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THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO.4 OF 2018

BETWEEN

10 **SSEMUJJU ABDULNUL..... PETITIONER**

VERSUS

ATTORNEY GENERAL RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC

Hon. Mr. Justice Cheborion Barishaki, JA/JCC

15 **Hon. Lady. Justice Hellen Obura, JA/ JCC**

Hon. Mr. Justice Stephen Musota, JA/ JCC

Hon. Lady. Justice Monica Mugenyi, JA/ JCC

JUDGMENT OF HON. JUSTICE KENNETH KAKURU, JA/ JCC

20 The Petition is brought under *Article 137* of the 1995 Constitution of Uganda and the
Constitutional Court (Petitions and References) Rules 2005 Statutory Instrument
No. 91 of 2005.

Background

25 On 6th December, 2017, the petitioner was arrested from Kiwatule by armed but
plain clothed security operatives who rushed and detained him at the chieftaincy of
Military Intelligence (hereinafter referred to as CMI) at Mbuya, Nakawa Division.
The petitioner spent two weeks at CMI until the 18th day of December, 2017 when
he was arraigned before the General Court Martial Makindye, he was charged with
kidnapping contrary to Sections 139 and 242 of the Penal Code Act. He was
consequently remanded to Luzira Maximum Security Prison. The petitioner is a
30 civilian and not a member of the Armed Forces.

5 He was subsequently charged before the General Court Martial as a person subject to military law by virtue of Section 119(1) (h) (i) of the UPDF Act 2005.

He now challenges the said trial before the General Court Martial that was brought under Sections 119 (1) (h) (i) of the UPDF Act, 2005, in respect of offences under Sections 239 and 242 of the Penal Code Act Cap. 120. At the commencement of the trial he declined to take plea challenging its constitutionality. He persistently objected to his trial before the General Court Martial. In the result that he filed this petition contending among others that his trial before the Court Martial was unconstitutional.

He now petitions this Court seeking the following declarations, orders and reliefs:-

15 (a) That Section 197 of the UPDF Act, 2006 is inconsistent with and in contravention of Article 28(1), 126(1) and 29(2) of the Constitution to the extent that it purports to create a Court of law without Constitutional authority.

20 (b) That Section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28(1) and 44(c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the Court Martial over any, including non-disciplinary offences and over every person.

25 (c) That the General Court Martial and other Military Courts established under part VIII of the UPDF Act are not Courts of law within the meaning of Articles 126(1), 29(1) and 210 and 257 of the Constitution of the Republic of Uganda.

30 (d) That the act of charging/arraigning the Petitioner before the General Court Martial Holden at Makindye is inconsistent with and in contravention of Article 28(1) of the Constitution of the Republic of Uganda.

(e) That the proceeding in CR CASE NO. UPDF/GCM/024/2017: Uganda Versus SSP. Nixon Agasirwe Karuhanga and Ssemujju Adbulnul alias Minana are null and void and be terminated forthwith.

5 (f) That reliance on the above impugned provisions of the UPDF Act by the Respondent's agents in their ordinary course of duty have caused injustice to the Petitioner and subjected him to immense violation of the fundamental right to a fair hearing before a fair Court of Competent jurisdiction established by law and the Respondent is vicariously liable.

10 (g) A permanent injunction restraining the Respondent, his agents, servants and others acting under his authority from prosecuting the Petitioner before the General Court Martial with capital and other non-disciplinary offences.

 (h) Costs of the Petition

The petition is accompanied by an affidavit sworn by the petitioner and filed in this

15 Court on 23rd April 2010, the relevant parts are as follows: -

1. That on the 6th of December, 2017, I was arrested from Kiwatule at a washing bay by armed plain clothed security operatives who rushed and detained me at Chieftaincy of Military Intelligence (Hereinafter referred to as CMI) Mbuya, Nakawa Division where I spent two weeks up to the 18th day of December, 2017 when I was arraigned before the General Court Martial Makindye and charged with the offences relating to Kidnapping contrary to Section 239 and 242 of the Penal Code Act Cap. 120 by virtue of S. 199(1) (h) (i) of the Uganda Peoples Defence Forces Act (hereinafter referred to as UPDF Act 2005) vide CR. CASE NO. UPDF/GCM/024/2017: Uganda Versus Nixon Agasirwe Kuruhanga and Ssemujju Adbulnul alais Minana.
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2. That on the basis of the above, that charge sheet was read to me and I was told to take a plea which I declined to do on the basis that as a civilian, I ought not to have been charged before the General Court Martial. I indicated to Court that I wish to take it in the midst and / or presence of my lawyer. (See copy of the proceedings attached hereto and marked Annexure "B").
30
3. That while the said SSP NIXON AGASIRWE KARUHANGA is a serving member of the Uganda Police Force, I am a civilian and do object to the said trial by the General Court Martial. I have also been informed by my lawyer of M/s Lukwago & Co. Advocates which information I verily believe to be true that the General Court Martial is not clothed with the jurisdiction to try me, for it is not a
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5 *competent Court established under Constitutional Authority. The General Court Martial has insisted that it is a Court of Law with the power to try the Petitioner and other civilians with the offences charged and I am affected and aggrieved by the said arraignment thus this petition.*

10 4. *That I dispute the competence of the Court Martial's authority to try me as a civilian with no military connection as well as the contest that it is not a Court of law within the meaning of the Constitution of the Republic of Uganda.*

15 5. *That I am affected and aggrieved by some provisions of the Uganda Peoples Defence Forces Act, 2005 as stated in the petition and some acts of the Uganda Peoples Defence Forces being inconsistent with and in contravention with the Constitution of the Republic of Uganda.*

20 6. *That in particular, I am aggrieved with the provisions of Sections 2 and 192 the UPDF Act which defines and establishes a "Court" contrary to the Constitution and empowering military Courts to try all service offences which are defined to mean all offences under any law.*

25 7. *That I further complain that the act of remanding me to Luzira Upper Prison by a forum not authorised by the law was done in contravention of the principles and provisions of Article 23 (1) of the Constitution in so far as I was illegally deprived of the right to liberty and freedom.*

30 8. *That I further complain that the act of remanding me to Luzira upper Prison by a forum not authorised by law was done in contravention of the principles and provisions of Article 23(1) of the Constitution in so far as I was illegally deprived of the right to liberty and freedom.*

35 9. *That I am due to take plea on the 16th day of January, 2018 before, that the same Court as evidenced from the proceedings attached herein above which trial violates my right to a fair trial guaranteed under Article 28(1) of the Constitution of the Republic, a threat that is real and eminent.*

5 10. That as an ardent believer in the Rule of Law, I am affected and aggrieved with
my continued arraignment, trial and prosecution before the General Court
Martial, a forum with no legal authority under the law.

10 11. That I have been informed by my above mentioned lawyers which information I
verily believe to be true that: -

a) The General Court is not a Court of competent jurisdiction within the
meaning of Articles 28 (1), 126 (1), 129 (1) and 257(1) (d) of the
Constitution of the Republic of the Republic of Uganda.

15 b) The said provisions of the UPDF Act, 2005, to the extent that they purport
to establish the General Court Martial with powers to try capital and
non-disciplinary offences are inconsistent with and or in contravention of
Articles 28(1), (2) and Article 210 of the Constitution of the Republic of
Uganda 1995.

20 c) The act of charging/arraigning me before the General Court Martial
Holden at Makindye under CR. CASE NO. UPDF/GCM/024/2017: Uganda
Versus Nixon Agasirwe Kuruhanga and Ssemujju Adbulnul alais Minana
by virtue of Section 199(1)(h)(i) of the UPDF 2005 Act over offences
relating to kidnapping contrary to Section 239 and 242 of the Penal Code
25 Act Cap 120 is inconsistent with and in contravention of Articles 28(1),
126(1), 129(1), 210 and 257 of the Constitution of the Republic of
Uganda and such acts have deprived me of the Constitutional protection I
am entitled to as a citizen, being fair trial and treatment .

30 d) Remanding me at Luzira Upper Prison by and or on orders of the General
Court Martial which lacks legal authority was in contravention of and is
inconsistent with Article 23 (1) of the Constitution of the Republic of
Uganda.

35 e) My detention in Luzira Upper Prison on the orders of the General Court
Martial which is not a Court of competent jurisdiction within the
meaning and provisions of the Constitution was inconsistent with and in
contravention of Article 23 (1) of the Constitution of the Republic of
Uganda.

5 The respondent filed an answer to the petition in which he denied the allegations in the petition and described it as misconceived. The answer to the petition reads as follows: -

10 *"Save as herein expressly admitted, the allegations contained in the Petition are hereby denied in toto as if the same were set forth herein verbatim and denied seriatim.*

1. *The Respondent admits the contents of Paragraphs 1 and 2 of the Petition only in as far as they refer to the description of the parties to the Petition.*
2. *The Respondent contends that the allegations as specified in Paragraph 3 of the Petition are false.*
- 15 3. *In response to Paragraphs 4 and 5 the Respondent shall contend that the Petitioner is being charged before the General Court Marital strictly in accordance with the Constitution and the relevant Laws and there is no matter for constitutional interpretation hereto.*
- 20 4. *The Respondent avers that in response to Paragraph 6 the Petitioner is currently being charged in accordance with the Law and it is premature to allege that the trial that is currently being undertaken before the Court Martial, court does it without jurisdiction.*
- 25 5. *The Respondent avers that in response to Paragraph 7 the Petitioner is currently being charged in accordance with the Law and it is premature to allege that the trial that is currently being undertaken before the Court Martial shall be a violation of his right to a fair hearing guaranteed under Article 28(1) and a violation of Articles 126(1), 129(1), 257(1) of the 1995 Constitution of the Republic of Uganda.*
- 30 6. *In further response to paragraph 7, the Respondent contends that the establishment of the General Court Martial is in no way a contravention of Articles 28(1)(2), 126(1), 129(1), 210 and 257(1)(d) of the 1995 Constitution.*
7. *In response to Paragraphs 8 and 9 of the Petition, the Respondent contends that it has long since been established that the General Court*

5 *Martial is a Court of competent jurisdiction as provided by Article 210(a) of the 1995 Constitution and Section 197 of the UPDP Act, 2005 and it is established strictly in accordance with the Constitution.*

10 8. *In response to Paragraphs 10 and 11 of the Petition, the Respondent contends that it has long since been established that the General Court Martial is a court of competent jurisdiction as provided by Article 210(a) of the 1995 Constitution and Section 197 of the UPDP Act, 2005 and it is established strictly in accordance with the Constitution.*

15 9. *In further reply to paragraph 10, the Respondent avers that, the Petitioner is currently being charged in accordance with the Law and it is premature to allege that the trial that is currently being undertaken before the Court Martial is in contravention of Article 28(1)(2) and Article 210(a) of the 1995 Constitution of the Republic of Uganda.*

20 10. *In response to paragraphs 12, 13 and 14 of the Petition the Respondent shall illustrate to this Honourable Court that the act of charging, and arraigning the Petitioner before the General Court Martial and further remanding him to Luzira upper prison is strictly in accordance with the 1995 Constitution of the Republic of Uganda.*

11. *Lastly the Respondent shall contend as follows:*

25 (a) *That the Petition discloses no question for constitutional interpretation as the allegations by the Petitioner are in line with the 1995 Constitution.*

(b) *That the impugned acts as stated in the Petition are neither inconsistent nor in contravention of any Article of the Constitution.*

(c) *That the Petition should be dismissed with costs since it does not describe any act in contravention of any provision of the Constitution.*

30 (d) *That this answer to the Petition is supported by the affidavit CAPTAIN MASEREJE SAMUEL attached hereto.*

*The Respondent asserts that the Petitioner is not entitled to the orders and declarations sought **WHEREFORE** he prays that this Petition be dismissed with costs.*

5 The answer to the petition is also accompanied by affidavit sworn by Captain Masereje Samuel the Chief Legal Services in the Uganda Peoples Defence Forces. It sets out facts in support of the respondent's answer to the petition. The respondent seeks the dismissal of this petition contending that it discloses no question for constitutional interpretation. The relevant parts of the respondent's affidavit in
10 support of the petition are as follows: -

3. *That I know that the Petitioner is being charged before the General Court Marital strictly in accordance with the Constitution and the relevant Laws and there is no breach of the 1995 Constitution as alleged or at all.*
- 15 4. *That I know that the Petitioner is currently being charged before the General Court Martial in accordance with the Law and it is premature for him to allege that his trial currently being undertaken before the Court Martial shall be a violation of his right to a fair hearing.*
- 20 5. *That I know that it has long since been established in the Courts of Law that the General Court Martial is a court of competent jurisdiction as provided by Article 210(a) of the 1995 Constitution and Section 197 of the UPDF Act, 2005 and it is established strictly in accordance with the Constitution.*
- 25 6. *That I further know that it has also been established by the Supreme Court that civilians can legally be subjected to trial before the General Court Martial as provided by Section 197 of the UPDF Act.*
- 30 7. *That I therefore know that the act of charging and arraigning the Petitioner before the General Court Martial and further remanding him to Luzira upper Prison is strictly in accordance with the 1995 Constitution.*
- 35 8. *That I have been advised by Hon. Attorney General whose advise I verily believe to be true that the Petition discloses no question for constitutional interpretation as the impugned allegations raised by the Petitioner are in line with the 1995 Constitution.*
9. *That I have also been informed by our Lawyers in the Attorney General's Chambers that the Petition should be dismissed with costs as against the Respondent since it does not describe any act or omission in contravention of any provision of the Constitution.*

5 **Representations**

At the hearing of this petition, *Mr. Chrisotom Katumba* represented the petitioner, whilst *Ms. Clare Kukunda*, represented the respondent.

Issues

1. *Whether the petition raises any questions for constitutional interpretation.*
- 10 2. *Whether section 197 of the UPDF Act, 2005, is inconsistent with and in contravention of Articles 28(1), 126(1), 129(2), (3) and 210 of the Constitution of the Republic of Uganda to the extent that it purports to create a court of law without Constitutional authority?*
- 15 3. *Whether Section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28(1) and 44(c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the Court Martial over any criminal offence including non-disciplinary offences and over every person.?*
- 20 4. *Whether the act of charging/arraigning the Petitioner before the General Court Martial holden at Makindye is inconsistent with and in contravention of Article 28(1) and 44(c) of the Constitution of the Republic of Uganda?*
5. *Whether the Petitioner is entitled to the reliefs sought?*

I have carefully listened and considered the submissions of both Counsel on the constitutionality of *Section 2, 119 (1) (h) and 197 of the UPDF Act*. I have also
25 carefully perused the affidavits as well as the relative provisions of the law and authorities cited by the parties. From the pleadings of both parties and the issues set out above.

The constitutionality of the issues raised above were substantially raised and settled in the recent Constitutional decision of *Hon. Michael Kabaziguruka vs Attorney General Constitutional Petition No. 45 of 2016* (unreported). I will
30 reproduce the declarations in *extenso* for clarity: -

- 5 1) *The General Court Martial established under the Section 197 of the UPDF Act is a competent quasi-judicial military Court established under the UPDF Act whose jurisdiction is limited to the enforcement of military discipline.*
- 2) *The General Court Martial's jurisdiction is only limited to trying service offences specified under the UPDF Act, only in respect of persons subject to*
10 *military law.*
- 3) *Military law under the UPDF Act must be construed to exclude laws that are the preserve of Civil Courts of judicature established under Chapter Eight of the Constitution.*
- 4) *Persons subject to military law under UPDF Act must exclude all those*
15 *persons who have not voluntarily placed themselves under the jurisdiction of that Act excerpt as provided for under Section 119(1)(g).*
- 5) *Section 119(1)(h) and 179(1)(a) of the UPDF Act are unconstitutional as they are inconsistent with Article 28(1) of the Constitution.*
- 6) *Section 119(1) (g) of the UPDF Act is not unconstitutional. Provided the*
20 *person not otherwise subject to military law is tried as an accomplice together with a person who is subject to military law as the principle offender on the same charge sheet.*
- 7) *The petitioner is not a person subject to military law and his trial under the UPDF Act is unconstitutional. The charges brought against him under the*
25 *UPDF Act are unconstitutional null and void and of no effect.*
- 8) *Section 197 of UPDF Act is NOT unconstitutional.*

The above authority is still good law and I am bound to follow it. We are well aware that the above cited decision is currently pending appeal at Supreme Court. Until the Supreme Court decides otherwise, the authority is still good law.

30 The facts that gave raise to this petition are almost on all fours with those in *Hon. Michael Kabaziguruka vs Attorney General (Supra)*. Applying the above authority to this petition, I find that the petition does not raise any new issues for Constitutional Interpretation under Article 137 (3) of the Constitution. The petition is therefore allowed on that account alone. The same declarations and

35 orders in the Kabaziguruka petition apply to this petition.

By majority decision Kakuru, Cheborion, Obura, Musota JJCC, with Mugenyi, JCC dissenting this petition succeeds.

5 We now make the following orders that the petitioner be discharged forthwith from the General Court Martial and remanded at a civilian government prison.

We now make the following orders and declarations.

(1) This petition has merit and is hereby allowed.

10 (2) The same declarations of law issued in Kabaziguruka petition (supra) apply to this petition *mutatis mutandis*.

(3) We order the petitioner to be discharged from the Court Martial immediately and be transferred to a civilian Prison on remand.

The Director of Public Prosecutions is directed to take over the matter and make a final decision.

15 We so order.

Dated at Kampala this day of 2023.

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Kenneth Kakuru

JUSTICE OF APPEAL/JUSTICE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO.4 OF 2018

*(Coram: Kenneth Kakuru, Cheborion Barishaki, Hellen Obura, Stephen Musota &
Monica Mugenyi, JJCC)*

SSEMURU ABDULNUH.....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF CHEBORION BARISHAKI, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Kenneth Kakuru, JCC and I agree with him that the issues raised in the Petition were substantially settled by this Court in Constitutional Petition No.45 of 2016 and there is no reason to depart from that decision with the result that the petition succeeds. I also agree with the declarations and orders he has proposed.

Dated at Kampala this day of 2023.



Cheborion Barishaki

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

(CORAM: KAKURU; CHEBORION, OBURA, MUSOTA & MUGENYI, JJCC)

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 4 OF 2018

SEMUJJU ABDULNUL ::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

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

CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC
HON. JUSTICE CHEBORION BARISHAKI, JA/JCC
HON. JUSTICE HELLEN OBURA, JA/JCC
HON. JUSTICE STEPHEN MUSOTA, JA/JCC
HON. JUSTICE MONICA MUGENYI, JA/JCC

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Kenneth Kakuru, JA/JCC. I agree with his finding that the constitutionality of the issues raised in this petition were settled in the recent constitutional court decision of **Hon. Michael Kabaziguruka Vs Attorney General Constitutional Petition No. 45 of 2016.**

This authority is still good law and binds us. The facts in the instant petition are almost on all fours with those in **Hon. Michael Kabaziguruka Vs Attorney General** (supra).

Consequently, I agree that this petition does not raise any new issues for constitutional interpretation under Article 137(3) of the Constitution.

I also agree with the orders proposed.

Dated this 30 day of February 2022



Stephen Musota

JUSTICE OF APPEAL/CONSTITUTIONAL COURT.



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

(Coram: Kakuru, Barishaki, Obura, Musota and Mugenyi, JJCC)

CONSTITUTIONAL PETITION NO. 4 OF 2018

SSEMUJU ABDULNUL PETITIONER

VERSUS

ATTORNEY GENERAL RESPONDENT

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JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. I have had the benefit of reading in draft the judgment of my brother, Hon. Justice Kenneth Kakuru in this matter. I am in general agreement with the observation therein that insofar as this Petition challenges sections 119(1)(h) and 197 of the Uganda Peoples Defence Forces (UPDF), 2005, the questions raised therein are substantially the same as the questions that were before this Court in the case of **Michael Kabaziguruka v Attorney General, Constitutional Petition No. 45 of 2016**.
2. That case is currently pending conclusive determination by the Supreme Court on appeal and it would thus be pre-emptive to consider it as a precedent. Accordingly, I shall refrain from delving into the merits of the **Michael Kabaziguruka** case in this judgment, and will only consider it within the context of its bearing on the lead judgment.
3. The questions arising from the present Petition are additionally addressed within the context of this Court's earlier decision in **Uganda Law Society v. Attorney General, Constitutional Petition No. 18 of 2005**, as well as its determination on appeal in **Attorney General v. Uganda Law Society (2009) UGSC 2**.¹
4. I do abide the summation of the parties' respective cases, as well as the representations herein, as elaborately laid down in the lead judgment. For the avoidance of doubt, nonetheless, I deem it necessary to reproduce an abridged version of the Petitioner's case for purposes of aiding the interrogation of the question as to whether this Petition raises no new matters for constitutional interpretation, the issues raised therein having since been settled by this Court or the Supreme Court on appeal, as appears to be the mainstay of the Respondent's case.

¹ also reported as Constitutional Appeal No. 1 of 2006

B. Factual Background

5. In a nutshell, the Petitioner does not consider the courts martial created under Part VIII of the UPDF Act to be courts of law as contemplated under Articles 28(1), 29, 126(1), 210 and 257 of the Constitution; specifically contesting section 197 of the UPDF Act for purportedly flouting Articles 28(1), 29(2) and 126(1) of the Constitution. He thus challenges his trial before the General Court Martial under section 119(1)(h)(i) of the UPDF Act in respect of offences prescribed under sections 239 and 242 of the Penal Code Act, Cap. 71, contending that the designation of those offences as service offences in section 2 of the UPDF Act violates Articles 28(1) and 44(c) of the Constitution.
6. Pursuant thereto, the Petitioners seek the following declarations and orders (reproduced verbatim):
 - (a) *That section 197 of the UPDF Act, 2006 is inconsistent with and in contravention of Article 28(1), 126(1), 29(2) of the Constitution to the extent that it purports to create a court of law without constitutional authority.*
 - (b) *That section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28(1) and 44(c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the Court Martial over any, including non-disciplinary offences and over every person.*
 - (c) *That the General Court Martial and other Military Courts established under part VIII of the UPDF Act are not courts of law within the meaning of Articles 126(1), 29(1), 210 and 257 of the Constitution of the Republic of Uganda.*
 - (d) *That the act of charging/arraigning the Petitioner before the General Court Martial holden at Makindye is inconsistent with and in*

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contravention of Article 28(1) of the Constitution of the Republic of Uganda.

- (e) That the proceedings in CR CASE NO. UPDF/GCM/024/2017: Uganda versus Nixon Agasirwe Karuhanga and Ssemujju Abdulnul alias Minana are null and void and be terminated forthwith.*
- (f) That reliance on the above impugned provisions of the UPDF Act by the Respondent's agents in their ordinary course of duty has caused injustice to the Petitioner and subjected him to immense violation of the fundamental right to a fair hearing before a fair court of competent jurisdiction established by law and the Respondent is vicariously liable.*
- (g) A permanent injunction restraining the Respondent, his agents, servants and others acting under his authority from prosecuting the Petitioner before the General Court Martial with capital and other non-disciplinary offences.*
- (h) Costs of the Petition.*

C. Determination

7. I carefully considered the judgment in **Uganda Law Society v. Attorney General** (supra) and **Attorney General v. Uganda Law Society** (supra) against the matters in contention before the Court presently. 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 were settled by this Court in **Uganda Law Society v. Attorney General** (supra). 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.*

8. The final orders of the 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.

9. 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**,² but the Appeal was dismissed. That Court's findings on the constitutionality of section 119(1)(g) and (h) of the UPDF Act was not the subject of either the appeal or cross appeal. The consistency of those statutory provisions with Articles 28(1), 126(1) and 210 of the Constitution was thus affirmed by the Constitutional Court in that case, and remains good law to date. It is against that jurisprudential background that I ponder the findings of the majority in **Michael Kabaziguruka v Attorney General** (supra).

10. First and foremost, they declared section 119(1)(h) of the UPDF Act unconstitutional on the premise that it was inconsistent with Article 28(1) of the Constitution. With tremendous respect, the Court's decision in that regard is a marked departure from the settled question in **Uganda Law Society v. Attorney General** (supra) that the said legal provision is indeed consistent with Article 28(1) of the Constitution. A contrary finding as transpired in the **Kabaziguruka** case offends the doctrine of *stare decisis* as articulated in **Attorney General v. Uganda Law Society** (supra) as follows (per Mulenga, JSC):

Under the doctrine of *stare decisis*, which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decisions save in exceptional cases where the previous decision is distinguishable or was over-ruled by a higher court on appeal or was arrived *per incuriam* without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances, a panel of an appellate court is bound by previous decisions of other panels of the same court. (*my emphasis*)

11. Consequently, until the Supreme Court pronounces itself on the appeal in the **Michael Kabaziguruka** case, with the greatest respect, the decision in that case

² also reported as Constitutional Appeal No. 1 of 2006

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on section 119(1)(h) of the UPDF Act was made *per incuriam* and this Court is not bound by or obliged to follow it.

12. Meanwhile, section 119(1)(g) of the UPDF Act was adjudged by the majority in the **Kabaziguruka** case to be constitutional only in as far as a person not otherwise subject to military law was tried '*as an accomplice together with*' and '*on the same charge sheet (as)*' a person that is subject to military law. The Court thus sought to contextualize its findings on section 119(1)(g) of the UPDF Act to the specific handling of the indictments in respect of persons otherwise not subject to military law.

13. Without delving into the merits of that case, it would appear that the Petitioner therein had been charged separately from the persons that were subject to military law that he was accused of aiding and abetting under section 119(1)(g) of the UPDF Act. In the case of **Uganda Law Society v. Attorney General** (supra), on the other hand, all the accused persons (both civilian and military) were apparently jointly charged before the Court Martial. This is borne out in the introductory observations of the Supreme Court in **Attorney General v. Uganda Law Society** (supra) as follows:

In the charge sheet before the General Court Martial, all the accused persons are jointly charged with the offence of terrorism on the allegation that between November and December 2004, they procured or were found in unlawful possession of firearms and ammunitions, which are listed therein. In the alternative they are jointly charged with the offence of unlawful possession of firearms on the same allegation.

14. Consequently, the stance adopted by the majority in the **Kabaziguruka** case of upholding the constitutionality of section 119(1)(g) subject to a joint indictment in respect of the civilian and military accused persons would be in conformity with the position in **Uganda Law Society v. Attorney General** (supra) as to the constitutionality of that statutory provision. It would appear to endorse the constitutionality of the trial of civilians under section 119(1)(g) of the UPDF Act where they are jointly charged with their military accomplices. It is, to that extent (in my humble view), good law that is for the time-being binding on this Court.

15. Turning to the matter before us presently, *Issues 3 and 4* raise questions as to whether the definition of the term 'service offence' to include any criminal offence committed by a person that is subject to military law, as well as the Petitioner's arraignment before the General Court Martial under section 119(1)(h) of the UPDF Act, are consistent with Articles 28(1) and 44(c) of the Constitution. Inherent in both those issues is, first, the extension of service offences to all criminal offences and, secondly, the subjection of civilians to military law.
16. I am constrained to point out, however, that the Petitioner was charged under section 119(1)(h) of the UPDF Act for presumably having been found in the possession of classified stores that are ordinarily the monopoly of the UPDF, and not under section 119(1)(g) under which the issue of service offences arises. It is thus not readily apparent to me why the issue of service offences is raised at all in this Petition but, for completeness, I will address both issues.
17. Article 28(1) provides for the right to a '**fair, speedy and public hearing before an independent and impartial court or tribunal established by law.**' Article 44(c), on the other hand, simply designates the right to a fair hearing in the category of rights from which no derogation is permissible. Both constitutional provisions therefore address one and the same thing: the right to a fair hearing. Meanwhile, section 119(1)(g) and (h) of the UPDF Act defines persons that are subject to military law to include a person not otherwise subject to the said law that '**aids or abets a person subject to military law in the commission of a service offence**', and a person found in unlawful possession of arms, ammunition, equipment or other classified stores '**ordinarily being the monopoly of the Defence Forces.**'
18. It seems to me, therefore, that in so far as the Constitutional Court did in **Uganda Law Society v. Attorney General** (supra) uphold the consistency of section 119(1)(g) and (h) of the UPDF Act with Article 28(1) of the Constitution, it clearly addressed the constitutionality of all the elements of that statutory provision, to wit, the subjection of civilians to military laws for the commission of service offences and where they are found in the possession classified stores that are ordinarily the monopoly of the UPDF. Furthermore, to the extent that the Petitioner does in paragraphs 1 and 3 of his affidavit in support of the Petition concede that he was

charged together with a person subject to military law – SSP Nixon Agasirwe Karuhanga, this Court's decision in **Michael Kabaziguruka v Attorney General** (supra) similarly resolves the constitutionality of his trial before the General Court Martial in the affirmative.

19. I therefore find that no new question for constitutional interpretation is raised in *Issues 3 and 4* hereof and would, accordingly, decline to entertain them afresh. I would abide the constitutionality of section 119(1)(g) and (h) of the UPDF Act as was decided by this Court in **Uganda Law Society v. Attorney General** (supra) and **Michael Kabaziguruka v Attorney General** (supra). It is so held.

20. I now turn to the question as to whether the creation of military courts under section 197 of the UPDF Act is inconsistent with Articles 28(1), 126(1), 129(2) and (3) and 210 of the Constitution. That question, in my view, hinges on Article 126(1) of the Constitution which restricts the exercise of judicial power to the courts established under the Constitution. The Petitioner's interpretation of that constitutional provision is such as to limit the courts that are created under the Constitution to those that are expressly spelt out in Article 129(2) – the Supreme Court, Court of Appeal and High Court, and faults the Respondent for the creation of military courts beyond those confines.

21. In **Attorney General v. Joseph Tumushabe (2018) UGSC 32**,³ addressing the question raised before the lower court as to whether courts martial were created by or under the authority of the Constitution, recourse was made to Article 274(1) of the Constitution that saves laws that were in existence prior to the promulgation of the 1995 Constitution. It was held (per Mulenga, JSC):

The existing law so saved “*shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution.*” In order to bring the 1992 UPDF Act in such conformity, it is necessary to construe the provisions establishing the courts martial there-under as if they were enacted by Parliament under the authority of the Constitution. That construction is necessary because of two fundamental provisions of the Constitution. First, the Constitution provides in Article 126(1) –

³ Also reported as Constitutional Appeal No. 3 of 2005.

"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 the law and with the values, norms and aspirations of the people." (Emphasis is added)

This principle embraces all judicial power exercised by civilian and military courts. While Parliament established courts martial as organs of the UPDF, the authority to vest them with judicial power must be construed as derived from this constitutional provision, for only 'courts established under the Constitution' have mandate to exercise judicial power. Therefore, although courts martial are a specialized system to administer justice in accordance with military law, they are part of the system of courts that are, or are deemed to be, established under the Constitution to administer justice in the name of the people. In my view, they are not parallel but complimentary to the civilian courts, hence the convergence at the Court of Appeal. (my emphasis)

22. The Supreme Court thus endorsed the constitutionality of courts martial, adjudging them to have been established under the Constitution by virtue of the saving of laws that were in existence at its promulgation by Article 274(1) thereof. In so doing, the apex court did recognize courts martials as courts established under the Constitution within the confines of Article 126(1) of the Constitution.

23. Drawing from the decisions in **Uganda Law Society v. Attorney General** (supra) and **Attorney General v. Joseph Tumushabe** (supra) therefore, it becomes apparent that the current position of the law on the issues raised in the present Petition is as follows:

- I. Section 119(1)(g) and (h) of the UPDF Act is consistent with Articles 28(1), 44(c), 126(1) and 210 of the Constitution.
- II. The General Court Martial that is created under section 197 of the UPDF Act, as well as other military courts created under the same Act, are constitutionally recognized courts under Articles 126(1) and 274(1) of the Constitution.

24. I would accordingly disallow the notion peddled by the Petitioner that the General Court Martial and other military courts established under Part VIII of the UPDF Act are not courts of law within the meaning of Articles 29(1), 126(1), 210 and 257 of

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the Constitution. It follows, therefore, that trials conducted thereunder cannot, on that basis alone, be considered to flout the concept of a fair trial as encapsulated in Article 28(1) of the Constitution. In the result, I would resolve *Issue No. 2* in the negative.

D. Conclusion

25. Having held as I have on the three substantive issues as framed, I am most respectfully unable to abide the conclusions and final orders of the lead judgment herein. I would decline to grant the Declarations and Orders sought in the Petition.

26. I take due cognizance of the general rule that costs should follow the event, unless a court for good reason decides otherwise. Given the vitality of the issues raised in this Petition to national statecraft, I consider it to be a befitting case for a departure from the general rule on costs.

27. 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 30 day of February, 2022,



Monica K. Mugenyi

Justice of the Constitutional Court