd day of October 2012 wherein the petitioner was given an opportunity to be heard and he defended himself.
- That the Disciplinary Committee made its ruling on 25th January 2016, finding him guilty of the misconduct and recommended that he be severely reprimanded on grounds that he had been previously reprimanded in the matter of *PRI/67/95/159/03 Charles Tumwesigye v Agaba John*.
- That the disciplinary committee forwarded the file to the full Commission for its final decision.
- That the Commission in its 246th meeting held on 1st February 2016 considered the recommendations of the Disciplinary Committee and made a final decision to retire the petitioner in public interest.
- That the Commission decision was communicated to the Chief Registrar for implementation and the petitioner was retired in public interest.

Representation

At the hearing of the Petition, the Petitioner was represented by Machere Nyambok Omondi holding brief for Brian Okello, while the respondent was represented by Geoffrey Atwine, a Principal State Attorney, representing the Attorney General.

Issues to be resolved

1. Whether the Petition raises any matter for constitutional interpretation.
2. Whether the act of the Judicial Service Commission of trying and sentencing the Petitioner for failing to deliver a judgment within 60 days was inconsistent with and in contravention of Articles 2, 20, 28, 42, 44, 128 (4), 147 and 173 of the Constitution.
3. Whether the act of the Judicial Service Commission of retiring the Petitioner on a complaint that had been heard and determined infringed the Petitioner's right to a fair hearing and is inconsistent with Articles 2, 20, 21, 28, 42, 44 and 147 of the Constitution.

4. Whether the act/ conduct of the Judicial Service Commission of lifting the judicial immunity enjoyed by the Petitioner while carrying out his judicial duties and charging him with acting in contravention of the Code of Judicial Conduct contrary to regulation 23 (J) of the Judicial Service Commission Regulations 2005, was inconsistent with and in
5 contravention of Articles 2, 20, 28, 42, 44, 128 (4), 147 and 173 of the Constitution.

5. Whether the Petitioner is entitled to the remedies and declarations sought.

The Petitioner's case

10 Issue 1

Whether the Petition raises any matter for constitutional interpretation

Counsel for the Petitioner observed that the jurisdiction of the Constitutional Court is derived from Article 137 of the Constitution. That the same had been interpreted variously by both this Court and the Constitutional Appeal Court. He
15 cited ***Rapahel Baku Obudra v. Attorney General; Supreme Court Constitutional Appeal No. 01 of 2003.***

He submitted that the act of the Judicial Service Commission (JSC) charging the Petitioner with breach of the Judicial Code of Conduct contrary to Regulation 23 (j) of the Judicial Service Commission Regulations was inconsistent with and in
20 contravention of Article 147 of the Constitution that provides for the functions of the JSC. As such, the petitioner required the interpretation of that Article to clarify whether the functions therein also empowered the JSC to enact or create service offences for judicial officers like failing to deliver a judgment within 60 days and further, whether the JSC by entertaining such an offence was not
25 acting under the influence, direction and/ or control of the Code of Judicial Conduct- guidelines that are not made/ issued and/ or promulgated by the Commission.

Counsel pointed out that under Article 147 (f) of the Constitution, the JSC is given 'any other function' prescribed by the Constitution or by Parliament. That pursuant to that, Parliament enacted the Judicial Service Act which provides for the functions of the JSC under Section 5 and the same did not include creating offences. He contended that it was Section 27 of the Judicial Service Act that gave the Commission powers to make regulations in relation to the discharge of its functions and this power did not include prescribing or creating offences. And as such, the question for this Court was whether the JSC could create offences beyond its functions as stipulated both in the Constitution and the Judicial Service Act.

He further pointed out that this Court needed to establish whether charging a person for an offence under the Code of Conduct was ultravires the functions of the JSC and whether it amounted to a direction of the Commission in the performance of its functions, and thus inconsistent with Article 147 (2) of the Constitution.

Citing ***Vincent L'Okucha Emoru v A.G; Constitutional Court Case No. 5 of 1998***, counsel also pointed out that this Court did interpret Article 28 (12) to the effect that disciplinary offences are not criminal offences to be covered under that Article. He stated that although the Court did not address the role of the Director of Prosecutions (DPP), yet Section 28 of the Judicial Service Act stipulates that no judicial officer will be charged under the Act without the consent of the DPP. To him, since the offences under the Judicial Service Act required the consent of the DPP, they were criminal in nature and as such, Article 28 (12) of the Constitution should apply to them.

Based on the above, counsel contended that there were matters that required the interpretation by this Court and as such, this Court had jurisdiction in the matter.

Issue 2

Whether the act of the Judicial Service Commission of trying and sentencing the Petitioner for failing to deliver a judgment within 60 days was inconsistent with and in contravention of Articles 2, 20, 28, 42, 44, 128 (4), 147 and 173 of the Constitution.

Counsel submitted that the functions of the JSC as established under Articles 146 and 147 of the Constitution, and specifically under Article 147 (d) and (f), do not include creating service offences for which judicial officers could be charged. He stated that the nearest could be, *'to receive and process people's recommendations'*, yet even that did not include creating offences like failure to deliver judgment within 60 days.

He contended that whereas Section 27 of the Judicial Service Act gives the JSC powers to make Regulations, Section 27 (2) gives the kind of regulations that can be made and this does not include creating offences. Counsel submitted that the offences made under Regulation 23 of the Judicial Service Commission Regulations, 2015, were unconstitutional and inconsistent with Articles 146 and 147 of the Constitution.

Counsel submitted further that Regulation 23 (j) under which the Petitioner was specifically charged was not defined by the said Regulations or any other law. He argued that the Code of judicial conduct in Uganda was like a Memorandum of Understanding of judicial officers to be guided by the 'Code' in the discharge of their duties. That being the case, if the JSC was charging judicial officers for breaching the Code of conduct, then the JSC was working under the direction of judicial officers which contravened Article 147 (2) that provides that the JSC is independent and cannot be subject to the direction or control of any person or authority including the judicial officers.

Issue 3

Whether the act of the Judicial Service Commission of retiring the Petitioner on a complaint that had been heard and determined infringed the Petitioner's right to a fair hearing and is inconsistent with Articles 2,
5 20, 21, 28, 42, 44 and 147 of the Constitution.

Counsel contended that '*exercising disciplinary control over persons*' was not an open cheque for the JSC to charge a judicial officer with an offence unknown in law. He submitted that Article 148 did not give the JSC power to remove a judicial officer from his position at will. Citing ***Davis Wesley Tusingwire v Attorney***
10 ***General; Supreme Court Constitutional Appeal No. 04 of 2016***, counsel submitted that in interpreting the Constitution, all Articles should be read as an integral whole, with each supporting the other.

Counsel argued that the Petitioner was charged with the offence of failing to write a judgment within 60 days which is not known in law. He was given a hearing
15 to defend himself on that charge but he was not given a hearing when he was retired in public interest. Counsel cited the case of ***De Souza v. Tanga Town Council; 1961 EA 377***, where it was held that if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the principles
20 of justice, that decision must be declared to be no decision. He also cited ***Ridge v. Baldwin (1964) AC 40***, where it was held that a decision reached in violation of the principles of natural justice especially relating to the right to be heard is void and unlawful.

Counsel contended that Section 11 of the Judicial Service Act which provides
25 that in the removal of a judicial officer, that officer must be informed of the particulars of the case against him and must be given a right to defend himself. Counsel posed a question as to whether Article 148 of the Constitution gave the JSC powers to do what it pleased when there were laws governing its operations. He argued that the charge of failure to write a judgment within 60 days was

handled and completed and the petitioner was sentenced to a severe reprimand, and that being the case, the JSC had no power to do as it pleased by retiring the petitioner in public interest without following the law.

He contended further that Regulation 29 of the Judicial Service Commission Regulations, 2005, provides that the Chief Registrar was the responsible officer to initiate proceedings against a judicial officer leading to his removal. In this case, counsel submitted that the Petitioner was retired in public interest on a complaint of failing to write a judgment within 60 days, which complaint was not initiated by the Chief Registrar. Counsel contended that the acts of the JSC above contravened Articles 44, 128, 147 and 148 of the Constitution.

Issue 4

Whether the act/ conduct of the Judicial Service Commission of lifting the judicial immunity enjoyed by the Petitioner while carrying out his judicial duties and charging him with acting in contravention of the Code of Judicial Conduct contrary to regulation 23 (J) of the Judicial Service Commission Regulations 2005, was inconsistent with and in contravention of Articles 2, 20, 28, 42, 44, 128 (4), 147 and 173 of the Constitution.

Counsel submitted that the Petitioner was charged with an offence that is not written and is unknown in the law. A written law would have put the Petitioner on guard. He cited an example of advocates who know the offences they could be charged with under the Advocates Act.

He also cited the examples of the Judicial Codes of Conduct of Kenya and Zambia which had been reduced into a Code. He submitted that the Uganda Judicial Code of Conduct was not a Code at all as it was not promulgated and approved by Parliament, as is stipulated under Articles 79 of the Constitution that it is only Parliament that has powers to make laws on any other matter and no other person has powers to make law or any other provisions having the force of law in Uganda except under the authority conferred by an Act of Parliament.

To counsel, it was thus inconsistent with the Constitution for the Petitioner's immunity to be lifted and for him to be charged with an offence that did not have the force of law in Uganda.

Issue 5

5 Whether the Petitioner is entitled to the remedies and declarations sought.

Counsel prayed that Court finds that the acts of the JSC against the Petitioner were inconsistent with the cited provisions of the Constitution and that the Petitioner is entitled to the declarations sought and the remedies outlined in the Petition.

10 The respondent's case

Issue 1

Counsel submitted that the Petitioner went through due process when he was charged. He was given a fair hearing before the Committee which found him guilty as charged and recommended a punishment of severe reprimand. He stated that the JSC acting on the recommendation of the D.C. and considering his past record, retired the Petitioner in public interest. It was thus counsel's contention that that could not be a point for constitutional interpretation but rather one of enforcement of rights. To him, the right remedy for the Petitioner was to seek for enforcement of his rights under Article 50 of the Constitution.

According to counsel, there was no matter for constitutional interpretation. Counsel cited the authorities of *Ismail Serugo v. Kampala City Council & Attorney General; Constitutional Appeal No. 02 of 1998; Attorney General v. Major General David Tinyefuza; Constitutional Appeal No. 1 of 1997*; that have addressed the issue of the jurisdiction of this Court.

He submitted that the mandate of the JSC was set out under Articles 147 and 148 of the Constitution and there- under, the JSC was legally mandated to discipline judicial officers of the category under which the Petitioner fell. He argued that following that constitutional mandate and Section 5 of the Judicial

Service Act, the JSC Regulations, 2005, were promulgated. He went on to point out that Regulation 23 of the JSC Regulations stipulates the offences which warrant disciplinary action by the JSC, including; abuse of judicial authority and contravention of the Code of Judicial Conduct, the offences that the
5 Petitioner herein was charged with.

To counsel, the offences created under Regulation 23 fell squarely within the mandate and functions of the JSC under Articles 147 and 148, and that the two ought to be read together to achieve harmony. He argued that it could not, therefore, be rightly said that Article 147 of the Constitution which prescribes
10 the functions of the JSC does not empower it to enact or create service offences for judicial officers. He implored this Court to read the Constitution as a whole, rather than isolating some provisions.

Counsel for the respondent contended that the petitioner's argument that charging an officer with an offence under the Code of Judicial Conduct was ultra
15 vires the functions of the JSC, was moot. To him, the Petitioner was never charged under the Code but rather under Regulation 23 of the JSC Regulations. He stated that it was Regulation 23 that created the offence not the Code of Conduct. He argued that since it was not possible to prescribe each and every type of conduct which amounts to indiscipline, the Regulations make reference
20 to Code of Conduct which provides guidance for regulating judicial conduct.

Counsel further submitted that equally moot was the argument that charging a person under the Code amounts to interference with the independence of the JSC. He argued that the argument was not only farfetched but without basis since the Petitioner did not show how the independence of the JSC was
25 compromised through the said actions. He reiterated that the impugned offences were created under the JSC Regulations and not the Code of Conduct and stated that there was, therefore, no contravention of Article 147 (2) of the Constitution.

Furthermore, he argued that the offences under Regulation 23 of the Commission Regulations are not criminal offences and as such cannot be subject

to the requirements of Article 28 (12) of the Constitution requiring an offence to be specifically defined and the penalty for it prescribed by law.

Issues 2 and 4

5 Counsel for the respondent cited Regulation 23 of the Judicial Service Commission Regulations, 2005, that provides for the offences a judicial officer may commit against discipline offences. He equally cited Regulation 29 that lays down the procedure of trying a judicial officer if the misconduct requires dismissal. Regulation 31 gives the penalties.

10 Counsel also cited Section 10 of the Judicial Service Act, 1997, that provides for meetings and decisions of the Commission. He noted Regulation 13 (2) of the Judicial Service (Complaints and Disciplinary Proceedings) Regulations, 2005, that provides that the Commission may delegate its functions to the Disciplinary Committee.

15 He thus contended that the Disciplinary Committee of the JSC only acts on delegated authority from the Commission. He contended further that when handling disciplinary matters under Section 10 (6) of the Judicial Service Act, the Committee makes recommendations and reports its findings to the Commission for the final decision.

20 He referred to Regulation 31(3)(a) of the Judicial Service Commission Regulations that provides that nothing in the Regulations shall limit the powers conferred on the Commission to retire a judicial officer from the service on grounds of public interest.

25 Counsel submitted that the Petitioner was given a fair hearing as is evidenced in the affidavit of Julius Mwebembezi showing that the Petitioner went through a due process, was given a fair hearing and a recommendation for severe reprimand made by the Disciplinary Committee to the Commission. That it was on the basis of Regulation 31 (3) (a) of the Commission Regulations that the Commission took a decision to retire the Petitioner in public interest. To counsel,

those actions were not inconsistent with Articles 2, 20, 28, 42, 44, 128 (4) and 173 of the Constitution.

Issue 3

5 Counsel submitted that whereas Article 128 (4) of the Constitution provides immunity to a judicial officer, that immunity does not mean that the judicial officer cannot be subject to disciplinary proceedings in respect of acts contrary to the judicial conduct under the JSC Regulations, as was the case in the instant Petition. He noted that judicial officers were accountable for their conduct to the appropriate institutions to maintain judicial standards. He cited the case of
10 ***Attorney General v. Gladys Nakibuule Kisekka; Supreme Court Constitutional Appeal No. 02 of 2016***, and submitted that the authority was instructive and clearly put the issue of judicial immunity to rest. He contended that the act of the JSC charging the Petitioner for acting in contravention of the Judicial Code of Conduct was consistent with the mandate of the Commission
15 under Article 148 of the Constitution and did not in any way contravene the constitutional protection accorded a judicial officer under Article 128 (4) and nor does it amount to a violation of Articles 2, 20, 28, 42, 44 and 173 of the Constitution.

Issue 5

20 Counsel submitted that premised on the resolution of Issues 1, 2, 3 and 4, it was the respondent's case that the Petitioner is not entitled to any of the remedies and orders sought for. He thus prayed that the Petition be dismissed with costs.

Court's consideration

Issue 1

25 **Whether the Petition raises any matter for constitutional interpretation.**

The jurisdiction of the Constitutional Court is derived from Article 137 of the Constitution. It provides thus:

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.

5 (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

10 (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.”

In *Constitutional Appeal No. 01 of 1997; Attorney General v Major General*

15 *David Tinyefuza*, Hon. Justice Wambuzi, CJ, (as he then was) held:

“In my view, jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these

20 circumstances, I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.”

(Sic) (Emphasis added)

25 In *Raphael Baku Obudra v Attorney General; Constitutional Appeal No. 1 of 2003*, Mulenga JSC observed:

5 “In a number of cases such as Attorney General v. Major General Tinyefuza, Constitutional Appeal No. 1 of 1997 (S.C.) and Serugo v. Kampala City Council, Constitutional Appeal No. 2 of 1998 (S.C.) this court has expressed the view that in constitutional petitions brought under Article 137(3) of the Constitution, a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration.” (Sic) (Emphasis added)

10 In the instant matter, to establish whether the Petition raises questions for constitutional interpretation will require this Court to look at the Petition itself. For ease of reference, I will reproduce a portion of the Petition here below:

PETITION

15 **(Under Article 137 (3)(4) And (7) Of The Constitution And The Constitution Court (Petition And Reference) Rules S.I 91 Of 2005)**

The Humble Petition of **AGABA JOHN** C/o M/s Alliance Advocates, Plot No. 44, Nakasero Road, P.O. Box 4109, Kampala whose name is stated at the foot of this Petition sheweth.

- 20 1. Your Petitioner is a male adult Ugandan of sound mind recently designated as Acting Chief Magistrate of the Courts of Judicature.
2. The Respondent is the constitutionally mandated legal representative of the Government of Uganda in all legal proceedings.
- 25 3. Your Petitioner states that he has/ is suffering the infringement of his fundamental rights and a breach of the Constitution of the Republic of Uganda due to the acts and/ or omissions of the Judicial Service Commissions Disciplinary Committee all of which are inconsistent with and in contravention of the provisions of the Constitution by reason whereof your Petitioner is aggrieved, interested in and seeks the following declarations and orders;

The Petition goes ahead to list the declarations and orders sought under paragraph 3. Paragraph 4 of the Petition gives the factual background. Paragraphs 3 and 4 have been re-produced in the introductory part of this Judgment. From a simple and quick perusal of the Petition, there is no mention or reference to any provision of the Constitution that was contravened. What the Petitioner does is complain about the 'acts and conduct' and 'attitude' of the Judicial Service Commission during the disciplinary hearing of the complaint against him.

Bearing in mind the decision of the Supreme Court in **Raphael Baku Obudra v Attorney General** (supra) to the effect that a cause of action is disclosed if the petitioner alleges the act or omission complained of and cites the provision of the Constitution which has been contravened and prays for a declaration, I cannot but find that the Petition herein has fallen short of meeting that standard.

It was rather a disguised claim for the enforcement of his alleged infringed human rights. As a matter of fact, paragraph 3 of the Petition clearly demonstrates the Petitioner's allegation of the infringement of his human rights. This is a matter that can be safely addressed by any court proceeding under Article 50 of the Constitution. Article 50 (1) of the Constitution provides:

“(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.”

On this particular aspect, the Supreme Court (Kanyeihamba, JSC) in **Ismail Serugo v Kampala City Council; Constitutional Appeal No. 02 of 1998**, reviewed its decision in **Attorney General v Major General David Tinyefuza; Constitutional Appeal No. 1 of 1997**, and stated thus:

“There is a number of facets to the decision of the Supreme Court in that case. Nevertheless, when it comes to that Court's view of the jurisdiction of the Court of Appeal as a

Constitutional Court, its decision in that case is that the Constitutional Court has no original jurisdiction merely to enforce rights and freedoms enshrined in the Constitution in isolation to interpreting the Constitution and resolving any dispute as to the meaning of its provisions. The judgment of the majority in that case, [Wambuzi, C.J., Tsekooko J.S.C., Karokora J.S.C., and Kanyeihamba J.S.C.], is that to be clothed with jurisdiction at all, the Constitutional Court must be petitioned to determine the meaning of any part of the Constitution in addition to whatever remedies are sought from it in the same petition. It is therefore erroneous for any petition to rely solely on the provisions of Article 50 or any other Article of the Constitution without reference to the provisions of Article 137 which is the sole Article that breathes life in the jurisdiction of the Court of Appeal as a Constitutional Court.”

(Emphasis ours)

Wambuzi, CJ, in *Attorney General v Major General David Tinyefuza* (supra) set out the limits of the jurisdiction of this court as provided for in Article 137 of the Constitution, as follows:

“In my view, jurisdiction of the Constitutional Court is limited in Article 137 (1) of the Constitution to interpretation of the Constitution. Put in a different way no other jurisdiction apart from, interpretation of the Constitution is given. In these circumstances, I would hold that unless the question before the Constitutional Court, depends for its determination on the interpretation of the Constitution or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction.”

In the instant case, the petitioner simply sought an enforcement of his rights that he claims were violated by the manner in which the JSC Disciplinary Committee handled the complaint against him, and the decision that was eventually reached by the Commission to retire him in public interest. Short of that, there is nothing that requires this court's mandate of interpretation in as far as Article 137 of the Constitution provides. I, therefore, answer issue 1 in the negative.

Having found under Issue 1 that the Petition raises no question for constitutional interpretation, I would ordinarily dismiss the whole Petition at this point. Nonetheless, for purposes of completeness of this Judgment, I will proceed to resolve the remaining issues.

Issue 2

It was the contention of counsel for the Petitioner that the JSC had no mandate to enact an offence such as failure to deliver a judgment in 60 days and accordingly find him guilty of the same and decide to dismiss him from service in public interest. On the other hand, counsel for the respondent pointed out that the Commission preferred charges against the Petitioner using Regulation 23 of the JSC Regulations which was well within its mandate under Article 147 of the Constitution.

Article 146 of the Constitution provides for the establishment of the Judicial Service Commission. Article 147 gives the functions of that Commission. It provides:

“Functions of the Judicial Service Commission

(1) The functions of the Judicial Service Commission are—

(a) to advise the President in the exercise of the President's power to appoint persons to hold or act in any office specified in clause (3) of this article, which includes power to confirm

appointments, to exercise disciplinary control over such persons and to remove them from office;

(b) subject to the provisions of this Constitution, to review and make recommendations on the terms and conditions of service of judges and other judicial officers;

(c) to prepare and implement programmes for the education of, and for the dissemination of information to judicial officers and the public about law and the administration of justice;

(d) to receive and process people's recommendations and complaints concerning the judiciary and the administration of justice and,

generally, to act as a link between the people and the judiciary;

(e) to advise the Government on improving the administration of justice; and

(f) any other function prescribed by this Constitution or by Parliament.

(2) In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority.

(3) The offices referred to in clause (1)(a) of this article are— (a) the office of the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court; and (b) the office of the Chief Registrar and a registrar."

Article 148 of the Constitution also provides for the appointment of other judicial officers, as follows:

“Subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified in article 147(3) of this Constitution and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office.”

Pursuant to its powers under Article 79 of the Constitution, Parliament enacted the Judicial Service Act, 1997, as an *‘Act to regulate and facilitate the discharge by the President and the Judicial Service Commission of their functions under Chapter Eight of the Constitution pursuant to clause (2) of article 150 of the Constitution, and for other matters related to the Judiciary’*.

Under Section 28 of the Judicial Service Act, powers are given to the Commission to make Regulations. This power is well within the permission granted by Parliament under Article 79 (2) of the Constitution. Section 28 provides:

“(1) The Commission may, by statutory instrument, make regulations in relation to the discharge of its functions under the Constitution and under this Act.

(2) Without prejudice to the general effect of subsection (1), regulation may be made under it-

(a) regulating the manner in which matters shall be referred to the Commission;

(b) providing for and regulating the conduct of disciplinary proceedings by the Commission

(c) providing for the organization of the work of the Commission and regulating the manner in which it shall exercise its functions;

(d) prescribing disciplinary penalties and awards; and

(e) requiring persons to attend before the Commission to answer questions relating to the exercise by the Commission of its functions.”

By that power, there was enacted the Judicial Service Commission Regulations,
5 No. 87 of 2005.

In the instant Petition, the Petitioner was charged with ‘*failure to deliver a judgment within 60 days*’ under Regulation 23 (j) of the Regulations. Regulation 23 generally provides for offences. Regulation 23 (j) provides:

10 **A judicial officer commits an offence against discipline if he or she does all or any of the following—**

(a).....;

(b)

(c)

(d).....;

15 **(e).....;**

(f).....;

(g).....;

(h).....;

(i).....;

20 **(j) acts in contravention of the Code of Judicial Conduct, the Judicial Oath or any other oath taken by the judicial officer;**

(k)

It is worth- noting at this point that distinction should be made between offences under penal laws like the Penal Code Act, Cap 120, the Anti- Corruption Act, No.
25 6 of 2009, among others, and service offences like the ones being impugned

under this Petition. Penal offences require proof beyond reasonable doubt before a court of law. Service offences, on the other hand, are handled by the respective disciplinary bodies of the various institutions. For the case of the Judiciary, one such body is the Judicial Service Commission as provided for under Article 147
5 of the Constitution.

That noted, a look at the Uganda Code of Judicial Conduct shows that it is a commitment adopted by the Judicial Officers to provide guidance for regulating judicial conduct. The same gives 6 principles and rules, viz; Independence; Impartiality; Integrity; Propriety; Equality, and Competence and Diligence. Under
10 Competence and Diligence, it is provided:

“6.2. A Judicial Officer shall promptly dispose of the business of the court, but in so doing, must ensure that justice prevails. Protracted trial of a case must be avoided wherever possible. Where a judgement is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so.”

(Emphasis added)

It was the Petitioner’s contention that the Judicial Code of Conduct is simply a guide and a memorandum that was reached by the judicial officers. That as such, for the JSC to charge him for violating it was acting ultra vires and that in
20 so doing, the Commission was acting under the direction of the Judicial officers hence violating its constitutional independence as provided for under Article 147 (2) of the Constitution. Counsel for the respondent, on his part, contended that it was Regulation 23 that created the offence not the Code of Conduct. He argued that since it was not possible to prescribe each and every type of conduct which
25 amounted to indiscipline, the Regulations make reference to Code of Conduct which provides guidance for regulating judicial conduct.

By the wording of the Uganda Judicial Code of Conduct, the same is an undertaking by judicial officers to be guided by the principles and rules laid down therein. It reads in part:

**“NOW WE THE JUDICIAL OFFICERS OF UGANDA DO HEREBY
ADOPT the following principles and rules designed to provide
guidance for regulating judicial conduct AND to be known as
"The Uganda Code of Judicial Conduct”**

5 However, these principles and rules have been given the force of law under Regulation 23 (j) of the Commission Regulations. As such, it cannot be rightly said that the Petitioner was charged under a non- existent offence.

As for the argument that in adopting the provisions of the Judicial Code of Conduct, the Commission then works under the direction of the judicial officers
10 thereby forfeiting its independence, I would find the contention baseless. This is because in the performance of its duties, the Commission conducts a hearing before it reaches its final decision. Besides, the Commission would not act in isolation of the Institutions it is designed to administer. In this case, it is designed to appoint persons to hold or act in any judicial office, and that power
15 includes power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office. If the Judiciary has come up with a Code to guide the performance of its officers, then there is no harm if means are put in place to hold the officers accountable to that standard as set out in the Code. I find that Regulation 23 (j) was legally provided for and it does not
20 take away the independence of the JSC. I would answer that Issue in the negative.

Issue 3

In arguing this Issue, the Petitioner sought to suggest that the Disciplinary Committee of the Judicial Service Commission was independent of the
25 Commission. He argued that the Committee heard him on the charge and recommended a *SEVERE REPRIMAND*. He stated that he was alarmed to learn that the Commission then later sat and decided to retire him in public interest.

Section 12 of the Judicial Service Act provides for the observance of the rules of natural justice. It provides:

5 **“In dealing with matters of discipline, and removal of a judicial officer, the commission shall observe the rules of natural justice and in particular, the Commission shall ensure that an officer against whom discipline or removal proceedings are being taken is-**

(a) informed about the particulars of the case against him or her;

(b) given the right to defend himself or herself and present his or her

10 **(c) case at the meeting of the Commission or at any inquiry set up by the Commission for the purpose;**

(d) where practicable, given the right to engage an advocate of his or her own choice; and

(e) told the reasons for the decision of the commission.”

15 Section 28 (1) of the Judicial Service Act provides that the Commission may by, statutory instrument, make regulations in relation to the discharge of its functions under the Constitution and under this Act. Section 28 (2) provides:

(2) Without prejudice to the general effect of subsection (1), regulation may be made under it-

20 **(a) regulating the manner in which matters shall be referred to the Commission;**

(b) providing for and regulating the conduct of disciplinary proceedings by the Commission;

25 **(c) providing for the organization of the work of the Commission and regulating the manner in which it shall exercise its functions;**

(d) prescribing disciplinary penalties and awards; and

(e) requiring persons to attend before the Commission to answer questions relating to the exercise by the Commission of its functions.”

5 The Judicial Service (Complaints and Disciplinary Proceedings) Regulations, 2005 (S.I. No. 88 of 2005) provides under the Interpretation section that the ‘disciplinary committee’ means the disciplinary committee of the Commission. Regulation 14 gives the composition of the Committee to be at least three members who shall also constitute the coram. Regulation 19 provides for the law
10 applicable and states:

(1) Proceedings before the Disciplinary Committee shall be governed by general principles of law applicable in Uganda.

(2) The Commission shall handle complaints in the best interest of the public and of the Judiciary.

15 Regulation 17 provides that the decision of the Commission shall be in writing.

In the instant Petition, the Petitioner confirms under paragraph 6 of his affidavit in support of the Petition, that the Disciplinary Committee of the JSC preferred charges against him, conducted a hearing and found him guilty. It is not contested that he appeared before the Committee and defended himself. That
20 far, it cannot be true that his right to a fair hearing was violated. For him to claim that the Committee having already punished him by recommending a SEVERE REPRIMAND, the Commission could not punish him by retiring him in public interest, was rather outrageous. As already noted, the Committee is a part of the Commission. The two are not separate entities. The Committee hears the
25 complaints and makes recommendations to the Commission. It is the Commission that then makes a final decision. In this case, it did make the decision to retire the Petitioner and duly communicated this decision in writing. As for the information that a recommendation for a SEVERE REPRIMAND had been made, the Petitioner only got wind of that upon applying for a copy of the

proceedings of the Disciplinary Committee. There is no evidence that the Petitioner had already been punished with a severe reprimand and was then subjected to another punishment of retirement in public interest. The petitioner did not present such evidence and he had a duty to prove his own allegation.

- 5 On the contention that under Regulation 29 of the JSC Regulations, only the Chief Registrar is the responsible officer to initiate proceedings against a judicial officer leading to his removal, yet in this case, the Petitioner was retired in public interest on a complaint of failing to write a judgment within 60 days, which complaint was not initiated by the Chief Registrar, we will look at the relevant
10 provisions. Regulation 29 of the JSC Regulations provides:

“29. Misconduct justifying dismissal

15 **(1) Where the Chief Registrar or the responsible officer considers it necessary to institute disciplinary proceedings against a judicial officer other than a Judge, on the ground of misconduct which, if proved, would justify dismissal from the service, the Chief Registrar or the responsible officer shall, after any preliminary investigations, which he or she considers necessary—**

20 **(a) forward to the judicial officer a statement of the charge or charges framed against the judicial officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based; and**

25 **(b) call upon the judicial officer to state in writing before a day to be specified by the Chief Registrar or the responsible officer, any grounds on which the judicial officer relies to exculpate himself or herself.**

(2) If the judicial officer does not furnish a reply to any charge under sub regulation (1) within the specified period, or if in the

opinion of the Chief Registrar or the responsible officer, the judicial officer fails to exculpate himself or herself, the Chief Registrar or responsible officer shall make a report and forward copies of that report, the statement of the charges and the reply, if any, of the judicial officer to the Secretary.

(3) If, upon consideration of the report of the Chief Registrar or the report of the responsible officer, the Commission is of the opinion that proceedings for the dismissal of the judicial officer should be continued, it shall inquire into the matter in such manner as it thinks fit. (4) The Commission shall inform the judicial officer that on a specified day the charges made against him or her will be investigated and that the judicial officer will be allowed or, if the Commission so determines, will be required to appear before it to defend himself or herself.

(5) Where a witness is examined by the Commission, the judicial officer shall be given an opportunity of being present and of putting questions to the witness and no documentary evidence shall be used against the judicial officer unless he or she has previously been supplied with a copy of the documentary evidence or been given access to the document.

(6) The Commission shall, where a judicial officer so requests, permit the judicial officer to be represented at its proceedings by an advocate.

(7) A charge may be amended at any stage of the proceedings as long as the amendment does not cause a miscarriage of justice."

The above clearly provides for circumstances where the Chief Registrar or responsible officer considers it necessary to institute disciplinary proceedings

against a judicial officer other than a Judge. However, this should not be read in isolation of Regulation 3 of the Judicial Service (Complaints and Disciplinary Proceedings) Regulations, 2005. It provides:

“3. Filing of complaint

5 **(1) A person or organisation aggrieved by the improper conduct of a judicial officer or with a complaint concerning the judiciary or the administration of justice generally may make a complaint to the Commission.**

10 **(2) Where an aggrieved party cannot make a complaint on his or her own, a relative, friend or legal representative may make a complaint on his or her behalf.”** (Emphasis mine)

The two provisions (Regulation 29 of the JSC Regulations and Regulation 3 of the Judicial Service (Complaints and Disciplinary Proceedings) Regulations), create distinct circumstances under which a complaint may be made to the Commission. However, what is emphasized under both scenarios is the need to ensure compliance with the principles of natural justice; that is, the person against whom the proceedings are brought must be given an opportunity to defend himself and must be informed of the nature of the complaint brought against him or her.

20 In this case, the Petitioner’s case came to the Commission through a complaint by an individual that was aggrieved by the delayed judgment. The Commission considered the complaint, heard the Petitioner and made a decision. That decision was well within its mandate under Regulation 31 of the JSC Regulations on disciplinary penalties which may be imposed by the Commission and particularly; Regulation 31 (3) (a) that provides:

“(3) Nothing in this regulation shall-

(a) **Limit the powers conferred on the Commission by these Regulations to retire a judicial officer from the service on grounds of public interest;"**

I would find that the Petitioner was duly heard and the decision to retire him in public interest was duly reached. I would accordingly answer this issue in the negative.

Issue 4

The question of judicial immunity has been ably and well settled by the Supreme Court of the land. In the case of *Attorney General v Gladys Nakibuule Kisekka; Constitutional Appeal No. 02 of 2016*, Dr. Tibatemwa, held:

"I further opine that the concept of judicial immunity is only applicable to judicial acts properly so called. The concept cannot extend to acts not qualified as judicial although performed by a judicial officer. Even if so qualified, judicial immunity is not applicable where a body constitutionally intended to be a shield from public scrutiny. Judicial independence and immunity do not shield a judicial officer from accountability. I must emphasize that in a democratic polity, it is inconceivable, that any person, whether an individual or an authority, exercises power without being answerable for the exercise. Judicial accountability like judicial independence has thus come to be recognized as a bulwark of the Rule of Law."

(Sic)

In the instant Petition, the Petitioner was found guilty of failure to deliver a judgment in a criminal matter whose hearing had been concluded in 2003 and the charges were brought before the JSC in 2008. The Disciplinary Committee of the Commission ruled that the Petitioner was guilty of the disciplinary offence as charged. That kind of delay that was never clearly explained and justified cannot be called a judicial act that would warrant protection by judicial

immunity. As such, I would find that the instant case is not one where the Petitioner could rightly claim judicial immunity. He committed a wrong that necessitated disciplinary action. It cannot be that the framers of the Constitution intended that judicial immunity be used to evade disciplinary measures.

5 Otherwise, the same Constitution would not empower the JSC to exercise disciplinary control over judicial officers even to a point of removing them from office, where it deems fit. This is the essence of the interpretation principle that requires the provisions of the Constitution to be read as a whole. See **Davis Wesley Tusingwire** (supra). I would, therefore, answer this issue in the negative.

10 **Issue 5**

Having found under Issue 1 that the Petition raises no question for constitutional interpretation and having found that there was no contravention of the impugned constitutional provisions under issues 2, 3 and 4, I would find that this Petition lacks merit and cannot stand.

15 Since all the members of the Panel herein agree with the lead judgment, it is, therefore, the unanimous decision of this Court that this Petition fails. It is accordingly dismissed with no order as to costs.

Dated at Kampala this 8th day of Dec 2022

20



Richard Buteera

25 **Deputy Chief Justice**

Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 042 OF 2016

AGABA JOHN PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ/ JCC
HON. JUSTICE STEPHEN MUSOTA, JA/ JCC
HON. JUSTICE MUZAMIRU M. KIBEEDI, JA/ JCC
HON. JUSTICE IRENE MULYAGONJA, JA/JCC
HON. JUSTICE MONICA MUGENYI, JA/JCC

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA/ JCC

I have had the benefit of reading in draft the Judgment prepared by My Lord, Hon. Justice Richard Buteera, DCJ/JCC. I agree that the Petition should be dismissed in the terms he has proposed.

DATED this 8th day of Dec 2022.



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MUZAMIRU MUTANGULA KIBEEDI
JUSTICE OF APPEAL

CONSTITUTIONAL PETITION 042 of 2016

VERSUS

JUSTICE CONSTITUTIONAL COURT



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

CORAM: BUTEERA, DCJ; MUSOTA, KIBEEDI, MULYAGONJA & MUGENYI, JJCC

CONSTITUTIONAL PETITION NO. 42 OF 2016

AGABA JOHN PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

I have had the benefit of reading in draft the lead Judgment of his lordship, the Hon. The Deputy Chief Justice in this matter. I agree with the decision arrived at and the orders therein, and have nothing useful to add.

Dated and delivered at Kampala this 5th day of Dec, 2022.

Monica K. Mugenyi

Monica K. Mugenyi

Justice of the Constitutional Court