THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA
HOLDEN AT KAMPALA

(CORAM: S.T. MANYINDO - DCJ, G.M. OKELLO - J, LADY JUSTICE A.E. MPAGI-BAHIGEINE, J.P. TABARD - J, AND F.M.S. EGONDA-NTENDE J)

CONSTITUTIONAL PETITION NO. 1 OF 1996

BETWEEN

MAJOR GENERAL DAVID TINYEFUZA: :: :: :: PETITIONER

VS

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

JUDGMENT OF MANYINDO - DCJ:

The Petitioner, Major General David Tinyefuza, joined the National Resistance Army (NRA), now Uganda Peoples' Defence Forces (UPDF) in 1981. At that time the NRA was a guerilla Army engaged in the struggle to oust the Government of the day. They succeeded and took over the reigns of power on 26-1-86. By that time the petitioner was a Senior Officer and a historical member of the High Command of the NRA.

Under section 14A of Legal Notice No. 1 of 1986, as amended by Decree No. 1 of 1987, the "bush" NRA became the National Army of Uganda from 26-1-86, and an Army Council was established consisting among others, Senior Army Officers as at 26-1-86. That Army was formally raised and regulated by the National Resistance Army Statute, 1992, (No. 3 of 1992) which came into force on 24-4-92, and which repealed the Armed Forces Act and

Legal Notice No. 1 of 1986. By virtue of section 9 thereof the petitioner, in his capacity as a Senior Officer, became a Member of the National Resistance Army Council, created under that section. He also became a Member of the new High Command under section 10(1) (c) of the same Statute, as a historical member of the NRA as at 26-1-86. In 1988, he was promoted to the rank of Brigadier. In 1989, he was further promoted to his present rank of Major General. In that same year he was appointed Minister of State for Defence, a post he held until 2-2-93, when he was appointed Presidential Advisor on Military Affairs. The letter of appointment was written on 24—5—93, but the appointment was backdated to 2-2-93. The appointment was on contract terms, for a period of 24 months.

From 1994, to 1995, the petitioner also represented (at different times) the NRA in the National Resistance Council (Parliament) and the Constituent Assembly. On 28-11-96, he was summoned by the Parliamentary Sessional Committee on Defence and Internal Affairs and through the Minister of State for Defence (General), to testify before that Committee in connection with the Civil strife in Northern Uganda. He appeared before the Committee and testified freely and at great length. Before us he adopted that testimony and the entire record of proceedings before the Committee as part of his case. In the Course of his testimony before the Parliamentary Committee the petitioner made a stinging attack on the Uganda Peoples' Defence Force, (as the Army had come to be known under the present Constitution which came into force on 8-10-95), in its conduct generally and in particular, its handling of the insurgency in Northern Uganda.

Those criticisms were widely reported by the media and press. Apparently the criticisms did not go down well with some Senior Government and Army officials. For example the Army Commander was reported by the partly Government owned New Vision News Paper of 4-12-96, to have told the same Parliamentary Committee when he appeared before it that the petitioner should have first resigned from the Army if he wanted to express his own views and not those of the Army. The Minister of State for Defence (General), Hon. Amama Mbabazi, was reported by the same News Paper of 8-12-96, to have said, in an interview with that paper, that he thought that somebody was "up to something" and the petitioner "was playing along." And in the New Vision of 18-12-96, it was reported that President Museveni had told a Press Conference at State House on 17-12-96, that the petitioner would have to sort out his problems with the Army before he was allowed to resign. This was

after the petitioner had submitted his resignation from the UPDF and its High Command on 3-12-96.

The letter of resignation was addressed to the President and Commander - in - Chief of the Peoples' Defence Forces. The letter reads thus:-

" Presidential Advisor on Defence
KAMPALA.

3-12-1996

His Excellency President of Uganda
Commander - in - Chief - UPDF Chairman of
High Command.

Re: Resignation From UPDF and High Command

Your Excellency,

With great difficulty, I have decided to resign as a Member of the Uganda People's Defence Forces and also resign from the UPDF.

There are several reasons but most important among those is that I feel I am unjustly being harrassed over my testimony before that Parliamentary Committee on Defence and Internal Affairs.

To require me to appear before the High Command so that Action is taken against me is rather too high handed.

I will state my reasons briefly:-

Article 90(1) of the Uganda Constitution 1995, states among other things that 'Parliament shall appoint standing committees and other committees necessary for the efficient discharge of its functions.'

Then Article 90(A) says 'In the exercise of their functions under this Article, committees of Parliament 90(4) may call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence.'

Article 90(4) (c) "shall have powers of the High Court for (i) Enforcing the attendance of witnesses and examining them on Oath Affirmation or otherwise, (ii) Compelling the production of Documents and (iii) issuing a commission or request to examine witnesses abroad."

As can be seen from the above, I did appear before the Parliamentary Committee on Defence and Internal Affairs under Article 90(4) (c). Its terms of reference were set by Parliament. These include among others -

(a) Give evidence as to the causes of Kony War;

(b) Why it has taken Government so long to end that war;

(c) The effects of that war on the Country;

(d) How that war can be ended.

It is in light of the foregoing that I appeared before the Committee and gave testimony. In so doing I may have displeased a few people but when giving Evidence under Oath you do not do so to please people but to tell the truth, something I did very well in my view as a matter of fact.

There are many things which remained unsaid, which in my view thought were not good for National Security and in any case which may not have had serious bearing on the subject matter before the Committee.

This goes to prove that whatever was said was in good faith and to try to help this Country end the prevailing wars all round.

I wish to state that:-

(a) I did not request nor volunteer to appear before this Committee.

(b) Was summoned by it.

(c) The Summons were served on the Army Commander who only informed me. The terms of Reference which allow the press a free access were not set by me.

(d) In my view, a Parliamentary Committee on Defence and Internal Affairs has a right to know matters concerning the Army and war. After all that is why it was set up. Article 42 of our Constitution requires that any person appearing before any administrative official or body has

> a right to be treated justly and fairly and shall have a right to apply to a Court of law in respect of any Administrative decision taken against him or her.

I am of the strong view that I will not have that Constitutional right before the UPDF High Command for obvious reasons.

It is therefore, because of the above that I must resign from the Army and subsequently its High Command. I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to.

I must say sir, that it was a privilege and an honour to serve the National Resistance Army and the UPDF and more particularly to serve under you. As one said, I owe much to your wise guidance and kindly for bearance. I know my own faults very well and I do not suppose I am an easy subordinate; I like to go my own way. But you have kept me on the rail's in difficult and stormy times, and have taught me much. For all this, I am grateful. And I thank you for all you have done for me.

Needless to say, it has been a great honour to have been a Member of this Historic Army and Mission." We have achieved much in war; may we achieve even more in peace.

Your Very Devoted Commorade,

DAVUD-TINYEFUZA-MUWUNGU-BWAJOJO
MAJOR GENERAL "

The letter was copied to several persons, including the Minister of State for Defence (General).

On 8th December, 1996, the Minister of State for Defence (g) replied as follows:-

"MSD/G/1

8th December 1996

Maj. Gen. David Tinyefuza,
President's Office, KAMPALA.

Re: YOUR RESIGNATION FROM UPDF

Yours addressed to H.E. The President and Commander-in-Chief of 3rd instant and copied to me among others refers.

Having looked at the laws/regulations of the NRA Statute and its subsidiary legislation relevant to the issue at hand, and having consulted with the Commander-in-Chief and, furthermore, having exhaustively discussed it in the Meeting of the High Command, I advise you that the resignation of officers is governed by the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993. These provide in reg. 28(1) that for

an officer to resign his commission, the Commissions Board, established by Reg. 3(1) of the same Statutory Instrument No. 6 of 1993, would have to grant permission for such resignation in writing.

As you know one of the hallmarks of the NRM struggle has been the restoration of the rule of law. All Ugandans individually and collectively are equal before and governed by the law enacted by the authorised organs of state.

This is, therefore, to inform you that your purported resignation is null and void by virtue of the above quoted provisions. I have taken trouble to quote them extensively for your benefit. I would advise that you follow the right procedure in case you are contemplating resigning your commission.

Amama Mbabazi
MINISTER OF STATE FOR DEFENCE (G)"

The petitioner then presented before us this petition under Articles 50 and 137 of the Constitution and Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions, 1996. The petition reads thus:-

PETITION

The Petition of DAVID TINYEFUZA of c/o P.O. Box 2255 -Kampala, whose names are stated at the foot of this petition:-

1. Your Petitioner is a person having interest in or is affected by the following matters being inconsistent with the Constitution of the Republic of Uganda 1995, whereby your Petitioner is aggrieved:-

(a) That the letter of the Hon. Minister of State for Defence (G) addressed to the Petitioner Ref: MSO/G/1 dated 8th day of December, 1996, rejecting the Petitioner's resignation from the Uganda People's Defence Forces and it's High Command and requiring the Petitioner to resign in accordance with Regulation 28(1) of the National Resistance Army

(Conditions of Service) (Officers) Regulations 1993 is unconstitutional for being contrary to Articles 25(2) and 25(3)(c) of the Constitution of the Republic of Uganda 1995.

(b) Proceedings in the Parliamentary Sessional Committee on Defence and Internal Affairs are privileged under Article 97 of the Constitution and as such cannot form a basis for any disciplinary and or Criminal/Civil action against the Petitioner in any Court of law and/or administrative body of any kind.

Your Petitioner states that the actions of the Minister of State for Defence requiring him to tender his resignation in accordance with the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 Reg. 28(1) is unconstitutional and therefore null and void on the following grounds:

(a) The Petitioner ceased to be a continuing full time Member of a regular force as defined in the Army Code, upon his appointment to the Civil Service of the Republic of Uganda as Presidential Advisor on the 24th day of May, 1994.

(b) The Petitioner was not resigning a Commission as required by Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 since no Commission has ever been issued to him in accordance with Regulation 13(3) of the said Regulations.

(c) Having ceased to be a Member of a regular force the Petitioner was obliged to regularise his status in relation to the regular force and the High Command.

(d) In the circumstances elaborated in the Petitioner's resignation letter, affidavit in support of this Petition and the testimony before the Parliamentary Sessional Committee, the Petitioner is a conscientious objector within the meaning of Article 25(2) and 25(3)(c) of the Constitution, and as such his resignation cannot be questioned.

Therefore your Petitioner prays that the Court may grant a declaration that the following measures and acts are in consistent with the Constitution in their application to the Petitioner and are a violation of his fundamental human rights granted in the following Constitutional provisions:

(a) (i) Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations 1993;

(ii) Any threatened disciplinary, administrative, criminal or Civil action or actions against the Petitioner in any tribunal, forum, or Court of law, arising out of his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs;

was inconsistent with the Constitution of the Republic of Uganda;

(i) Articles 25(2) and 25(3)(c);

(ii) Articles 20, 23, 25(2) and 25(3)(c);

(iii) Article 97.

(b) Grant orders restraining all persons whatsoever from interfering or threatening to interfere or denying the Petitioner of the exercise of his right and freedom guaranteed by the provisions of the Constitution."

It is supported by three affidavits sworn by the Petitioner on various dates.

In his answer to the petition, the respondent contended

(a) that the petition lacks a cause of action as it does not show that there is an act or ommission by any person or authority which contravenes or is inconsistent with a provision of the Constitution,

(b) that the letter of the Minister of State for Defence quoted above did not require the petitioner to perform forced labour or do or refrain from doing anything that is inconsistent with the Constitution, but only advised the petitioner to resign according to the law; (c) that no disciplinary and/or criminal or civil action has been taken against the petitioner by anyone as a result of the petitioner's testimony to the Committee and (d) that the affidavits accompanying the petition were fatally defective. In another line of defence, it was contended that the petitioner is and remains a Member of the UPDF until he resigns in accordance with Regulation 28 (1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993. The answer to the petition was accompanied by an affidavit sworn by Hon. Amama Mbabazi on 6-1-97.

When the petition came up for hearing, the learned Solicitor General, Mr. Kabatsi, who represented the Attorney-General, raised preliminary points of objection to the effect - (a) the affidavits accompanying the petition were defective as they contained lies and grave inconsistences, (b) the requisite fees were not paid and (c) the petition does not disclose a cause of action as it does not allege that a specific act or ommission violates a provision of the Constitution.

After hearing the reply of Mr. Lule, learned Senior Counsel for the petitioner on the points of objections, we decided to join the preliminary objection with the questions arising on merits and decide them together. It is necessary therefore for me to deal first with the question whether this petition is maintainable, in other words, whether it is competent. On the question of Court Fees there was evidence - from the receipts in possession of Counsel for the petitioner and the endorsements on the Registrar's file - that the petition was accompanied by Court Fees of Shs. 10,500= and Shs. 100,000= security for costs as required by the Rules. So there was really no merit in this point of objection.

With regard to non-disclosure of a cause of action, the petitioner's case as can be gathered from the petition and the accompanying affidavits, is that (a) under the Constitution no one has the right to question him on what he said to the Parliamentary Committee and (b) that he is entitled to a declaration to the effect that he is no longer a Member of the UPDF and therefore cannot be subjected to Military service which would amount to subjecting him to forced labour. Now Article 25(2) protects the individual against forced labour. Since the petitioner claims that the Government wants to keep him in the Army against his will, and to question him and possibly discipline him as a result of his testimony to the Committee -which would violate the protection given to him by Article 97 of the Constitution, it seemed clear to me that he was entitled to petition this Court for redress under Article 50(1) of the Constitution which provides:-

> "50. (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 the face of it the petition disclosed a cause of action. With regard to the validity of the affidavits, Mr. Kabatsi's first complaint was that the petitioner's affidavit in reply to that of Hon. Amama Mbabazi was fatally defective in that in paragraph 8 thereof the petitioner does not disclose, when he should, his source of information but merely states that he was advised by his Lawyers that Military Regulations no longer apply to him since he ceased to be a Member of a regular force when he was appointed Presidential Advisor on Military Affairs. Mr. Kabatsi submitted that the petitioner should have stated the name or names of the lawyer or lawyers who so advised him. The law on the point seemed to me to be well settled. An affidavit must state the means of the deponent's knowledge or the ground of his or her belief with regard to the matters set out in the affidavit. See: Caspair Ltd. -v- Harry Gandy [1962] E.A. 414 at 417. In the instant case the petitioner averred that his source of information were his lawyers. I could not see it as necessary to particularise the lawyer or lawyers as in this context the lawyers must be the lawyers who drew up the petitioner's affidavit.

As for the alleged lies and inconsistences, it was argued by Mr. Kabatsi that some of the averments in the affidavits made those affidavits contradict each other and also were at variance with the petitioner's testimony to the Committee in some material respects. It seemed clear to me that Mr. Kabatsi's arguments went to the merits of the petition which was premature. In my opinion the case of Bitaitana and 4 Others -v- Kananura High Court Civil Appeal No. 47 of 1976, Allen J. (as he then was) which Mr. Kabatsi cited in support of his contention that the petition must fail as it was supported by totally defective affidavits can be distinguished from the instant case. In that case the affidavits supporting the petition contained several deliberate falsehoods. The deponent did not disclose the source of some of his information and worse still, the Notice of Motion was itself defective in that it did not state the grounds of the application.

Kananura (supra) was a decision of the High Court which can only have persuasive influence on this Court. Allen J, took a very strict stand in that case and even criticised higher Courts on the point albeit orbiter, when he stated:

> "Before I take leave of this case I should like to express my misgivings about the lenient attitude by

the Court of Appeal for East Africa in dealing with irregularities."

With respect to the learned Judge, the decision of the Court of Appeal for East Africa in: Uganda -v- Commissioner of Prisons, Ex Parte Matovu [1966] E.A. 514 is to be preferred. In that case the applicant was detained under Emergency legislation. He took out habeas corpus proceedings in the High Court. At the same time constitutional issues were framed and referred to the Constitutional Court for determination. Clearly the writ of habeas corpus was defective. Nevertheless, the Court took the position that as the liberty of a Citizen of Uganda was involved, the application as presented was not objected to and that as considerable importance was attached to the questions of law under reference, the case ought to be heard on merit in the interest of justice.

The case before us relates to the fundamental rights and freedom of the individual like the petitioner which are enshrined in and protected by the Constitution. In my opinion it would be highly improper to deny him a hearing on technical or procedural grounds. I would even go further and say that even where the respondent objects to the petition as in this case, the matter should proceed to trial on the merits unless it does not disclose a cause of action at all. This Court should readily apply the provision of Article 126 (2) (e) of the Constitution in a case like this and administer substantive justice without undue regard to technicalities. It is for the above reasons that I can not uphold Mr. Kabatsi's objections.

During the course of the trial Counsel for the petitioner sought to put in evidence a document which was attached to the petitioner's affidavit in reply as Annexture A4. It was objected to by the Counsel for the respondent. I was one of the four Judges who upheld the objection for reasons which we promised to give in the judgment. These are my reasons. First, Annexture 4 was a photostat copy of a radio message. Counsel for the petitioner did not at the time have the original transcript. Second, the author of the message was not fully disclosed on the document. Mr. Lule informed us that he did not have instructions then as to who the author was. Third, the document was not signed. Fourth, it was crossed with a bold ink line in the middle all through its five pages. In those circumstances I did not regard it as a genuine document to be received in evidence.

Happily for the petitioner, the original transcript was subsequently obtained and produced in evidence as it was not crossed, it was signed and it was acknowledged by Hon. Amama Mbabazi - in cross -examination - as the message sent to all Members of the High Command, including the petitioner, by the President of Uganda/Commander- in-Chief of the Uganda Peoples' Defence Forces.

I now turn to the petition on the merits. At the Commencement of the hearing of the petition the Counsel for the parties framed the agreed issues as follows:-

"1. Whether on his appointment to the post of Presidential Advisor on Military Affairs the Petitioner became a public servant by virtue of the terms as spelt out in the letter of his appointment.

2. Whether upon his appointment with effect from 2nd February, 1994, the terms of service spelt out in the letter of appointment were the terms governing the Petitioner and his service relationship with the Republic of Uganda.

Whether upon being offered new terms of service, set out in the letter of appointment, the Petitioner continued to be governed by the terms of his old employment too, in the Uganda Armed Forces.

Whether having served in the Army and appointed to a new position outside the Military establishment, the Petitioner continued to be a Member of a regular force as defined in the National Resistance Army Statute and the Regulations made thereunder.

Whether in his new status, arising from his new terms of service set out in his letter of appointment the Petitioner continued to be subject to Military law, to which Members of the Uganda Peoples' Defence Forces are subject.

Whether to be a Member of the High Command as defined or necessity also have to be a Member of a regular force.

Whether the letter from the Minister of State for Defence (Annexture "E" to the Petition) which declared the Petitioner' resignation and departure from the Army and the High Command "null and void" was in effect a denial of the Petitioner's liberty and calculated to require the Petitioner to perform forced labour.

Whether the Petitioner resigned from the High Command and refused to be a Member of a regular force as a conscientious objector in accordance with Article 25(2) and 25(3) on the Constitution, 1995.

Whether the testimony given by the Petitioner before the Parliamentary Sessional Committee on Defence and Internal Affairs was made on a privileged occasion and entitled the Petitioner to immunity from any actual or threatened prosecution, harassment or victimization guaranteed by Articles 97 and 173 of the Constitution, 1995, and the provisions of the National Assembly (Powers and Privileges) Act Cap. 249 Laws of Uganda, 1964 Edition.

10. Whether the letter from the Minister of State for Defence and the reported conduct of the other authorities in the Government and the Army

amounted to a threat to the Petitioner's fundamental rights and freedoms guaranteed and protected under Articles 20, 23, 25(2), 25(3)(c) and 97 thus justifying the Petition.

11. Whether the Petitioner is entitled to the declarations and remedies prayed or any other."

No doubt some of the issues overlap. From those issues, the declarations sought, the evidence adduced and the submissions of Counsel for the parties it can be said that the real questions for determination are:

1. Whether the testimony given to the Parliamentary Sessional Committee on Defence and Internal Affairs by the Petitioner is covered by the Parliamentary immunities and privileges provided in Article 97 of the Constitution.

2. Whether the letter of the Minister of State for Defence (General) to the petitioner, declaring the latter's purported resignation from the UPDF and its High Command null and void and the reported conduct of some Government and Army Officers amounted to a denial of his liberty and a threat to his fundamental rights and freedoms

and was calculated to require him to perform forced labour.

3. Whether having been appointed Presidential Advisor

on Military Affairs outside the Military establishment, the petitioner continued to be a Member of the Army.

A. If the answer to (3) is in the affirmative, whether the petitioner continued to be governed by the terms of his employment in the Army and was subject to Military Law while also being governed by his terms of service as Presidential Advisor on Military Affairs.

5. Whether a Member of the High Command must necessarily be a Member of the Army.

6. Whether the petitioner is a conscientious objector within the meaning of Article 25(2) and (3) of the Constitution.

7. Whether the petitioner has resigned from the High Command of the Army.

8. Whether the petitioner is entitled to the declarations he seeks.

I propose to deal with those questions in that order. But perhaps I should first and briefly address my mind to the principles that govern the interpretation of the Constitution. I think it is now well established that the principles which govern the Construction of Statutes also apply to the construction of Constitutional provisions. And so the widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all ancilliary and subsidiary matters. See: Republic -v- El. Mann [1969] E.A. 357 and Uganda -v-Kabaka's Government [1965] E.A. 393.

As was rightly pointed out by Mwendwa, CJ, (as he then was) in El. Mann (supra) , in certain contexts a liberal interpretation of Constitutional provisions may be called for. In my opinion Constitutional provisions should be given liberal construction, unfetterred with technicalities because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to new and fuller import to its meaning. A Constitutional provision containing a fundamental right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexable, keeping in view ideals of the people, socio-economic and politico -cultural values so as to extend the benefit of the same to the maximum possible.

In other words, the role of the Court should be to expand the scope of such a provision and not to extenuate it. Therefore, the provisions in the Constitution touching on fundamental rights ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution.

If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course. However, the Court may decline relief if the grant of same, instead of advancing or fostering the cause of justice, would perpetuate injustice or where the Court feels that it would not be just and proper for example if the matter has been overtaken by events. In my opinion, in this regard, there seems to be no distinction between the enforcement of a fundamental right and a legal right under a general law.

The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution. The third principle is that the words of the written Constitution prevail over all unwritten conventions, precedents and practices. I think it is now also widely accepted that a Court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution.

I now turn to consider the questions raised by the petition. With regard to the first question, whether the petitioner's testimony before the Parliamentary Sessional Committee was made on a privileged occasion with the result that no one can question him, harrass him or even take any action against him on account of that testimony, I would answer the question in the

affirmative. Even Mr. Kabatsi admitted in his final address to the Court, that that testimony was given on a privileged occasion.

It was his submission that in fact no one was contemplating prosecuting, harrassing or victimising the petitioner because of what he stated to the Committee. The protection lies in Article 97 of the Constitution which provides as follows:-

> "97. The Speaker, the Deputy Speaker, Members of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its Committees shall be entitled to such immunities and privileges as Parliament shall by law prescribe."

The relevant law is to be found in the National Assembly (Powers and Privileges) Act (Cap 249). Under section 9 thereof the Parliament or a Sessional Committee of Parliament may summon witnesses to testify before it. Under section 14 any person summoned to testify or produce papers, books, records or documents before the Parliament or a Committee thereof is entitled, in respect of such evidence or the disclosure of any communication or production of the articles referred to above to the same right or privilege as before a Court of law. There are, under that section, exceptions as to what a witness may say or produce before the Parliament or a Sessional Committee thereof but they are not relevant to this case.

The evidence before us shows that the petitioner was summoned as a witness by the Committee in his capacity as a Senior Officer in the Army and a Presidential Advisor on Military Affairs. He

was to testify on, inter alia, the cause or causes of the war or Civil strife in Northern Uganda and to suggest to the Committee a possible solution to the problem. It was the evidence of Hon. Amama Mbabazi that it was agreed by the Committee and the Ministry of Defence that Army Officers should be summoned through him as Minister of State for Defence. This was for disciplinary purposes. The petitioner was so summoned, whereupon the Minister directed the Army Commander to allow the petitioner to respond to the summons. That was done.

It is clear from the record of proceedings before the Committee that the petitioner was assured by the Committee that his testimony would be privileged. Clearly the Committee had in mind the provisions of Article 97 of the Constitution and the National Assembly (Privileges and Powers) Act (Cap 249).

Regarding the second question, whether the Minister's letter touching on the petitioner's purported resignation and the conduct of other Government and Army officials derogated from the petitioner's liberty, threatened his fundamental rights and freedoms and was calculated to require him to perform forced labour in the Army, it seems clear to me that in that letter the Minister merely expressed his opinion that the purported resignation was null and void as it was not done according to the law. He then went on to advise the petition to proceed under Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 which were made under section 104 of the NRA Statute, 1992.

Mr. Lule's argument was that to require the petitioner to resign in accordance with Military Law when he was not a Military man would be to expose him to dire consequences. For example Military action could be taken against him in the process of resignation. Of course this argument begs the question whether the petitioner is a Military person or not which will be dealt with later in the judgment. Suffice it to say here that in my opinion the letter in question was neither an act nor a threat to the petitioner's liberty and fundamental rights. It did not state that the petitioner could not resign

from the Army. On the contrary, it advised him to resign but legally. So the threat of forced labour did not arise.

However, threats can easily be deduced from (a) Hon. Amama Mbabazi's statement to the Sunday Vision of 8-12-96, to the effect that somebody was up to something and the petitioner was playing along; (b) the reported statement by the Army Commander in the New Vision of 4-12-96, to the effect that the petitioner should have resigned from the Army before giving the damaging or damning testimony to the Parliamentary Committee; (c) the statement by the Commander - in - Chief of the UPDF to the effect that the petitioner would have to sort out his problems with the Army before he could resign and the message (exhb. p2) sent to the High Command by the Commander - in - Chief, in connection with the petitioner's testimony to the Parliamentary Committee. The contents of exh. p2 cannot be discussed here for security reasons.

The News-paper reports have not been denied. The presumption must be that they were accurate. Exhibit p2 contained some serious allegations against the petitioner which could lead to some sort of action being taken against him for what he had said to the Parliamentary Committee. That would clearly be unconstitutional under Article 97 of the Constitution. However, I cannot agree that those statements -in the press and in exh. p2 - were calculated to require the petitioner to perform forced labour as it was never claimed therein that the petitioner had to remain in the Army and perform forced labour. In any case under Article 25 (3) of the Constitution forced labour does not include military service.

And so I would answer the second question thus; the Minister's letter in question did not deny or in any way threaten the petitioner's liberty and fundamental rights, nor did it require him to perform forced labour, but the said statements to the press and the radio message in exh. p2 constituted a threat to the petitioner's liberty and freedom.

I now turn to the third question - whether the petitioner continued to be a Member of the Army even after his appointment as Presidential Advisor on Military Affairs. His stand is that he was a non commissioned Officer in the Army and that upon his appointment to the public service he ceased to be a member of the Army. In other words, that that appointment terminated his employment in the Army. It would follow then that at the time he testified before the Parliamentary Committee he did so only as a public servant and not as a Military man.

For the respondent it was contended that he was a Commissioned Officer and that his appointment to the public service did not and could not take him out of the Army. He could leave the Army only with the permission of the Commissions Board under Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993. It is not disputed that the petitioner has been a Senior Officer in the Army. What is disputed is whether he is a Commissioned Officer or not. It is therefore necessary to examine the chequered history of commissions in the Army of Uganda in order to decide whether the petitioner was a Commissioned Officer or not.

Before 1971, the National Army was governed by the Armed Forces Act (Cap 295). Section 11 of that Act provided for the Defence Council and its composition. Under section 96 (1) the Defence Council was empowered to make regulations to govern the Armed Forces. Section 96 (2) (c) empowered the Defence Council to make regulations in respect of the ranks of officers and men of the Armed Forces, the numbers in each rank and the use of uniforms by the Officers and men.

The Defence Council made Regulations known as The Armed Forces (Conditions of Service) (Officers) Regulations, 1969 under Statutory Instrument No. 30 of 1969. Part I thereof related to Commissions. Under

Regulation I thereof the Commissions Board was established. One of its functions was to advise the Defence Council in respect of appointment of persons to commissions in the Armed Forces - Schedule 2 of those Regulations contained the format of the warrant of appointment to commissions. That format clearly emphasized the supremacy of the Defence Com

Following the Military coup de tat of 1971, the Armed Forces Act was amended by the Amin regime. Under section 5 of the Armed Forces Decree (No. 1 of 1971), some sections or parts of the Armed Forces Act, 1969 ceased to have effect.

The composition of the Defence Council was also changed. It was to consist of the Military Head of State who was also the Chief of Defence Staff and Commander - in - Chief of the Armed Forces as Chairman, and other persons specified in that section. Previously the Defence Council consisted of the Prime Minister, the Minister of Defence, the Chief of Defence Staff, the Army Chief of Staff, the Chief of Air Staff and other persons to be appointed by the Prime Minister on the advice of the Cabinet.

Clearly, under the 1971 Decree the Commissions Board whose function had been to advise the Defence Council on matters of promotions, appointments and retirement of Officers, became redundant since the Head of State had become the Chairman of the Defence Council and also the Commissions Board in his capacity as Chief of Defence Staff. The Existing Law (Miscellaneous Repeal) Statute (No. 2 of 1980) which repealed the Armed Forces Decree, 1971 (No. 1 of 1971) made no provision for the composition of the Defence Council which would be the body to determine and issue Commissions to officers in the Army under the Armed Forces Act, 1969 which was still in force. No mention was made of the sections of the Armed Forces Act and the Regulations made thereunder which were repealed by Decree No. 1 of 1971. The matter has since been put right by the National Resistance Army Statute, 1992 (No. 3 of 1992).

It seems clear to me therefore, that in 1988 when the Army ranks were regularised to match with internationally recognised ranks, there was no Defence Council which could sanction the commissions. Under Article 78 of the 1967 Constitution which was in force until 8-10-95, the President enjoyed the power to appoint, promote and dismiss Members of the Armed Forces. It was in excessive of that power that in 1988, the President, as supreme command of the Armed Forces, promoted the petitioner to the commissioned rank of Brigadier under General and Administrative Order No. 6 under sub-heading 2 -Promotions/Commissions

There can be no doubt that the ranks of Brigadier and Major General are commissioned ranks. The petitioner freely accepted the appointment and promotion to those well recognised commissioned ranks of Brigadier and Major General. In my view it is immaterial that no warrant of commission was issued. I find therefore, that the petitioner was a commissioned officer in the NRA.

Under section 5 (1) of the National Resistance Army Statute 1992, No. 3 of 1992 service in the Army is a continuing full -time job and a member of the Army is liable to be employed on active service any time. Similary under the Public Service Standing Orders a public servant is engaged on full time basis. It follows that an Army Officer cannot be a public servant at the same time. And so when in 1993, the President appointed the petitioner to a public service job as Presidential Advisor on contract terms, he thereby took him out of the Army. There is no doubt that the President's power to appoint Army Officers included power to remove them from the Army.

There was evidence to the effect that as a matter of practice the Army Council allows Officers in the Army to accept assignments in the public service while remaining Army Officers. Clearly this practice contravenes section 5 (1) of the NRA Statute. There was also some evidence to the

effect that while a Presidential Advisor, the petitioner continued to enjoy certain facilities from the Army which included salary. Obviously he was not entitled to receive double salary. He might have enjoyed the other facilities in his capacity as a member of the High Command which is understandable. My finding on the third question is therefore that the petitioner ceased being a member of the Army on 2-2-1993, when he was appointed Presidential Advisor on Military Affairs.

In view of my finding as regards the third question, I would answer the fourth question - whether the petitioner continued to be governed by both the terms of service in the Army and those of the service in the public service and was subject to Military Law in the negative. He was governed only by the terms of the contract in the public service.

Since he was no longer a member of the Army he could not be subjected to Military Law except in his capacity as a historical member of the High Command.

As for the fifth question, whether a Member of the High Command must also be a Member of the Army, the answer is clearly no. This point was easily agreed by the Counsel for both parties. Under section 10(1) of the National Resistance Army Statute, 1992, the High Command consists, among others, the original Members of the High Command (the bush High Command) as at 26-1-86, which includes the petitioner and some civilians as ex officio members. As the law stands, it appears that historical or original Members of the High Command are there for life unless they resign. This may explain why under sub-section (2) of the said section, an original Member of the High Command cannot participate in the proceedings of the High Command in circumstances specified therein.

The sixth question - whether the petitioner is a conscientious objector under Article 25(2) and (3) of the Constitution - is of no consequence now in view of my finding that the petitioner is not a member of the Army. No one is asking him or forcing him to join the Army. Mr. Lule did make the interesting submission that a member of the Army can be a conscientious objector if he begins to question the propriety of military service. In that case he or she should be exempted from military service as a conscientious objector. My view is that one cannot be a member of the Army and at the same time be a conscientious objector to that Army as military service is not forced labour under Article 25(3) (c). Only an outsider, a civilian, may refuse to join the Army on the ground that he or she is a conscientious objector. A member of a disciplined force has no choice in the matter. His or her work there cannot be said to be forced labour. The momment that person loses faith in the Army and in the way it operates then that person must resign from the Army.

In accordance with the unanimous view it is ordered that the following declarations shall issue: -

(1) that any threatened disciplinary, administrative, criminal or civil action or actions against the Petitioner in any tribunal, forum or court of law, arising out of his testimony before the parliamentary sessional committee on Defence and Internal Affairs would be unconstitutional as it would violate Article 97 of the constitution;

(2) that Regulation 28 (1) of the National Resistance Army (conditions of service) (officers) Regulations, 1993, is not applicable to the petitioner as he is not a member of the Army.

The other declaration or orders sought are not granted. It is also ordered that the respondent shall pay the petitioner's costs of this petition.

JUDGMENT OF G.M. OKELLO, J.

This Petition has attracted a great deal of interest from members of the public, either because of its press coverage or because of the personalities involved. Whatever may be the reason, the case is important. It is a challenge to the government commitment to its promise to return the country to Constitutionalism. A large sum of money had been spent from the public funds to gather informations to produce this Constitution of Uganda 1993. It is the Constitution, and not any organ of government which is Supreme. It is the duty of every citizen individually or collectively to uphold, protect and defend the Constitution. It is therefore logical and fitting that the public should demonstrate keen interest to ensure that the contents of this Constitution are zealously respected by all.

That Petition made two major challenges. Firstly on the Constitutionality of the letter of the Minister of State for Defence (G) rejecting the Petitioner's resignation and requiring the latter to follow military laws when the Petitioner claimed that he had been removed from the Army upon his appointment as a Presidential Advisor on military affairs. Secondly, it questioned the Constitutionality of any threatened disciplinary, criminal or civil action in any court or tribunal against the Petitioner on account of the Petitioner's testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

The Petitioner had joined the NRA (now UPDF) during its bush war days when it was still a guerilla force. At 26th January, 1986 when the NRA seized state powers, the Petitioner was not only a member of the NRA but was also a member of

its High Command and the Army Council. By Legal Notice No.1 of 1986, the NRA was converted into a National Army for Uganda. The Petitioner had served the NRA in various capacities. He was Commanding officer at various

places including the North. At various times he was the head of military intelligence and head of combatant operations (CCC). In 1988 when the President and Commander-in-Chief by General and Administrative Order regularised the ranks of the NRA officers to the internationally recognised ranks, the Petitioner was ranked to a Brigadier. In 1989, he was promoted to a Major General. Between 1990 and 1992, the Petitioner served as a Minister of State for Defence (MSD). Then by a letter dated 24th May, 1994, the Petitioner was appointed a Presidential Advisor on military affairs. This is a Public Service post. The appointment was back-dated to take effect from the 2nd February 1993. It was a two years renewable contract. The terms and conditions of the appointment were set out in detail in the letter of appointment.

Later in 1996, a Parliamentary Sessional Committee on Defence and Internal Affairs was set up to probe into all aspects of the armed conflict currently taking place in the North and to recommend possible solutions. Because of his experience and direct involvement in the armed conflict in the North, the Petitioner was on 28th November 1996 summoned to the Parliamentary Sessional Committee to give evidence. On 29th November 1996, the Petitioner appeared before the Committee in obedience to the summons. After he was assured of his personal immunity, the Petitioner testified before the Committee on oath. The evidence was critical of the manner in which some senior army officers were handling the conflict. The criticism was not taken well by some government and army senior officers.

A few days after his testimony, the Petitioner saw in New Vision Newspaper Reports attributed to some government and army senior officers criticising the Petitioner's evidence. The Petitioner perceived the reports as exposed him to atmosphere of fear and he felt that his human rights were about to be infringed. Then on 3rd December 1996, he wrote to H.E. The President and Commander-in-Chief and Chairman of the Army High Command and Minister of Defence tendering his resignation from the Army and its High Command. Subsequent to his letter of resignation, the Petitioner

received a letter dated 8th December 1996, Annexture 'E' to the Petition, from the Minister of State for Defence (G) rejecting the Petitioner's resignation and required him to resign as a serving military officer in accordance with Reg. 28(1) of the NRA (conditions of service) (officers)

Regulations 1993. Thereafter, there was another report in the new vision, a government owned newspaper, of 18th December, 1996, (Annexture A3 to the Petitioner's affidavit in reply) attributed to the President saying to the effect that the Petitioner would have to follow procedure to resign. In view of the above scenario, the Petitioner filed this Petition on 19th December, 1996.

The Petition was supported by three affidavits of the Petitioner.

The Respondent filed an answer in which he denied all the allegations contained in the Petition. The answer was supported by an affidavit of Hon. Amama Mbabazi, Minister of State for Defence. He also gave a verbal evidence when he was summoned by court in terms of rule 12(2) of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996.

When the Petition was called for hearing, the learned Solicitor General who represented the Attorney General raised a preliminary objection challenging the competence of the Petition before this court. Three grounds were advanced in support of the objection, namely:-

(1) that no court fees were paid by the Petitioner at the time of filing the Petition.

(2) that the Petition was supported by defective affidavits and

(3) that the Petition discloses no cause of action.

The objection was strongly opposed. After hearing the arguments from Counsel for both parties, the court reserved its opinion on the matter to be incorporated in the main judgment and directed the hearing of the Petition to proceed. The reason for that decision was based on the importance of the

Petition concerning a citizen's right guaranteed under the Constitution. Court did not want to stifle the case from the bud on technicalities.

I now deem it appropriate to tackle the preliminary objections at this stage. The learned Solicitor General pointed out correctly, in my view, that rules 3 of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) rules 1992 Directions 1996 requires a prescribed court fees plus security for costs of shillings 100,000/= to be paid at the time of presenting a Petition for filing. He submitted that in the instant case, court fees were not paid at the time of presenting the Petition. The learned Solicitor General argued that payment of court fees was not the kind of technicalities envisaged in article 126(2)(e) of the Constitution of Uganda 1995. He submitted that the non-payment of the prescribed court fees rendered the Petition incompetent and prayed that the Petition be struck, out for incompetence.

It transpired in the course of the hearing that both the prescribed fees plus the requisite security for costs were paid and receipts issued. Mr. Lule leading Counsel for the Petitioner had the receipts and produced them to court. One receipt was for shillings 10,500/= and the other for shillings 100,000/=. Both receipts described both payments as court fees. The Registrar confirmed that both the prescribed court fees and security for costs were duly paid notwithstanding the mis-description in the receipt.

Payment of the prescribed court fees plus a further shillings 100,000/= for security for costs at the time of presenting a Petition is clearly mandatory under rule 3 of the Modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996. Failure to comply with that requirement is punishable under rule 4 thereof which enjoins the Registrar not to receive such a Petition. There is no doubt that there was due compliance with the requirement of rule 3 in the instant case. The full amount of shs.110,500/= was paid at the time of presenting the Petition. This covered the prescribed court fees of shs.10.500/= plus the security for costs of

shs.100,000/=. The receipts issued on receipt of the money wrongly described both payments as court fees. This of course was a misdescription in part since shs.100,000/= was a refundable security for costs. The Petitioner can not be blamed for that mis-description. That was the work of an official of the court. In the circumstances I would find no merits in this ground of objection.

The second ground of objection was that the Petition was supported by affidavits which contain very grave and serious defects in themselves and with others. The following defects were alleged, namely:-

(a) that the affidavits are inconsistent in themselves and with others.

(b) that the affidavits did not disclose the sources of information.

(c) that the affidavits did not distinguish between matters sworn on information and those deponed on the deponent's own knowledge.

The learned Solicitor General referred to various paragraphs of the Petitioner's affidavit of 12th December 1996 and some passages in the Petitioner's testimony before the Parliamentary Committee to show inconsistencies in the affidavit. The paragraphs referred to were:- 2, 12, and 17 and a passage on page 61 of the Petitioner's testimony. In those paragraphs and the passage on that page, the Solicitor General pointed out, the Petitioner stated that he was a member of the UPDF. But that in paragraph 18 of the same affidavit and in paragraph 8 of the Petitioner's affidavit in reply dated 12th of February 1997, the Petitioner made statements which contradicted the previous ones. The Solicitor General argued that in these latter paragraphs, the Petitioner stated that he had ceased to be a member of the regular force upon his appointment to the post of Presidential Advisor.

The Solicitor General further pointed out that in paragraph 7 of his affidavit of 12th December 1996, the Petitioner falsely stated that the Petitioner had represented the Army on the Constitutional Commission. When

the Respondent had pointed out that that statement was false, the Solicitor General argued, the Petitioner sought to correct the error in paragraph 12 of his subsequent affidavit dated 12th February 1997. The Solicitor General submitted that inconsistency or falsehood in an affidavit cannot be ignored however minor. He cited the following cases as authorities for that proposition.-

(1) Sirasi Bitaitano & 4 Others Vs E. Kananura (1977) HCB 34

(2) Kabwenukya - Vs - John Kisigwa (1978) HCB 257

(3) Milton Obote Foundation - Vs - C. Ogwal and Others HCCS No.690/96 (unreported).

Another ground of attack on the affidavits sworn in support of the Petition was that the affidavits did not disclose the sources of information where facts are based on information. The learned Solicitor General submitted, correctly in my view, that affidavit which is sworn on facts based on information and belief, must disclose the source of the information and the grounds for belief. The following cases were relied on for authorities for that view.

(1) A.N. Phakey - Vs - World Wide Agencies Ltd (1918) 15 EACA 1

(2) Caspair Ltd. - Vs - Happy Gandy (1962) EA 414

The learned Solicitor General submitted that in the instant case, affidavit sworn in support of the Petition did not disclose sources of information where facts are based on information. He cited paragraphs 8 and 9 of the Petitioner's affidavit in reply dated 12th February 1997 as examples of those omissions.

The next complaint against the affidavit in support of the Petition was that the affidavit did not distinguish between facts deponed to on information and those sworn en the deponent's own knowledge. The learned Solicitor General contended, rightly in my view, that an affidavit must distinguish between facts sworn on information and those sworn on the deponent's own knowledge. The following case was cited as authority for that view.

Noor Mohamed Jan Muhamed -Vs- Kassamali Virji Madhvani (1953)20 EACA 8

Mr. Lule responded that the affidavits in support of the Petition did not contain inconsistencies. Sources of information, he said, were disclosed were facts were based on information. He explained that the words "my lawyers" in paragraphs 8 and 9 of the Petitioner's affidavit in reply dated 12th February 1997 means the lawyers who drafted the document. He drew the court's attention to its duty under article 126(2)(e) of the Constitution of Uganda 1995, to administer substantive justice without undue regards to technicalities. Relying on article 2(1)(2) and 273 (1) of the Constitution, Mr. Lule submitted that the cases cited by the learned Solicitor General being existing laws must be construed so as to bring them in conformity with the Constitution.

Article 2(1) provides that the Constitution "is the Supreme Law of Uganda and shall have binding force on all authorities and persons throughout Uganda."

Article 2(2) provides that if any other law or any custom is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail and that other law or custom shall, to the extent of the inconsistency, be void.

Article 273(1) saves existing laws.

The defects which the learned Solicitor General complained about in the affidavits are technicalities which are not fundamental. In cases concerning fundamental rights of a citizen such technicalities must be considered in light of article 126 (2)(e) of the Constitution of Uganda 1995 and be ignored to avoid compromising substantive justice. That is what the Legislatures must have intended in the above Constitutional Provision. This was done in Uganda -Vs-Commissioner of Prisons exparte Matovu (1966) EA 574 where at page 521, Sir Udo Udorna C.J. as he then was, while dealing with technical defects in application concerning the liberty of a citizen had this to say,

> "We decided in the interest of justice to jettison formalism to the wind and overlook the several deficiencies in the application and thereupon proceeded to the determination of the issue referred to us"

The case before us concerns the fundamental rights and freedom of a citizen guaranteed under the Constitution of this country. The principle applied in Matovu's case above will be adopted here too. It is in line with article 126(2)(e) of the Constitution. It is appropriate to ensure that cases concerning fundamental rights of a citizen are not killed at birth.

The third ground of objection was that the Petition discloses no cause of action. Mr. Kabatsi pointed out that article 137(3) of the Constitution of Uganda 1995 requires a Petitioner to allege an act or omission which violates a provision of the Constitution to constitute a cause of action. The learned Solicitor General pointed out that the act complained of was that the Minister of State for Defence in his letter advised the Petitioner to follow the law. That advice, Mr. Kabatsi submitted, can not be unconstitutional because it does not violate any provision of the Constitution.

Mr. Lule responded that the Petition discloses a cause of action. He pointed out that to determine whether or not a Petition discloses a cause of action one must look at only the Petition itself and the supporting affidavit. He

argued that article 137(3) of the Constitution of Uganda 1995, creates a right of action to a person who alleges that,

(a) an Act of Parliament or any other law or

(b) an act or omission of any person or authority is inconsistent with a provision of the Constitution. Mr. Lule pointed out that this Petition covers article 137(3)(a) and (b) of the Constitution. He submitted that article 137 must be read together with article 50(1) which gives right of action where there is a threat to violate one's fundamental right.

It is instructive to state the principle applicable to determine whether or not a Petition discloses a cause of action. I have not been able to lay my hands on a Constitutional Petition case directly on the point. But by analogy, it is perhaps helpful to refer to the observations of spray Ag. President of the defunct Eastern African Courts of Appeal in Attorney vs Olouch (1972) EA at page 394 paragraph A and B where he said,

"In deciding whether or not a suit discloses a cause of action, one looks ordinarily, only at the Plaint (Jiraj Shariff & Co. -vs- Chotai Farey Store (1960) EA 374) and assumes that the facts alleged in it are true"

I respectfully agree with that principle. In the case before us, it is only the Petition and the supporting affidavits that must be looked at and to assume that the facts stated therein are true, to decide whether the Petition discloses a cause of action.

This Petition was brought under article 50(1) and 137(3) of the Constitution of Uganda 1995. Article 50(1) authorises any person who,

"claims that a fundamental right or freedom guaranteed under this Constitution has been infringed or threatened to bring action to court for redress."

Article 137(3) on the other hand, authorises any person who alleges either that an Act of Parliament, or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority is inconsistent with or in contravention of this Constitution to bring action to this Constitutional Court for a declaration.

The instant Petition alleges as unconstitutional the letter of the Minister of State for Defence rejecting the Petitioner's resignation from the UPDF and its High Command and requiring the Petitioner to resign in accordance with Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993 for being contrary to article 25(2) and 25(3)(c) of the Constitution of Uganda 1995.

It further alleges a threatened disciplinary, or criminal or civil action against the Petitioner on account of his testimony before the Parliamentary Sessional Committee as being contrary to article 97 of the Constitution.

Assuming that what are contained in the Petition and the supporting affidavit are true, reading articles 50(1) and 137(3) together, is clear to me, that the Petition discloses causes of action. Whether the letter of the Minister actually infringes the stated provisions of the Constitution or not is a matter to be determined at the close of the hearing of the Petition.

Similarly, whether the Newspaper reports and the Radio message contained threat is also a matter to be determined by the trial. For these reasons, I would find and hold that the Petition discloses causes of action.

Before I tackle the merits of the Petition itself, there is one more issue which I must deal with. In the course of the hearing, leading Counsel for the Petitioner had attempted to tender in evidence a photocopy of a Radio message which was annexed to the Petition as annexture A4. That attempt was resisted by the Solicitor General on the grounds that (1) it was a photocopy, (2) its source was not disclosed, (3) it was not signed and (4) it was crossed. It

was crossed vertically through all the pages with a thick black ink. After hearing arguments from both Counsels, Court ruled by 4 to 1 that the document was inadmissible and reserved its reasons to be incorporated in the judgment. I was one of the four Judges who ruled against its admissibility. As for the reasons for that, I associate myself with the reasons given by My Lord Justice Manyindo DCJ which I had the chance to read in draft.

As if not to feel being undone, Mr. Lule later in cross-examination handed to Hon. Amama Mbabazi the same recorded Radio message but this time in original hand written form. Hon. Mbabazi recognised it as a Radio message which was sent by H.E. The President to the Minister of State for Defence (G) and copied to all members of the High Command including the Petitioner. He thought the document was restricted. Consequently a second attempt to tender it in evidence was again resisted but this time on ground of national security. Court however ordered that it be admitted in evidence since it is relevant to the case but that it should be admitted in camera. So it was done and the document is marked in evidence as (Exh P2.)

I now turn to consider the merits of the Petition itself. Our task in this Petition is to interpret certain provisions of the Constitution of Uganda 1995 in relation to certain acts and measures which the Petitioner alleged are contrary to the provisions of the Constitution. It is perhaps appropriate at this point, to set out the principles that govern interpretation of a Constitution.

In Andrew Lutakome Kayiira and Paul Semogerere - Vs - Edward Rugumayo and two others - Constitutional case No.1 of 1979 - Odoki J as he then was adopted the principles governing interpretation of statute. In doing so, he followed earlier cases like (1) Uganda -Vs - Kabaka's Government (1965)EA 395; (2) Republic -Vs-E.L. Mann (1969) EA 357.

It would appear clear from those cases that the principles which govern interpretation of statute also apply to interpretation of Constitutions.

The rule of statutory interpretation are set out clearly in Craies on Statute 6th Edition at page 66 as follows:-

> "The Cardinal rule of Construction of Acts of Parliament is that they should
>
> be construed according to the intention expressed in the Acts themselves.
>
> The Tribunal-------that has to construe an Act of a legislature or indeed any
>
> other document has to determine the intention as expressed by the words used. And in order to understand those words, it is natural to inquire what is the subject matter with respect of which they are used and the object in view If the words of the statute are themselves precise and un- ambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the laws-givers. Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislatures."

The above quotation is clear. The rule is simply put, that where the words of the document to be construed are clear and unambiguous, they must be given their ordinary and natural sense irrespective of the consequences. An argument was advanced that a more liberal interpretation should be adopted to interpret a Constitution than an ordinary statute. Commenting on that view, Mwendwa CJ had this to say in Republic Vs E.L. Mann above,

"We do not deny that in certain context a liberal interpretation may be called for; but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is where the words are precise and un-ambiguous, they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."

It must also be added that in "Maxwell on Interpretation of Statute 3rd Edition" page 3498, the learned authors put the point in this way,

> "The tendency of modern decisions upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more strict regard to the language and criminal statutes with a more rational regard to the aim and intention of the legislature than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our own free institutions that the interpretation of all statutes should be favourable to personal liberty and it is still preserved in a certain reluctance to supply the defects of language or to eke out the meaning of an obscure passage by strained or doubtful inferences. The effect of the strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself."

It is clear from the above quotation that to determine the intention of the legislature, the words used should be the tool. Where they are precise and unambiguous their ordinary and natural meaning must be given effect to. Where a passage is obscure and ambiguous and leaves doubt as to its meaning, the benefit of the doubt must be given to the subject rather than to the legislature which has failed to be clear. I would adopt these principles in the interpretation of the constitutional provisions at hand.

The following issues were agreed on by Counsel for both parties for determination of the court:-(1) whether on his appointment to the post of Presidential Special Advisor on Military Affairs the Petitioner became a public servant by

virtue of the terms of service spelt out in the letter of his appointment.

whether upon his appointment with effect from 2nd February 1993; the terms of service spelt out in the letter of appointment were the terms governing the Petitioner and his service relationship with the Republic of Uganda.

whether upon being offered new terms of service, set out in the letter of appointment, the Petitioner continued to be governed by the terms of his old employment, too in the Uganda Armed Forces.

whether having served in the Army and appointed to a new position outside the military establishment, the Petitioner continued to be a member of a regular force as defined in the National Resistance Army Statute and the Regulations made thereunder.

whether in his new status, arising from his new terms of service set out in his letter of appointment, the Petitioner continued to be subject to military laws, to which members of the Uganda Peoples Defence Forces are subject.

whether to be a member of the High Command as defined or set out in the National Resistance Army Statute one must of necessity also be a member of a regular force.

whether the letter from the Minister of State for Defence (Annexture'E' to the Petitioner) which declared the Petitioner's resignation and departure from the Army and the High Command "null and void" was in effect a denial of the Petitioner's liberty and calculated to require the Petitioner to perform forced labour.

whether the Petitioner resigned from the High Command and refused to be a member of a regular force as a conscientious objector in accordance with article 25(2) and 25(3) of the Constitution.

whether the testimony given by the Petitioner before the Parliamentary Sessional Committee on Defence and Internal Affairs was made on a privileged occasion and entitled the Petitioner to immunity from any actual or threatened prosecution, harassment or victimization guaranteed by Articles 97 and 173 of the Constitution 1995 and the Provisions of the National Assembly Powers and Privileges Act Cap 249 Laws of Uganda 1964.

(10) whether the letter from the Minister of State for Defence and the reported conduct of the other authorities in the government and the army amounted to a threat to the Petitioner's fundamental rights and freedoms guaranteed and protected under articles 20, 23, 25(2), 25(3)(c) and 97 thus justifying the Petition.

(11) Whether the Petitioner is entitled to the declarations and remedies prayed or any others.

From the Petition, its supporting affidavits, the answer to the Petition and the affidavit in support thereof and the verbal evidence given before us plus the arguments of Counsel on both sides, there are only two fundamental is sues in this case. The above issues are all subsidiary to these fundamental issues. They are,

(1) whether the Petitioner is protected from any actual or threatened prosecution, whether disciplinary, criminal or civil on his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

(2) whether the Petitioner was removed from the Army upon his appointment as Presidential Advisor effective from 2nd February 1993.

I shall deal with these two fundamental issues in that order.

PROCEEDINGS BEFORE PARLIAMENTARY COMMITTEE.

Paragraph 1 (b) of the Petition was couched in these words,

> "Proceedings in the Parliamentary Sessional Committee on Defence and Internal Affairs are privileged under Article 97 of the Constitution and as such can not form a basis for any disciplinary and or criminal/civil action against the Petitioner in any court of law and or administrative body of any
>
> kind"

The Petitioner's case is that, he is protected by article 97 of the Constitution from prosecution actual or threatened or any harassment on his testimony before the Parliamentary Committee. He alleged that there was threat to take disciplinary action and probably to punish him under the military code of conduct on account of his testimony before the Parliamentary Sessional Committee. He deponed in his affidavit that he feared that his fundamental rights guaranteed under that article 97 of the Constitution was therefore threatened. His fear was based on Newspaper reports attributed to some government and army senior members.

The Solicitor General conceded that the Petitioner is protected on his testimony before the Parliamentary Committee under article 97 of the Constitution but contended that the Newspaper reports attributed to the government and army senior members did not constitute any threat to the Petitioner.

From the above, the issue here has turned on whether there was evidence of threat to take disciplinary or other action against the Petitioner on account of his testimony before the Parliamentary Committee.

Article 97 of the Constitution enjoins Parliament to make laws prescribing Parliamentary immunities and privileges. Parliament responded to this order. It made laws - the National Assembly (Powers and Privileges) Act Cap.249. Section 14(1) thereof provides for a witness who testifies before Parliament or it committee same rights and privileges as those who testify before a court of law. The Petitioner is covered under this provision on account of his evidence before the Parliamentary Committee.

The Respondent denied that the Newspaper Reports attributed to the Army Commander and Hon. Amama Mbabazi contained any threat to take disciplinary or any other action against the Petitioner on account of his testimony before the Parliamentary Committee.

"Threat" is an ordinary English word whose dictionary meaning includes expression of an intention to hurt, punish or cause pain etc. I have read Newspaper Reports attributed to some government and army senior members. In

New Vision of 4th December 1996 was a Report with the Caption "Army Chief tells Tinyefuza to quit". This Report was attributed to the Army Commander who was reported to have said,

> "If Tinyefuza wanted to express his own views he should have resigned, otherwise he has to abide by the agreed position taken by the army. Muntu charged that Tinyefuza's utterances on Friday were against UPDF organisational structure".

The New Vision of 7th December, 1996 carried another Report entitled "Tinyefuza to face High Command". This was attributed to the President who was reported to have said,

"Tinyefuza could be summoned before the High Command as a serving
military officer under the Military Code".

The same article reported the Army Commander to have said:

"Tinyefuza was undisciplined and a deviant who should have resigned before testifying. The testimony was meant to cause friction and undermine the cohesion within the army which jeopardises national security".

In the Sunday Vision of 8th December, 1996 was a Report which was attributed to Hon. Amama under the heading, "Tinyefuza is up to something". The article reported Hon. Amama to have said, "I do not want to discuss this Tinyefuza issue, but I think he is trying to make a huge mountain from a mole. I think somebody is up to something and Tinyefuza is playing along".

The New Vision of 18th December of 1996 carried yet another Report under the title,

"No split in the army over Tinyefuza".

This was attributed the President who was reported to have said, "If he (Tinyefuza) wants to go, we shall let him go after he has sotted out his problem with the army. If he committed an offence in the army, he will have to sort out that one first."

This last report summed up clearly the intention. If he committed an offence with the army he will have to sort out that one first. The Reports attributed to the Army Commander and Hon. Mbabazi imputed to the Petitioner commission of offences against the army code of conduct. For example, indiscipline, subversion, intrigues are offences under the army code

of conduct. Imputation of commission of offence is an expression of an intention to punish.

The Radio message (Exh P2) confirmed the Petitioner's fear. It sets out certain offences for which the Petitioner would have been disciplined under the army code of conduct and directed the High Command meeting to consider them and recommend causes of action. Mr. Kabatsi submitted that the Radio message (Exh P2) was inconclusive and did not constitute a threat. I do not agree. By labelling charges against the Petitioner and directing the High Command meeting to consider them, the Radio message had sufficiently expressed an intention to punish the Petitioner. What could be a clearer expression of intention than framing charges against someone. I would hold that there was a threat to take disciplinary action against the Petitioner on account of the testimony the Petitioner gave before the Parliamentary Committee on Defence and Internal Affairs then probing into the causes of the armed conflict being waged in the North of Uganda. The Petitioner is entitled to the protection of this court against that threat.

This now leads me to the second fundamental question in this Petition which is whether the Petitioner was removed from the army upon his appointment as Presidential Advisor.

Paragraph 1(a) of the Petition alleges,

"(a) that the Minister of State for Defence (G)'s letter of 8th December 1996 rejecting the Petitioner's resignation and requiring the Petitioner to resign in accordance with Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993 is contrary to article 25(2) and 25(3)(c) of the Constitution of Uganda 1995.

Article 25(2) of the Constitution of Uganda 1995 prohibits compelling any person to perform forced labour. The relevant provision reads that,

> "No person shall be required to perform forced labour."

Article 25(3)(c) of the same Constitution sets out one of the limitations of

what amounts to forced labour. The relevant provision reads that,

> "any labour required of a member of a disciplined force as part of that member's duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or airforce, any labour which that person is required by law to perform in place of that service."

REMOVAL FROM ARMY

The Petitioner's argument was that he could not follow that procedure provided under the military law because he is not subject to military laws. He had ceased to be a member of the regular force when he was appointed to the Public Service as a Presidential Advisor and that he had not been a member of the Regular Reserve or any other component of the army. The Petitioner deponed in paragraph 6 of his affidavit of 12th December 1996 that he was appointed an Advisor to H.E. The President by a letter dated 24th May 1994. The appointment was on a two years renewable contract which was backdated to 2nd February 1993. Mr. Lule pointed out that the power of appointment conferred on the President under any article of the Constitution includes the power to remove, suspend or to reinstate by virtue of section 24 of the Interpretation Decree No.18 of 1976.

The Petitioner's letter of appointment set out the conditions of the appointment in detail. The conditions and terms of service in that letter and those prescribed in section 5(1) of the National Resistance Army Statute No.3 of 1992 both require full time service. Mr. Lule submitted that these are mutually exclusive and that by making the subsequent appointment with the terms and conditions of service exclusive of the earlier appointment, the President had in fact removed the Petitioner from the army and appointed him to the Public Service.

In support of that view, the Petitioner deponed in his affidavit that his salary and other entitlements which he used to receive as an army officer were stopped. He cited a letter from the Secretary for Defence (Annexture 'F') to the Petitioner's supplementary affidavit as evidence of the stoppage. The Petitioner's affidavit further showed that since his appointment as Presidential Advisor, the Petitioner had been paid his salary from the Public Service through the President's office and that his said salary was being deducted to pay graduated tax. He produced three salary pay slips (Exh.P1) to substantiate the points that his salary was paid from Public Service through the office of the President and that his said salary was being deducted to pay graduated tax. Mr. Lule pointed out that army officers arc exempted from payment of graduated tax by virtue of Reg.33 of the National Resistance Army (conditions of service)(officer s) Regulations 1993.

The Respondent's case was that despite those conditions and terms of the Petitioner's subsequent appointment as Presidential Ad visor, the Petitioner is still a member of the Regular force. That if anything it is the subsequent appointment which is to be void.

The Respondent's case hinges on two grounds namely:-

(1) That the National Resistance Statute No. 3 of 1992 does not provide for that manner of removal of an army officer from the army.

(2) That there is a policy which allowed army officers to be employed outside the army but still retained their membership of the army. The letter of appointment, the solicitor General submitted, did not remove the Petitioner from the army. Removal from the army, the Solicitor General argued, can only be in accordance with the law. Hon. Amama-Mbabazi (PW1) told court both in his affidavit and in his testimony that the Petitioner is still a member of the army. He testified to the existence of a policy in the UPDF passed by the High Command in 1992 which allows Army Officers to be employed outside the army but still retain their membership of the army. He produced various documents (Exh. D1-9) to show Army officers who under the policy were employed out side the army but still retained their membership in the army.

It was a further contention of the Respondent that the Petitioner is still a member of the army because he continued to be paid his emoluments and entitlements as an army officer. Hon. Amama Mbabazi produced assorted documents (Exh.D-10-21) to show that the Petitioner was continued to be given salary, food rations, army uniforms, fuel and other benefits from the army as an army officer after his appointment as President Advisor.

Another reason which the respondent advanced for the view that the Petitioner is still a member of the army is that the Petitioner had held out himself as an army officer even after his appointment as Presidential advisor. Hon. Amama Mbabazi cited instances where the Petitioner held out himself as an army officer. The instances were first that the Petitioner, told the Parliamentary Committee that the Petitioner is a Major General in the UPDF; the Petitioner presented himself and was elected by the army as a member of the Constituent Assembly representing the army, and continued to represent the army in that forum until 1995 when the constitution was promulgated.

In response, Mr. Lule challenged the evidence to show that the Petitioner continued to receive his entitlements in the army as unsatisfactory. The documents (Exh.D10-21) he said, do not contain the Petitioner's signature acknowledging receipt. He submitted that as there was admission of

dishonesty among the officials in the army institution, it was necessary to produce satisfactory evidence before a finding of fact could be made that the Petitioner received or authorised receipt of those items.

On the argument that the Petitioner had held out himself as an army officer, it was replied for the Petitioner that the doctrine of estoppel cannot operate to hinder operation of law. He cited a Book entitled "Maxwell on Interpretation of Statute 12th Edition by P. St.J. Langan". Mr. Lule submitted that the law does not regard the Petitioner as a member of the array and the Petitioner cannot be estopped from saying that he is not a member.

He finally reiterated that the Petitioner was removed from the army upon his appointment as a Presidential Advisor.

I shall deal with these arguments in that order.

It is conceded by Counsel for both parties that the appointment of the Petitioner as a Presidential Advisor was directed by H.E. The President under Article 104 (1) of the Constitution of Uganda 1967 as modified by legal Notice No. 1 of 1986. The letter of appointment annexture 'C' to the Petition, sets out in detail the terms and conditions of service for the post.

For brevity I shall not reproduce the letter here. It suffices to the state that the appointment gives the Petitioner a full-time employment on a two years' renewable contract with effect from 2nd February, 1993. The conditions of service prescribed in Section 5 (1) of the NRA Statute No. 3 of 1992 for a member of a Regular force is that,

> "Every member of a Regular force shall be on continuing full-time military service and shall at all time be liable to be employed on active service".

The conditions of service contained in the Petitioner's letter of appointment and those prescribed in the above quoted provisions are clearly mutually exclusive. Mr. Lule pointed out, and this was conceded by the Respondent that the Petitioner was appointed and promoted in the army under Article 78 (2) (b) of the Constitution of Uganda 1967 as modified by Legal Notice No. 1 of 1986.

Mr. Lule had submitted that the power to appoint conferred on the President under any article of the Constitution includes the power to remove, suspend or even to reinstate by virtue of section 24 of Decree No.18 of 1976.

I agree, The provisions of section 24 of the Interpretation Decree No. 18 of 1976 reads that,

> "S.24 where, by any Act or Decree, a power to make any appointment is conferred, the authority having power to make the appointment shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power."....

The above provision is clear. The power to appoint conferred on any authority by law includes the power to remove, suspend or reinstate. The power to appoint conferred on The President under any article of that constitution (1967) therefore included the power to remove, suspend or to reappoint by virtue of section 24 of Decree 18/76. The crucial question here is whether the Petitioner was removed from the army upon his appointment as a Presidential Advisor. Mr. Kabatsi submitted that the Petitioner was not removed from the army upon that appointment because the NRA statute No. 3 does not provide for that manner of removal. I must say that the same Statute does not provide for appointment or secondment of an army officer to a Public Service or indeed to any post outside the army. Article 210 of the Constitution of Uganda 1995 enjoined Parliament to make laws to provide for amongst others, appointment, recruitment, terms and conditions of service of the UPDF. The relevant article says that,

"Parliament shall make laws regulating the Uganda Peoples' Defence Force and in Particular providing for -

(b) Recruitment, appointment, promotion e.t.c

(c) terms and conditions of service of Uganda Peoples' Defence Force...".

The above article places emphasis on Parliament. It departed from the Uganda Constitution of 1967 whose article 78 (1) which dealt with the power to appoint army officers, placed emphasis on the President. Clause 4 of that Article gave Parliament discretion to regulate the power conferred on the President by Article 78 (1) above.

In compliance with article 210 above Parliament made laws, the National Resistance Army statute No. 3 of 1993. Section 104 (1) thereof empowers the Minister responsible for defence after consultation with the NRA council to make by Statutory Instrument Regulations to ensure discipline and good administration of the army and generally for the better implementation of the provisions of this statute.

The National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 (S1 No.6 of 1993 was made under the above provisions of the statute. Reg. 27 thereof prohibited removal of an army officer from the army except in accordance with the statute and Regulations made under it. Reg. 28 (1) provided the procedure for resignation and retirement of an army officer from the army. Resignation may be permitted under that Regulation by the Commission Board. Reg. 27 of the NRA (Conditions of Service) (Officers) Regulations 1993 is a subsidiary Legislation. It cannot over-ride the power to remove given under Section 24 of Decree 18 of 1976.

Sub-Section 2 of Section 104 of the NRA Statute No. 3 of 1992 empowers the Minister to provide for things like transfer and secondment of army officers from the army to offices outside the army but he chose not to do so. The rule of strict construction pointed out earlier in this judgment is that where words or sentence leaves reasonable doubt as to its meaning which the canons of interpretation fail to solve, the benefit of the doubt must be given to the subject and against the Legislature which has failed to explain itself.

It would appear to me clear that Section 5(1) of NRA Statute No.3 of 1992 is ambiguous as to whether an army officer can be employed outside the army and still retain his membership in the army. The Regulations made under that statute also makes no provision for secondment of army officers to offices outside the army while retaining their membership in the army. The NRA statute No. 3 of 1992 and the Regulations made under it are in that regard ambiguous. On the principle of construction stated above, the benefit of the doubt must be given to the Petitioner. That he was removed from the army upon his appointment as Presidential Advisor.

The contention that there is a policy which allowed army officers to be employed outside the Army but still retain their membership in the army is untenable because any policy which is not reduced into law cannot be enforced by courts.

In this age of Constitutionalism, when the rule of law is being restored, it is necessary that any policy which affects the right of citizen must be reduced into law not only for predicability of action but also for certainty of purpose. The alleged policy having not been reduced into law is unenforceable by Courts.

The argument that the Petitioner continued to be paid his emoluments and other benefits as an army officer is not supported by any satisfactory evidence. The documents Exh.D 10-21 which Hon. Amama Mbabazi produced in court

to substantiate the argument do not bear the Petitioner's signature or that of his agent acknowledging receipt of those items. When the Petitioner denied receipt of the items, the Respondent relied on the explanation that Senior and busy Army officers of the Petitioner's category do not line up to receive their entitlements from their junior officer. They would send their aides for the same. That explanation is not enough. Better evidence was required to rebut the denial. Clear evidence to connect the Petitioner with receipt of those items was necessary. The necessity for such evidence became greater when there was admission of dishonesty in the Institution of the Army. Evidence or Affidavit from the Petitioner's aides or agents was necessary to show that receipt of those items were on the Petitioner's authority. That was not availed.

The evidence available indicated that some of the items were received by the Petitioner in his other capacities; either as a member of the High Command or as a Member of the Army Council. It is conceded that membership of the High Command was not dependent on membership of the army. And that being a member of the High command, entitles one to automatic membership of the army council. Hon. Amama Mbabazi further conceded that as a member of the Army council, the Petitioner was entitled to army escorts. The Petitioner conceded that vehicle Land Rover 110 Reg. UPE 745 was retained by him for official use of those army escorts. He further conceded that fuel was also obtained from the army for use in that vehicle for that purpose. It was the evidence of Hon. Amama Mbabazi that members of the High Command are allocated vehicles by virtue of the position they hold except those who were members as at 26th January. 1986. It is conceded that the Petitioner was a member of the High Command as at 26th January, 1986.

The above evidence casts doubt as to whether the Petitioner continued to be given his emoluments and other benefits as an army officer after his appointment as Presidential Advisor. It is important to note that Hon. Amama Mbabazi had stated in his evidence that part of the policy passed by the High Command in 1992, was that salaries of army officers who were employed outside the army would be paid by the institution which employed them. The

army, he said, would not pay salaries of such officers during the tenure of their employment outside the army.

In that regard, Hon. Mbabazi stated that salary payments were made from the army to the Petitioner after the Petitioner's appointment as Presidential Advisor in error. The Petitioner of course denied receipt of those payments. The point is, payment made in error does not prove that the payee is still a member of the army.

To reiterate that he had been removed from the army upon his appointment as Presidential Advisor, the Petitioner produced in evidence his three salary pay slips (Exh. P1) to show not only that his salary was paid by the Public service through the President's office but also that an amount was being deducted from it to pay graduated tax.

The Respondent did not challenge the evidence that the Petitioner's salary was deducted to pay graduated tax. Reg. 33 of the Regulations 1993, exempts army officers from payment of graduated tax in these words,

"An officer shall be exempt from payment of graduated tax"

The deduction of the Petitioner's salary to pay graduated tax would be incompatible with the claim that the Petitioner is still a member of the army in view of that rule.

The contention that the Petitioner had held out himself as an army officer after his appointment as Presidential Advisor cannot be sustained in view of the well established principle of the law that the doctrine of estoppel cannot operate to hinder an operation of law.

In "Maxwell on Interpretation of Statute 12th Edition by P.St. J. Langan" to which we were referred by Counsel for the Petitioner, the learned author said at page 333, that,

> "Estoppel cannot operate to prevent or hinder the performance of a statutory duty or the exercise of a statutory discretion which is intended to be performed or exercised for the benefit of the public or a section of the public".

The Petitioner having been removed from the regular force and there is no suggestion that he was appointed to a regular reserve or to any other component of the army is not regarded under section 14(1) of the National Resistance Army Statute No.3 of 1992 as a member of the Army. His views as to what he is and whatever he does showing that he is an army officer are irrelevant because membership of the UPDF is a matter of law. The doctrine of Estoppel cannot operate to stop the Petitioner from asserting what the law say it is.

MINISTER OF STATE FOR DEFENCE (G)'S LETTER. The Petitioner's case was that the Minister of State for Defence (G)'s letter ref. MSO/G/1 dated 8th December 1996 rejecting the Petitioner's resignation and requiring the Petitioner to resign in accordance with Reg. 28(1) of the NRA (conditions of service) (officers) Regulations 1993 is unconstitutional for being contrary to - (a) article 25(2) of the Constitution of Uganda 1995 because the

Petitioner had ceased to be a member of the army upon his appointment to the Public Service as a Presidential Advisor.

The Petitioner had indeed been removed from the army as shown above upon his appointment as Presidential Advisor. The salient question to answer is whether the letter of the Minister of State for Defence in requiring the Petitioner to comply with Reg, 28 (1) of the NRA regulations 1993 (SI No.6 of 1.993) contravenes article 25(2) of the Constitution?

The controversial letter of the Minister reads as follows:-

"Major General David Tinyefuza,
President's Office
Kampala.

Re: Your Resignation from UPDF
Yours addressed to H.E. The President and Command-in-Chief of 3rd Instant and copied to me among others refers.

Having looked at the laws/Regulations of the NRA Statute and its subsidiary legislations relevant to the issue at hand, and having consulted with the Command-in-Chief and, further more, having exhaustively, discussed it in the meeting of the High Command, I advise you that the resignation of officers is governed by the National Resistance Army (Conditions of Service) (officers) Regulations 1993. These provide in Reg. 28 (1) that for an officer to resign his commission, the Commission Board, established by Reg. 3 (1) of the same Statutory Instrument No.6 of 1993, would have to grant permission for such resignation in writing.

As you know, one of the hall "marks of the NRA struggle has been the restoration of the rule of law, all Ugandans individually and collectively are equal before and governed by the law enacted by the authorised organ of state. This is therefore to inform you that your purported resignation is null and void by virtue of the above quoted provisions. I have taken trouble to quote them extensively for your benefit. I would advise that you follow the right procedure in case you are contemplating resigning your Commission."
Signed
Amama-Mbabazi
Minister of State for Defence (G)

c.c. H.E. The President.
c.c. The Speaker of Parliament
c.c. The Chairman,"
Parliamentary Committee on Defence and
Internal Affairs. c.c. The Army
Commander.

The words "your purported resignation is null and void by virtue of the above quoted provisions" in the first part of the last paragraph of that letter are controlled by the adjective "null and void". Longman Dictionary of Contemporary English (1984) Reprint's definition of "null and void" includes without force or effect in law. That sentence means that the Petitioner's resignation was without force or effect in law by virtue of the provisions quoted. That amounts to a rejection of the Petitioner's resignation.

The sentence "I would advise that you follow the right procedure in case you are contemplating resigning your commission" in the last part of the last paragraph in that letter is controlled by the verb "Advise".

The word "advise" of course means to recommend a line of action. That sentence in the ordinary and natural sense of the words used means that the letter recommended that the Petitioner follows the procedure under Reg. 28(1) of the NRA (conditions of service)(officers) Regulations 1993. It is important to note that the Petitioner had already been removed from the army upon his appointment as Presidential Ad visor on 2/2/93. He was no longer a member of the army. He was resigning his membership of the High Command. It was conceded that membership of that body was not dependent on membership of the army. It was further conceded that there was no prescribed procedure for resigning from membership of the High Command. The Solicitor General admitted that a letter addressed by a member to the

President and Chairman of the High Command would be a proper and effective signal by the member of his intention to quit. This was exactly what the Petitioner had done on 3rd December 1996. He wrote a letter addressed to H.E. The President, Commander-in-Chief and Chairman of the High Command. It was not

suggested that such resignation needed a prior acceptance to take effect.

To reject the Petitioner's resignation and "advise" that he follows the procedure prescribed for military officers when he is not a member of the army as stated in section 14(1) of the NRA Statute No.3 of 1992 does not make sense. The word "advise" in that context in its ordinary and natural sense would be unreasonable. Its correct and proper construction in that context would be "required" or "compelled". By requiring or compelling the Petitioner to resign as a military officer when he is not one, would be forcing him to do the work of a military man. That would run contrary to article 25(2) of the Constitution of Uganda 1995 since it is not his wish to work as a military officer. That would be forced labour.

The Petitioner further alleged that the letter of the Minister is contrary to article 25(3)(c) of the Constitution. The Petitioner had stated in his letter of resignation (Annexture 'D') to the Petition that,

> "I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to."

Mr. Lule submitted that in the above circumstances, the Petitioner became a conscientious objector. To force him to resign as a member of the army when he is not such a member would go counter to article 25(3)(c) of the Constitution. It was the Respondent's case that the Petitioner being a member of the army, cannot claim to be a conscientious objector.

Article 25(3)(c) of the Constitution was reproduced earlier in this judgment. Longman Dictionary of Contemporary English (1984) Reprint, definition of the words "conscientious objection" is objection on moral or religious belief. The same Dictionary defines "conscientious objector" as a person who refuses to serve in the armed forces because of moral or religious belief.

In this case, the Petitioner was found to have been removed from the army upon his appointment as a Presidential Advisor on 2nd February 1993. He was not a member of the army when he wrote his letter of resignation. In that letter he left no doubt that the Petitioner on moral ground, no longer wants to rejoin the army. To. force him to resign as a military

officer under reg. 28(1) of the NRA (conditions of service)(officers) Regulations 1993 would be forcing him despite his moral objection to be a member of the army. That would be unlawful as it would run contrary to article 25(3)(c) of the Constitution.

commission

This now brings me to the question of commission. One of the reasons which the Petitioner advanced for the view that he was not a member of the army was that he was not commissioned. He was not resigning his commission because no such commission was issued to him in accordance with Reg. 13(3) of the NRA (conditions of service) (officers) Regulations 1993.

It is pertinent to repeat that it was agreed by Counsel for both parties that the Petitioner was appointed and promoted effectively by H.E. The President under article 78(2)(b) of the Constitution of Uganda 1967 as modified by Legal Notice No.1 of 1986. The disputed commission of the Petitioner was effected by the General and Administrative Order No.5 (Exh.D22-23) in 1988. Mr. Kabatsi submitted that the unorthodox method was adopted because there was a vacuum in the law governing the control and administration of the army. He explained that the Armed Forces Decree No.1 of 1971 had merged the Commission Board which advised the Defence Council with the Defence Council itself. In his views, Statute No.2 of 1980 complicated the position further when it repealed the Armed Forces Decree No.1 of 1971 without providing for the composition of the Defence Council which determined the question of Commission until when the NRA Statute No.3 of 1992 and the Regulations made under it were made. Relying on section 43 of the Interpretation Decree No.18 of 1976, Mr. Kabatsi submitted that the General and Administrative Order No.5 (Exh.D22) which set out the format by which the Petitioner was commissioned shall not be invalidated because it deviated from the Commission Warrant Form prescribed by law.

The relevant "General and Administrative Order" took the following form.

"General and Administrative Order no.5.

2. Promotions/Commissions.

His Excellency Lt. General Yoweri Kaguta Museveni, The President of the Republic of Uganda and Commander-in-Chief of the National Resistance Army and Airforce is pleased to announce the promotions/Commissions of the under mentioned officers and Non-Commissioned officers of the National Resistance Army and Airforce to ranks as indicated against their names with

effect from 6th February 1988."

The document appended a list. In the list, the Petitioner RO/31 David Tinyefuza was included. The rank indicated against his name was a Brigadier and MHC.

The Commission Warrant as was prescribed under Regulation 17 of the Armed Forces (conditions of service)(officers) Regulations 1969 which was made under the Armed Forces Act Cap 295 was in this form.

"His Excellency

The President and Commander-in-Chief of The Republic of Uganda.....

TO THE TRUSTY AND WELL

BEHAVED: Greetings

"I depose special trust and confidence in your loyalty, courage and good conduct do by these presents constitute and appoint you to be an officer in the Armed Forces of the Republic of Uganda.

You are .....

President of the Republic of Uganda Signed (regular service)."

There is no doubt that the above two forms are different but their substance was the same - to appoint or to commission, Mr. Kabatsi had submitted that the unorthodox method

was adopted because there was a vacuum in the law governing the control and administration of the army then. I do not agree. I do not agree also with the explanation given by him. The Armed Forces Decree No.1 of 1971 had merely suspended the operation of certain sections of the Armed Forces Act Cap 295 and the Regulations made under it only during the continuance in force of the Decree. Once the Decree was repealed by Statute No.2 of 1980, the position of the law governing the control and administration of the army reverted to the period before Armed Forces Decree No.1 1971 was made. The Armed Forces

Act Cap. 295 and the Regulations 1969 (SI No.30 of 1969) made under it were revived. The Armed Forces (conditions of service)(officers) Regulations 1969 (ST 30 of 1969) provided for procedure to commission army officers and prescribed the Commission Warrant. Section 109(2) of the NRA Statute No.3 of 1992 saved these Regulations. Only the Armed Forces Act Cap 295was Repealed. It is therefore not true that there was a locuna in the law regarding commissioning of army officers in 1988.

I agree however with Mr. Kabatsi that the deviation in the form used to commission the Petitioner shall not invalidate the commission by virtue of section 43 of the Interpretation Decree No.18 of 1.976. The relevant section reads that,

> "43 - where any form is prescribed by any Act or Decree, an Instrument or Document which purports to be such a form shall not be void by reason of any deviation therefrom which does not affect the substance of such Instrument or Document or which is not calculated to mislead".

Though the General and Administrative Order No.5 by which the Petitioner was commissioned, deviated from the prescribed form, the substance was to confer commission. There is no suggestion that it was calculated to mislead. The officers who were commissioned by that method are still recognised by their said rank. The whole world recognise them as such. I would therefore hold that the General and Administrative Order No.5 (Exh.D22) effectively conferred commission on the Petitioner. It must be noted that in the event of resigning under Reg. 28(1) of the National Resistance Army (conditions of service)(officers) regulations 1993, an officer is not expected to surrender his commission. That is not a requirement of the law. When one resigns his post one does not return his or her Instrument of appointment as Mr. Lule seems to imply.

In summary, I would find as follows:—

(1) That the Petitioner is protected on his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

(2) That there was a threat to take disciplinary action against the Petitioner on account of his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs.

Consequently, I would allow the Petition and grant all the Declarations sought in the Petition except for an order in restraint, which I do not find any necessity to make. I would also award costs of this Petition to the Petitioner.

DATED at Kampala this 25th day of April, 1997.

JUDGMENT OF J.P.M.TABARO J.

This Constitutional Case was filed by Major General David Tinyefuza on 12/ 12/21/1996 alleging that his rights, freedoms and liberties were being threatened by Government. The matter arises out of the testimony the Petitioner gave before the Parliamentary Sessional Committee on Defence and Internal Affairs on 29/11/1996. In his testimony, the petitioner, was critical of the Army's performance in Northern Uganda, and other areas where there is insurgency or rebel activities. It appears the petitioner was asked to testify to causes of the rebellion, why it has subsisted for a long time and what can be done to bring it to an end. After giving the testimony, it would appear, he was summoned to the High Command in connection with what transpired when he gave the testimony. Fearing that adverse action might be taken against him, Petitioner, wrote a letter of esignation to the President, who, it will be recalled, is also the Commander-in-Chief of the Armed Forces and Chairman of the High Command of the Army. In response to the letter ("Annexure "D) to the Petition, the Minister of State for Defence (General) Hon. Amama Mbabazi (CW I) countered that the resignation was null and void and advised the petitioner to comply with Regulation 28 of the National Resistance Army (Conditions of Service) (Officers) Regulations 1993 (SI No

6 of 1993). Under that regulation the army Commissions Board may permit any officer to resign his commission in writing at any stage in his service (or to retire on pension after a minimum of thirteen years of reckonable service.)

From the affidavits sworn by the Petitioner and the Minister of State for Defence (General) Hon. Amama Mbabazi, as well as the latter's oral testimony as a court witness (CW I) it is amply clear that Petitioner joined the former National Resistance Army in 1981 which was (then) a guerrilla force fighting the then Government of Uganda. It will be recalled that in 1986 (on 26/1/ 1986) the NRA took over the government of Uganda and by virtue of the 1986 Proclamation (Legal Notice No 1 of 1986) formalised assumption of power of the Government of Uganda by the National Resistance Movement. It is not disputed that the NRA subsequently constituted the national army of Uganda. Needless to state, with promulgation of the Constitution, 1995 the NRA became the Uganda People's Defence Forces. In 1988 under General and Administrative Order No 5, the hitherto guerrilla army was regularised to conform to internationally recognised ranks. Petitioner in the General and Administrative Order is described as Brigadier David Tinyefuza (MHC). It is one of the basic issues as to whether Petitioner was properly and legally commissioned. This will further be dealt with later herein. In December, 1989 the petitioner was promoted to the rank of Major General under Administrative Order No 41. Later on, on 24/5/1994 the petitioner was appointed as Presidential Advisor on Military Affairs with effect from 2nd February, 1993. The letter of appointment is signed by D.Martin Orech, the then Head of the Civil Service. The letter states in the first paragraph:-

> "I am pleased to inform you that His Excellency the President has in accordance with powers vested in him under Article 104 (1)of the Constitution of the Republic of Uganda, directed that you be offered appointment to the post of Presidential Advisor on Military Affairs with effect from 2nd February, 1993". The duration of the appointment was 24 months subject to renewal. The appointment could be terminated at the pleasure of the Appointing Authority. No formal letter of renewal has since the expiration of 24 months been given to the petitioner although he continues to enjoy the terms conditions and benefits attached to the appointment. After petitioner was appointed Presidential Advisor on Military Affairs, the Secretary for Defence, B.Mbonye, wrote to him in these terms:-

"RETURN OF MINISTRY OF DEFENCE FACILITIES"

Following your appointment as presidential Advisor on Defence, I am informed that your office will be based in the office of the President. I am also informed that, that office will provide facilities required to enable you perform your duties.

This is to request you therefore to instruct officers under your command to return some of the facilities which were given to your office before the present appointment. Those in our records are the following motor vehicles which are in our register as belonging to the Ministry of Defence:

1. UD 0249 Nissan Laurel-already returned.
2. UD 273 Land Rover pick up.
3. UD 0290 Peugeot 504
4. UD 0291 UPE 745 Land Rover
5. UD 0293 Peugeot 504
6. UD 0311 UPN 771 Land Rover Defender
7. UD 0312 UPX 086 T/Stout

The Army will provide facilities required by virtue of your position in the NRA.

Other terms and conditions in the letter of appointment concern salary, gratuity, leave, housing transport, police guards and domestic servants, water and electricity, medical attention, and allowances.

In his letter tendering resignation petitioner stated that he was resigning from the UPDF and its High Command. The letter, Annexure 'D,' in part states'

> I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to"

Before hearing commenced, counsel for the respondent raised a number of objections, basically procedural in nature, in connection with the contents of affidavits in support of the petition which respondent alleged contained false statements, as well as payment of court fees. However, as the Court was satisfied that there was a cause of action the petitioner was permitted to proceed with his case. Since Uganda v. Commissioner of prisons, Ex Party Matovu, {1996} EA 514 was decided, by the High Court of Uganda when it was the constitutional Court of the Country, it would appear in a constitutional case involving the personal liberty of a citizen of Uganda the court may validly disregard formalities and proceed with substantive issues. In Matovu's case (supra) at P.521 para H, Sir Udo Udoma C.J. (as he then was) stated, "we decided in the interests of justice, to jettison formalism to the winds and overlook the several deficiencies in the application, and thereupon proceeded to the determination of the issues referred to Us".

Leading learned counsel for the petitioner, Mr. Lule (SC) framed issues which he submitted to the respondent for his opinion as to whether they could be regarded as the issues agreed upon by the parties. The Learned Solicitor General, Mr. Kabatsi, for the respondent agreed to the same. I have perused the same diligently, especially as some of them were jointly urged by learned counsel for the petitioner. In my humble opinion the basic issues from which any other emanate can be looked at as follows:-

(1) Whether the petitioner's testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs is privileged and cannot be basis of action against the petitioner.

(2) Whether petitioner's appointment as Presidential Advisor made him a public servant and ceased to be a member of the Army.

(3) Whether petitioner was governed by terms and conditions regulating the Armed Forces.

(4) Whether petitioner is subject to Military Law.

Regular Force.

(6) Whether petitioner is being required to perform forced labour.

(7) Whether petitioner is a conscientious objector.

(8) Whether petitioner' rights and/or liberties are threatened so as to justify a Constitutional Court intervention.

(9) Whether any government official has acted in contravention of the Constitution and therefore

whether court can grant orders to restrain the Official or officials from taking any action

or actions against the state.

Issue No 6 in my scheme arises from the fact that petitioner's letter of resignation was rejected, by the Minister of State for Defence (General). It is the petitioner's contention that the resignation complied with the law and hence requiring him to remain in the Armed Forces is tantamount to obliging him to render forced labour. As regards the question of a conscientious objector, it is the submission of the petitioner that he no longer believes in the UDPF and therefore, it is contended that he qualifies as a conscientious objector on the ground that the Constitution protects a conscientious objector who does not wish to render labour in a naval, military or air force.

In my understanding of the law, whereas general principles which govern construction of statutes apply to the interpretation of constitutions (see A.G. of Uganda v. Kabaka's Government [1965] E.A. 393, Republic v El Mann [1969] E.A. 357, Dr. Rwanyarare & 2 Others v. Attorney General, Constitutional Case No 1 of 1994, unreported (decided when the High Court of Uganda was the Constitutional Court under 1967 Constitution), when the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. Legislation which purports to invade any right of personal freedom should be construed strictly. Where an Act of Parliament is permissive, not imperative,

in its terms, where the power it confers is discretionary, the court will hold that that intention is that the discretion shall so far as possible be exercised so as to leave private rights intact - A.G. for Canada v. Hallet & Carey Ltd (1952) A.C. 427 p.450. The same principles are stated in "Cases in Constitution Law" by D.C. Keir & F.H Lawson Oxford (4th Edition) at Page 11. It appears doubt is resolved in favour of the subject - With these principles in mind I approach the facts and the law so as determine whether the petitioner's constitutional rights are being violated, that is, whether the Executive's actions in question are inconsistent with the constitution, or not.

Article 97 of the Constitution is couched in these words:-

> "The Speaker, the Deputy Speaker, member of Parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament shall by law prescribe".

Under the National Assembly (Powers and privileges Act (cap 249) witnesses before parliament or its committees enjoy the same rights and privileges as those

before a court of law.

In his affidavit and testimony before this court the Minister of State for Defence (General) Hon. Amama Mbabazi (CW I) endeavoured to draw a distinction between immunities and privileges to the persons mentioned in the article, and the proceedings. However, I think no such intention appears in the plain wording of the article. The learned Solicitor General, Mr. Kabatsi, rightly, in my opinion concedes that what the petitioner stated before the Parliamentary Committee is privileged and cannot be basis of punishment for the petitioner, whatsoever. It is the case for the respondent, however, that the rejection of the petitioner's resignation by the Minister of State for Defence (General) was lawful and only required the petitioner to observe the law by complying with Regulation 28 (of the NRA (Conditions of Service) (Officers) Regulations, 1993. Hence, the learned Solicitor General contends, the Minister's act

cannot be said to be inconsistent with the Constitution since the minister is merely advising the petitioner to follow the law. During the course of arguments, Mr. Lule Sc contended that the petitioner cannot resign under the regulation in question because no formal commission or warrant of appointment was issued to him. As will be recalled, ranks in the NRA were regularised in 1988 before the enactment of the NRA, Statute 1992, (Petitioner became - Brigadier) Hence, ordinarily, the Armed Forces Act (Cap 295, now repealed by the NRA Statute, 1993, should have been complied with. The format of warrant of appointment for regular commission was to be found in schedule 2 to the Armed Forces (Conditions of Service (Officers) Regulations, 1969, (SI No 31 of 1969). It is, perhaps, pertinent to note that the format of the warrant of appointment for regular commission now in the second schedule of the NRA Conditions of Service) (Officers) Regulations 1993 is basically the same except for a few modifications.

But, it is not disputed that the NRA of which petitioner was a member by 26/1/1986, when the NRM assumed power of the Government of Uganda, subsequently became the Army of Uganda by virtue of L.N. 1 of 1986. S.109 of the NRA Statute, 1992 which repealed the Armed Forces Act (cap 295), and the schedule to the Proclamation L.N, I of 1986, provides in S. 109(2)(b)--------

> "every officer commissioned and very militant
> enrolled or re-engaged under that enactment who
> is in the Army immediately before the commencement
> of this statute shall continue on, and after such commencement
> to serve in the Army as if he had been re-engaged, as
> the case may be, under this statute".

It appears to me therefore that S. 109 of NRA, Statute, 1992 has a general saving effect for all those officers and combatants who were commissioned before the NRA Statute, 1992 was enacted. Can commissioning refer only to the act of presenting the officer with the formal warrant of appointment? It cannot be so. It is only the culmination of a long process of vetting, training and receiving instructions. Holding otherwise would defeat the intention of the legislature.

Under S. 43 of the Interpretation Decree (No 18 of 1976, Laws of Uganda) where any form is prescribed by an Act or Decree an instrument or document which purports to be in such form shall not be void by reason of any deviation there from which does not effect the substance of such instrument or document or which is not calculated to mislead. General and Administrative Order No 5 (Exhibit D 22) would appear to be printed on headed papers of the National Resistance Army bearing its official logo or emblem. In the first paragraph of the document it is spelt out in clear terms that:-

"His Excellency Lt. General Yoweri Kaguta Museveni the President of the Republic of Uganda and Commander in-Chief of the National Resistance Army and Air Force is pleased to announce the regularisation of officer ranks to international recognised ranks within the Armed Forces of Uganda and the equating of former NRA ranks with professional ranks with effect from the 6th February, 1988". The second paragraph of the document, which is General and Administrative Order No. 6, the petitioner is named as RO/31 Brigadier Tinyefuza (MHC), under the heading "Promotions/Commissions". At the end the document is signed by one Lt. Col. James Sebagala, Deputy Chief of Personnel and Administration, National Resistance Army. The authenticity of the document is not in dispute. Nor is the meaning of the order contested. Evidently the document refers to commissioning or promotion of the petitioner to the rank of Brigadier. Since in 1981 he became a member of the Army(of Uganda in contradistinction to the former guerrilla force) and since under S. 109 of NRA Statute all such members of the army became members of the NRA, I am impelled to find that the petitioner was duly commissioned into the National Resistance Army in 1988. The elegant format envisaged in SI No 31 of 1969 was not followed but since the meaning is clearly conveyed the departue from the form should not be allowed to vitiate or invalidate the appointment, in agreement with the learned Solicitor General. Perhaps, the more crucial question to ask is why the respondent who was content to observe the spirit of the law and paid less attention to its letter, should now insist on his pound of flesh and require the petitioner to address his letter of resignation to the Commissions Board instead of the President/Commander-in-Chief of the Armed Forces to whom it was sent. Couldn't the petitioner's letter, for example,

be channelled by the President's assistants to the Commissions Board? I am aware that rules must be obeyed but we should not forget that they are merely handmaidens of justice.

At this juncture when the issue of the petitioner's commission is resolved, it is pertinent to next consider the fundamental issue - whether petitioner ceased to be a member of the Army when he was appointed Presidential Advisor on Military Affairs, with effect from 2nd February, 1993.

I would first observe that once a polity has enacted a constitution then the rule of law, that is the constitution becomes the cornerstone of all laws and regulates the structure of the principal organs of government and their relationships to each other and to the citizen, and determines their main functions. Needless to emphasize, all laws must conform to the Constitution as the supreme law of the land. It is the constitution, and not the Executive, Legislature or Judiciary, which is supreme. Under Article 2 (I) and 2 of the Constitution it has binding force on all authorities and persons throughout Uganda. In this regard I wish to refer to a remark made by two well known learned authors, E.C.S. Wade and Godfrey Phillips, in Constitutional Law. 8th Edn at P.62. Thereat it is stated:

> "The supremacy or rule of law has been since the Middle Ages a principle of the Constitution. It means that the exercise of powers of government shall be conditioned by law and that the subject shall not be exposed to the arbitrary will of his ruler".

The learned authors were primarily writing in a British context. However, substitute the word Government for ruler and the observations will apply to Uganda or any other country that has chosen constitutionalism as its guiding principle, for that matter.

I would agree with learned leading counsel for the petitioner, Mr. Lule Sc that it is significant that the appointing authority invoked Article 104 of the 1967 Constitution and not Art. 78, of the then Constitution, (1967). Article 104 vested power to appoint

persons to the public service in the President, while Article 78 of the 1967 Constitution vested in the President power to determine the operational use of the Armed Forces to appoint members of the Armed Forces, to promote them and to dismiss any member of the Armed Forces.

Hon. Amama Mbabazi (CWI) asserted that in 1992 the High Command decided that members of the NRA could serve in other government organs and/or agencies and remain members of the army. I prefer to believe that the Hon. the Minister of State for Defence meant well in making the assertion notwithstanding that minutes to that effect were not tendered in evidence. But, of course it is not sufficient to express good intentions, The practice must be grounded on the Constitution, the NRA Statute or any other law applicable in the Republic of Uganda'to be binding. To hold otherwise would be to sanction inconsistency with the Constitution, that is, violation of the rule of law. Perhaps the case for the respondent would be stronger if the petitioner were appointed under Art. 78 of 1967 Constitution which places the command of the Armed Forces under the President. It could possibly be argued that the petitioner as an army officer was being deployed as a Military Advisor. But, even then, there must be specific laws empowering the appointing to authority to deploy members of the Armed Forces in public service without severing them from the Armed Forces.

Mr. Lule SC submitted that being a member of the Armed Forces and serving in the public service are mutually exclusive, in view of the provisions of S.5(5) of the NRA, Statute, 1992.

They are worded as follows:-

> "Full time Regular Force Service
> S.5.1. Every member of a Regular Force Service shall be on continuing full time military service and shall at all times be liable to be employed on active service".

Under Uganda Government standing Orders "unless otherwise provided in the terms of his or her employment every Public officer is employed on the understanding that the whole of his or her time is at the disposal of the Government, and if the usual

office hours are insufficient to deal with the pressure of work it is his or her duty, whenever it becomes necessary to do so, to work outside office hours without extra remuneration - (Standing Orders) Chapter 1 para 1 at P.403.

Absence from the duty station requires the consent of the officer in charge - para 3 (ibid).

Perusal of the rules governing office hours in the army and public service leads to the conclusion that one cannot serve in both. Because they are mutually exclusive as both demand full time attention. The NRA Statute, 1992 which shall be read with modifications to mean the law governing the UDPF by virtue of Article 273 of the Constitution, does not say that members of the Army can be deployed in the public Service. Mr. Kabatsi canvassed that the Constitution does not prohibit members of the Army from belonging to other organs of Government. He gave the example of Art.78 (1) (c) of Constitution which makes army representatives members of Parliament. That is so. However, if it were the intention of the constitution makers to authorise army personnel to be deployed in the public service, no doubt express provisions to that effect would have been inserted. Equally significant we have to

bear in mind that it is personal liberty of an individual subject that is at stake. As that is so, the principle in Attorney General of Canada v. Hallet and Carey Ltd (1952) A.C. 427 at P.450, is in point that is, when the rights of a subject arc involved, whether personal or proprietory, and the import of the enactment in question is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. In other words such statutes are subject to strict interpretation. This approach appears to have found favour with (the Privy Council) - in A.G. of the Gambia v. Momodou Jobe [1984] A.C. 689 at 700 (LORD DIPLOCK) in which it was stated.

> "A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction".

Naturally, what is in issue are matters of liberty and freedom because petitioner may be subjected to military law. Under the Army Code of Conduct for example, under ss 13 and 16 NRA Statute, 1992 offences unknown to ordinary penal law are created. These are, quest for cheap popularity, liberalism, intrigue and double talk, tribalism and nepotism and formation of a clique in the Army. They attract possible sentence of life imprisonment.

I think there is nothing in the NRA Statute, 1992 or the Constitution, that could have empowered the appointing authority to retain the petitioner in the army after his appointment to the public service. 1 must hold therefore, that petitioner's appointment to public service severed him from the Army and is no longer a member of the UPDF. It was contended, emphatically, for the respondent that the practice in the Army has been to retain army officers serving in other agencies of government, in the army. On this issue it must be pointed out that there can be no estoppel against a statute (see Maxwell on Interpretation of Statute, 12th Edition, at P.334) less so can estoppel be invoked to modify a written Constitution. As

regards army equipment that petitioner might have made use of, or army privileges that might have accrued to him, I think this was not out of the ordinary for the reason that as a matter of law, the petitioner is a member of the High Command, in accordance with S. 10(1) (c) of the NRA Statute, 1992. In any case the letter from the Secretary for Defence virtually divested him of all facilities that he enjoyed as an army officer. High Command members as of 26/1/1986 continue to be members. They need not belong to the Regular Force. As a matter of law, in terms of Regulation 33 of NRA Regulations, 1993 (SI No 6 of 1993) army officers are exempt from the payment of graduated tax. Petitioner's counsel submitted that salary payment vouchers (Exh. D.21) indicate that graduated tax was deducted from the petitioner's remuneration. Unfortunately, the exhibit was tendered in photocopy and is not clear. However, in view of the fact that a subject's liberty is what is at stake this is not a matter that can be resolved in favour of the state. I cannot find that there were no graduated tax deductions made from the petitioner's salary. It is true that Petitioner was deployed in Northern Uganda when rebellion broke out there. But that alone cannot operate to modify the Constitution. It is not necessary to opine as to whether or not conscription is constitutional since it is not in issue.

Lastly, in connection with petitioner's status the court was referred to Regulation 27 of the NRA Regulations, 1993 (S.I) No 6 of 1993 and a submission made to the effect that the petitioner cannot be removed from the Army except in accordance with the Regulations.

Regulation 27 provides as follows:-

> "No officer shall be dismissed from service
> or have his service terminated except in accordance
> with the statute or regulations made under the statute".

It is beyond contention that the statute docs not say that an army officer can serve both in the Army and the Public Service. Hence if the regulation sought to modify the statute, and more

so the constitution, it would be invalid for being ultra vires. However, I think the true intent in the regulation is to safeguard army officers against arbitrary dismissal or arbitrary termination of services. No intention can or should be read into the regulation so as to enable army officers to remain in the Army after appointment to the public service.

Whereas the law defines membership of the High Command, under S. 10 of the NRA Statute, 1992, it is silent as regards resignation from the same. Under S.24 of the Interpretation Decree. 1976 where by any Act or Decree a power to make any appointment is conferred, the authority having power to make the appointment shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or reinstate any person appointed in the exercise of the power. In a word, the power to appoint includes power to remove. Hence, in absence of prescribed procedure for resigning from the High Command the petitioner cannot be faulted for having addressed his resignation to the Commander-in-Chief of the Armed Forces and Chairman of the High Command who. by law, is the President of the Republic of Uganda. And respondent has not shown any delegated authority under which the Minister of State for Defence could lawfully exercise power and reject the petitioner's resignation from the High Command. It has been indicated that petitioner's appointment to the Public Service severed him from the Army, in which case no law can oblige him to follow Regulation 28 of the NRA (Conditions of Service) (Officers) Regulations, 1993 as advised by the Hon. the Minister of state for Defence (General). The Chairman of the High Command has not indicated whether the petitioner's resignation was rejected or accepted, since 3/12/1996 when the letter of resignation was written. This is beyond contention.

Article 28 of the Constitution requires that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. In view of this provision I do not think it would be constitutional to treat the petitioner's resignation as ineffectual within the bounds of a free and democratic society.

In light of my findings that the petitioner's relationship was severed from the army by virtue of his appointment to the Public Service, it is crystal clear that he cannot be subjected to Military Law. At the same time Article 28 of the constitution protects the petitioner against appearance before the High Command. Hence it follows, as daylight follows night, that

obliging him to remain in the Army or High Command, without his consent would be tantamount to requiring him to render forced labour, in absence of provisions in the constitution permitting conscription in this regard. It was also contended for the petitioner that he does not wish to serve in an army in which he no longer believes and therefore, under Art. 25 (3)(c) he qualifies as a conscientious objector. In view of the conclusions I have reached I do not find it imperative to resolve this question. I can only state, in passing, that it is possible for a person to develop moral or religious views which incline him to object to the use of force in solving human problems. Thereby such a person becomes a conscientious objector and, in my humble opinion, he or she should be permitted to leave the Armed Forces on account of his or her pacifist principles.

Under Article 50 of the Constitution, Whether the orders sought to protect the petitioner can be granted depends on the question of absence or presence of a threat or threats against his personal liberty or proprietory interests (the latter are not in controversy in this case). After the petitioner testified before the Parliamentary Sessional Committee on Defence and Internal Affairs, it is not in dispute that the Army Commander, the Minister of State for Defence (General) as well as the Commander-in-Chief of the Armed Forces and Chairman of the High Command made some remarks about the petitioner in connection with his testimony before the Parliamentary Committee. It is not in dispute that the petitioner was thereafter summoned to appear before the High Command. The Army Commander complained that the petitioner was undisciplined and accused him of trying to undermine cohesion in the army which could jeopardise national security. There is no rebuttal as to the assertion that the Minister of State for Defence (General) thought that someone was up to something and the petitioner was playing along.

Finally, in the same regard, it is beyond contention, from Exhibit P.2 that the High Command stated that the petitioner in his testimony might have committed intrigue, was guilty of indiscipline and political confusion by a serving officer, and giving false impression to the enemy. Insubordination and subversion are accusations also levelled against the petitioner. The High Command was going to be convened for the purpose of recommending a course of action to be taken against the petitioner. Under Military Law, in terms of S. 37 of the NRA Statute, 1992 spreading harmful propaganda is a possible capital offence. In its definition it includes making oral or written statements ill of the Army or the Government excepting constructive criticism. Taking all these factors relating to statements from the High Command and the Ministry of Defence, there can be no doubt that there is a threat or threats

against the personal liberty of the petitioner. Once a constitutional court has found that any act or omission by any person or authority is inconsistent with the constitution, as an this case, a remedy is available under Article 137 (4) of the Constitution. I would declare, therefore, that it would be inconsistent with the Constitution for any organ of state or authority to prefer or threaten to prefer any disciplinary, administrative, civil or criminal action against the petitioner in any tribunal, forum, or court of law for any matter arising from the Petitioner's testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs. I would declare that Regulation 28(1) of the National Resistance Army (Conditions of Service) (Officers) Regulations, 1993 does not apply to the petitioner for he ceased to be a member of the Army when he was appointed to the Public Service as Presidential Advisor on Military Affairs in 1993. I would grant the orders of redress prayed for and declare that no organ of state or authority can proceed against the petitioner.

By virtue of my finding that taking action against the petitioner would be unconstitutional, I would find a restraining order unnecessary. I would award costs to the petitioner.

Dated at Kampala this 25th day of April 1997.

J.P.M. TABARO JUDGE