

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
ANTI CORRUPTION DIVISION
HOLDEN AT KOLOLO
MISC. CAUSE 3 OF 2023

MALE.H MABIRIZI.K. KIWANUKA APPLICANT

VRS

1. UGANDA (DPP)

2. ATTORNEY GENERAL RESPONDENTS

BEFORE GIDUDU, J

RULING

The applicant moved Court citing numerous provisions of the **Constitution, the Human Rights (Enforcement) Act, 2019 and the Judicature Act, Cap 13** seeking a wide range of declarations, orders and reliefs.

Specifically, the motion is brought under **Article 50 of the Constitution; Sections 3, 4, 6, of the Human Rights (Enforcement) Act 2019 and Section 33 of the Judicature Act, Cap 13.**

The applicant seeks the following declarations and orders:

1. That investigations, arrests, detentions and prosecutions by the Uganda Police Force, Director Public Prosecutions and any other State Agency of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets processed vide internal memo of the Minister for Karamoja



Affairs dated 12th January, 2023 infringe on fundamental and other rights of the said persons, those of the applicant and other Ugandans in respect of equal protection of the law, liberty, fair hearing, participation in government affairs and fair treatment in administrative decisions.

2. That the piecemeal investigations, arrests, detentions and prosecutions by the Uganda Police Force, Director Public Prosecutions and any other State Agency of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets processed vide internal memo of the Minister for Karamoja Affairs dated 12th January, 2023 infringe on fundamental and other rights of the said persons, those of the applicant and other Ugandans in respect of equal protection of the law, liberty, fair hearing, participation in government affairs and fair treatment in administrative decisions.
3. That a permanent injunction issues against the Uganda Police Force, Director Public Prosecutions and any other State Agency from further conducting investigations, arrests, detentions and prosecutions against the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets processed vide internal memo of the Minister for Karamoja Affairs dated 12th January, 2023
4. That an order issues nullifying, invalidating and setting aside all investigations, arrests, detentions and prosecutions by the Uganda Police Force, Director Public Prosecutions and any other State Agency of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets processed vide internal memo of the Minister for Karamoja Affairs dated 12th January, 2023
5. That the respondents pay general, exemplary and aggravated damages and costs.

The grounds for this motion are that:

I. The Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils are not holders of offices in the public service hence are not criminally liable as such.

5 II. It is the Permanent Secretary and subordinates are accountable for public resources and not the said officers.

III. Piece meal investigations, arrests, detentions and prosecutions derogate the right to fair hearing.

10 IV. The investigations, arrests, detentions and prosecutions by the Uganda Police Force, Director Public Prosecutions and any other State Agency of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets infringe on, violate and threaten the following rights of the said officers, the applicant's and other Ugandans.

- 15
- a) Right to equality and freedom from discrimination
 - b) Right to personal liberty
 - c) Right to fair hearing
 - d) Right to move freely throughout Uganda
 - 20 e) Right to participate in affairs of Uganda
 - f) Fair treatment in administrative decisions.

The motion is supported by an affidavit of the applicant who described himself as a holder of a law degree from Makerere University and a businessman by choice.

25 The affidavit contains an attachment of a copy of an internal memo signed by Kitutu Mary Goretti Kimono requesting for 12,200 iron sheets for distribution to vulnerable groups in Karamoja. The rest of the contents of the affidavit are a repeat of the motion.

30 The motion is opposed by the respondent through an affidavit of Ms Josephine Namatovu, Assistant **DPP**. She stated that she supervises all prosecutions related to corruption cases brought by the Police.

She contested the applicant's competence to bring this application. She also contested the applicant's assertion that the Vice President,



Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils are immune to criminal investigations and prosecution.

5 She denied that investigations were piece meal. She stated that different individuals played different roles necessitating different investigations. She justified the on-going investigations because the iron sheets were diverted from the intended purpose and that there were no violations of any rights to warrant the prayers sought in the application.

10 In rejoinder, Mr. Male Mabirizi stated that although the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils are not immune from criminal investigations, such investigations should be made against the permanent secretary.

15 The applicant appeared in person whilst the respondents were represented by Mr. Masaba Peter (PSA) from the Attorney General's chambers.

The following issues arise:

1. Whether the applicant has locus standi to bring this action
- 20 2. Whether investigations, arrests, detentions and prosecution of some Ministers violated their fundamental rights and freedoms enumerated in the Motion.
3. Whether such investigations, arrests, detentions and prosecutions are piece meal and if so whether they violate the
- 25 fundamental rights and freedoms listed in ground 4(a) to (h) of the Motion.
4. Whether investigations, arrests, detentions and prosecutions in respect of the 12,200 iron sheets are demonstrably justifiable in a free and democratic society.
- 30 5. What remedies if any are available.

Issue number one is a preliminary point of law which I am enjoined to dispose of first. Accordingly, I will consider the respondents' submissions in objection before that of the applicant.

Mr. Masaba submitted that the applicant had no locus standi because he does not reveal in what capacity he brought the application. He cited **section 3(2) of the Human Rights (Enforcement) Act, 2019** and contended that the applicant does not fall within the ambit of persons who can bring this application. He submitted that the applicant has not demonstrated that the political leaders are incapable of acting in their own name, or that the applicant is a member of an interest group or association or that he is acting in public interest.

Further, that there is no cause of action to entitle the applicant to come to court because he has not shown which of his right has been violated.

In reply, the applicant submitted that he did not file the application on behalf of others but in his own right under **Article 50(2) of the Constitution**. He contended that section 3(2) of the **Human Rights (Enforcement) Act, 2019** does not oust **Article 50(2) of the Constitution**.

In respect to the complaint about lack of a cause of action, the applicant relied on **Article 50 of the Constitution** to say it clothed him with a cause of action.

The problem that I see is that the applicant in his Motion cited numerous provisions of the law making it difficult to know under what specific procedure he is moving court. In the process, he appears to be shifting from one law to another depending on how he is challenged. **Article 50(1) & (2) of the Constitution** provides as follows:

50. Enforcement of rights and freedoms by courts.

(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.

(2) Any person or organisation may bring an action against the

violation of another person's or group's human rights.

Clearly, the applicant has audience as “**any person**” may bring an action against the violation of another person's right. This would have been sufficient to entitle the applicant to move court without
5 citing **section 3** of the **Human Rights (Enforcement) Act, 2019**. The later has qualifications regarding who can move court and in what circumstances. **Section 3** of the **Human Rights (Enforcement) Act, 2019** provides as follows:

Enforcement of human rights and freedoms

10 **(1) In accordance with article 50 of the Constitution, a person or Organisation who claims that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened may, without prejudice to any other action with respect to the same matter that is lawfully**
15 **available, apply for redress to a competent court in accordance with this Act.**

(2) Court proceedings under subsection (1) may be instituted by-

- 20 **(a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of a group or class of persons;**
- (c) a person acting in public interest; or**
- 25 **(d) an association acting in the interest of one or more of its members.**

The applicant can only come to court under paragraph (c) which provides for **public interest**. He would be required to demonstrate how it is in public interest not to institute criminal proceedings against the said officials.

For the moment, as regards the issue of locus standi, I find that the applicant has a right of audience to present his application. The objection is overruled.

Issues number two and three are inter-twined. They both relate

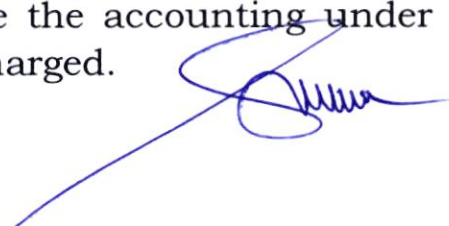
to whether the investigation, arrest, detention and prosecution by the Uganda Police Force, Director Public Prosecutions and any other State Agency of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets processed vide internal memo of the Minister for Karamoja Affairs dated 12th January, 2023 infringe on fundamental and other rights of the said persons, those of the applicant and other Ugandans in respect of equal protection of the law, liberty, fair hearing, participation in government affairs and fair treatment in administrative decisions.

I shall dispose of the two issues concurrently for brevity. These two issues are the basis of grounds one and two of the motion which I reproduce below for clarity.

1) That the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils are not holders of offices in the public service hence cannot be criminally liable as such.

2) That it is the permanent secretary Office of the Prime Minister and his/her subordinates who are responsible for accountability and not the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils.

The applicant submitted that Article **257(2)(b) of the Constitution** excludes the offices of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils from the public service. He contended that only civil servants are accountable and in this case the accounting under Article 164 of the Constitution should be charged.



He added that the functions of Cabinet under **Article 111(2) of the Constitution** are to formulate and implement policy of government and not accountability.

5 The applicant insinuated that since **Article 80(1)(c) of the Constitution** provides for “**A level**” qualification for the political leaders, it means that they are not expected to deal with complicated issues of accountability.

10 Finally, he submitted that the internal memo that Minister Kitutu wrote should have generated one file and not the numerous files (so far three) and many more yet to come. He called this a piece meal approach that he said violated **Article 28(9) of the Constitution and section 86(1) of the Magistrates’ Courts Act, Cap 16**.

15 In reply, Mr. Masaba for the respondents submitted that the arrests, detentions and interrogation of the suspects is constitutional. Further, that the politicians are being prosecuted for their roles and not by virtue of office.

20 He submitted further that the arrests and detention is for the purpose of bringing them to court as provided for in **Article 23(1)(c) of the Constitution**. He added that those arrested and detained have already been brought before courts and charged with crimes that involve theft which has nothing to do with the accounting officer because crime is individual.

25 He contended that the **Anti-Corruption Act, 2009** under which the Ministers have been charged, in its long title provides for effectual prevention of corruption in both public and private sector which covers politicians.

30 He dismissed reference to **Article 28(9) of the Constitution** by the applicant as misleading because that clause is about double jeopardy and not piece meal prosecutions. He also dismissed **section 86(1) of the Magistrates’ Court Act** as being advisory when preferring charges and that **section 86(3) of the Magistrates’ Court Act** allows court to order separate trials anyway.

Both sides filed bundles of authorities. I am grateful. But most of the applicant's authorities are distinguishable and not relevant to the case.

5 The case of **Male Mabirizi Kiwanuka Vrs Attorney General of Uganda Reference 6 of 2019** in the East African Court of Justice is an advisory opinion on consolidating suits for effective and efficient management under a notion called judicial economy to save resources of the court. It is prudent to consolidate multiple suits founded on the same facts by the same parties. Consolidation
10 requires suits to first exist in court. A court cannot direct consolidation of investigations but can direct consolidation of cases before it for trial. We have not reached that stage. There are no cases for trial before court to warrant consolidation. The cases so far in court are before Magistrates.

15 The case of **Kazinda Geoffrey Vrs AG constitutional petition 30 of 2014** was cited by the applicant out of context. I am aware this matter is pending an appeal in the Supreme Court but the decision of the Constitutional Court is that cases against an individual founded on the same facts based on his tenure of the same office
20 should have been consolidated and prosecuted as a bundle. I am not faced with a similar situation yet in this application.

It is true that **Article 257** defines offices and excludes political leaders from being referred to as holders of public office. This matter was sufficiently discussed by the Constitutional Court in
25 **Constitutional Petition 8 of 2006 between Darlington Sakwa and another Vrs Attorney General**. The court held that political leaders not being holders of public office are not bound by public service regulations which required that they resign their offices before standing for election as members of Parliament.

30 The court did not state that political leaders cannot be charged with criminal offences arising out of actions committed in their offices.

On the contrary the same court in **Constitutional Petition 30 of 2011 Prof Gilbert Balibaseka Bukenya Vrs AG**, held that immunity from prosecution was only provided to the President

temporarily as long as he/she was in office. If he/she leaves office, he/she can be prosecuted.

Prof Gilbert Bukenya who had been charged with corruption related offences had challenged his trial on grounds that he is a political leader, a Vice president and Cabinet Minister who acts on instructions of the president and since the President is immune from prosecution, he was immune by implication.

The court held that such immunity must be specifically granted by law. The court emphasized that no one else, not even the President who delegates or assigns duties can grant that immunity to anyone else.

It follows, in my view that political leaders can be charged with criminal offences committed whilst holding office. It is up to the prosecution to prove beyond reasonable doubt the individual culpability or guilt of each accused.

As to whether the accounting officer and not the Ministers should be the one charged, that is a decision informed by investigations in regard to participation which is a key ingredient in criminal cases. That decision can only be made by a court following a full trial on the basis of evidence adduced. I am not privileged at this stage to know the facts of the cases against the political leaders in question.

Having found that the said political leaders are not immune to prosecution and that the decision to consolidate their files is premature, were their rights as listed in the motion violated so as to call for intervention of this court?

The facts in the application are fairly simple. Minister Goretti Kitutu writes a memo to the accounting officer in the Office of the Prime Minister asking for 12,200 iron sheets to distribute to vulnerable groups and Karachunas willing to disassociate themselves from rustling in Karamoja.

Apparently, her request is granted. It would appear that the iron sheets once received are distributed to different people outside Karamoja and who are not vulnerable and are not rustlers.

Investigations are launched by the police under the supervision of the **DPP**. Some Ministers are arrested, detained and produced in court. They are on bail pending trial.

5 I have been asked to treat such arrests, detention and prosecution as a violation of their right to equality, to liberty, to fair hearing, to freedom of movement, to fair treatment in administrative decisions etc. I have been asked to stop the police and the **ODPP** and any other state agency from investigating, arresting, detaining and prosecuting the suspects in court under criminal charges.

10 I have been asked to find that it is in public interest to protect the suspects from prosecution because they hold political offices and it is unconstitutional to subject them to such actions.

With respect, having found that there is no constitutional immunity against the prosecution of political leaders, it follows that there are
15 no rights violated in investigating, arresting, detaining and prosecuting such suspects in law.

Accused persons have rights under **articles 23 and 28 of the Constitution** such as not being detained beyond 48 hours, the right to counsel, the right to apply for bail, the right to be taken to
20 court, the presumption of innocence, the right to an interpreter etc. It has not been demonstrated by the applicant that these rights have been violated.

As regards **Article 28(9) of the Constitution and section 86(1) of the Magistrates' Court Act, Cap 16**, it is clear that these were
25 wrongly cited because they deal with double Jeopardy and joinder of charges respectively which is irrelevant to the complaint before me.

There was no evidence that the suspects have ever been tried and convicted or acquitted on same charges before so as to invoke
30 **Article 28(9) of the Constitution** which is a complete defence. Under **section 86(3) of the Magistrates' Court Act, Cap 16**, the court can order separate trials of a person who may be facing

several counts in one file. It has not even been demonstrated who of the suspects is facing multiple trials in this court.

Consequently, since the alleged violation of the stated rights were based on the notion that there is immunity clothed upon political
5 leaders against criminal liability which I have found not to be true, it follows that the complaint that there were violations must fail.

The fourth issue is that it is the accounting officer and not the political heads who should be charged. The applicant canvassed the view that it is not demonstrably justifiable in a free and democratic
10 society to charge political leaders. I have not been persuaded that in democracies, political leaders are immune from prosecution. Such a country would descend into corruption and impunity. Even the President is only given temporary immunity whilst in office but after he/she vacates office the criminal charges can be slapped against
15 him/her. That is plain stated in **Article 98(4)(5) of the Constitution.**

(4) While holding office, the President shall not be liable to proceedings in any court.

**(5) Civil or criminal proceedings may be instituted against a
20 person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was
25 President.**

Clearly the application was misconceived from the word go because if the principal can be held accountable criminally what about the subordinates? The only difference being the timing. The principal must first leave office before being charged. As for those below, the
30 law acts in time.

The applicant cannot come to court by application and ask for orders to direct the **DPP** to drop charges against a certain category of suspects and instead charge another category. Criminal liability

is individual and the burden is upon the prosecution to prove their case against each accused person beyond reasonable doubt. This is achieved through a process of a trial and not otherwise.

The fifth issue relates to remedies. The applicant asked for damages saying he was disturbed that the Constitution had been violated by the arrest and charging of political leaders. Having found that there were no violations, the applicant's disturbance was not justified.

In conclusion, investigations, arrests, detentions and prosecutions by the Uganda Police Force, Director Public Prosecutions and any other State Agency of the Vice President, Speaker, Prime Minister, Ministers, Members of Parliament and Members of Local Councils in respect of 12,200 pieces of iron sheets processed vide internal memo of the Minister for Karamoja Affairs dated 12th January, 2023 do not infringe on any fundamental and other rights of the said persons, those of the applicant and other Ugandans in respect of equal protection of the law, liberty, fair hearing, participation in government affairs and fair treatment in administrative decisions.

It was not demonstrated to court how Ugandans would not want their leaders to be held accountable for their actions which may be criminal. Courts have held that once fraud is alleged, the same will be investigated and if proved, a sledge hammer would be used to hit its ugly head. It should be in public interest that every allegation of a criminal nature should be investigated and tried in courts of law.

The application falls on all its fours. It is dismissed. I make no order as to costs because the matters canvassed here are not personal to the applicant.

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Gidudu Lawrence

Judge

4th July 2023.

