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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

**CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE G.M. OKELLO, JA
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE C.N.B. KITUMBA, JA
HON. JUSTICE C.K. BYAMUGISHA, JA**

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CONSTITUTIONAL PETITION NO 20 OF 2006

FOUNDATION FOR HUMAN RIGHTS INITIATIVES:..... PETITIONER

VERSUS

ATTORNEY GENERAL:..... RESPONDENT

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JUDGMENT OF THE HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO

This petition is brought by a non Governmental Organization (NGO) known as the Foundation for Human Rights Initiatives whose objectives include protection, promotion and observance of human rights. The petitioner is aggrieved by a number of provisions in the following various statutes:-

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- a) **Certain provisions of the Trial on Indictments Act (CAP 23)**
- b) **The magistrates Courts Act (CAP 16)**
- c) **The Uganda Peoples Defence Forces Act No. 7 of 2005 (UPDF) and**
- d) **The Police Act (CAP 303)**

The petitioner, basing itself on the facts stated below, is praying for six declarations also mentioned here below:-

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- (a) **That sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictment Act are inconsistent with Articles 20, 23(1), 28(1) and 28(3) of the Constitution of the Republic of Uganda in so far as they impose restrictions, and limitations on the person's right to liberty, freedom of movement, the right to a fair and speedy trial and the presumption of innocence.**
- (b) **That sections 75(2) and 76 of the Magistrate's Courts Act are inconsistent with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda in so far as they exclude certain offences from the grant of bail, thereby infringing on the Constitutional right to liberty, the right to a fair and speedy trial, and the right to bail.**
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- (c) **That sections 219, 231 and 248 of the UPDF Act, which subject accused persons to lengthy periods of detention bail, are inconsistent with Articles 20, 23(6), 28(1), and 28(3) of the Constitution of the Republic of Uganda and as such violate the inherent rights and freedoms of the individual which are guaranteed by the said Constitution.**
- (d) **That section 25(2) of the Police Act which permits the police to detain a suspect for seven days without**
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- being charged in a court of law is inconsistent with**

Article 23(4) of the Constitution and is an infringement of the right to liberty and the presumption of innocence.

The Petitioner prays that this Honourable Court be pleased to grant the following declarations that;

10 **(a) Sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictment Act are inconsistent with Articles 20, 23(6), 28(3) of the Constitution and as such are null and void.**

(b) Sections 75(2) and 76 of the Magistrates Courts Act are inconsistent with Articles 20, 23(6), 28(1) and 28(3) of the Constitution and as such are null and void.

20 **(c) Section 219, 231 and 248 of the UPDF Act are inconsistent with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution and as such are null and void.**

(d) Section 25(2) of the Police Act is inconsistent with Articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void.

(e) The petitioner prays for costs of this petition.

The petition is supported by an affidavit sworn by Livingstone Ssewanyana, the Executive Director of the petitioner. To the petitioner the aforesaid provisions of the law do not only impose
30 unreasonable restrictions on a person's rights to liberty, freedom

of movement, right to a fair and speedy trial, presumption of innocence, right to bail but also violate the inherent human rights and freedoms of the individuals guaranteed by **Articles 20, 23 (1), 23(4), 23(6), 28(1) and 28(3) of the Constitution of Uganda 1995.**

As the petition was brought in the public interest, the Attorney General was sued as a statutory respondent.

10 In his answer the Attorney General denied the allegations in the petition and described it as misconceived. It reads, inter alia:-

“Save what is herein specifically admitted, the respondent denies the contents of the petition as if the same were set forth the traversed seriatim”.

In reply to paragraph 4(a-d) of the petition, the respondent’s position is as follows:-

20 (i) **Denies that sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictment Act are inconsistent with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution as the said provisions of the Trial on Indictment Act are both Constitutional and lawful.**

30 (ii) **Denies in response to paragraph 4(b) that sections 75(2) and 76 of the Magistrates Court’s Act are inconsistent with Articles 20, 23(1), 23(6) 28(1) and 28(3) of the Constitution as the said provisions are both Constitutional and lawful.**

(iii) **Denies in response to paragraph 4(c) that sections 219, 231 and 248 of the UPDF Act are inconsistent with Articles 20, 23(1), 23(6) and 28(3) of the Constitution as the said provisions are both Constitutional and lawful.**

(iv) **Denies in response to paragraph 4(d) that section 25(2) of the Police Act is inconsistent with Article 23(4) of the Constitution and is an infringement of the right to liberty and the presumption of innocence.**

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(3) **In response to paragraph 6 of the petition the respondent avers that the petition is misconceived and that the petitioner is not entitled to any of the declarations sought.**

The answer was supported by an affidavit sworn by Margaret Nabakooza, a Senior State Attorney in the Attorney General's Chambers.

At the scheduling conferencing, the parties agreed upon the following four issues:-

1. Whether sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictment Act are inconsistent with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution.

2. **Whether sections 75(2) and 76 of the Magistrate’s Court Act are inconsistent with the Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution.**

3. **Whether sections 219, 231 and 248 of the Uganda People’s Defence Forces Act are inconsistent with Articles 20, 23 (1), 23(6), 28(1) and 28 (3) of the Constitution.**

10 4. **Whether section 25(2) of the Police Act is inconsistent with Article 23(4) of the Constitution.**

At the hearing of this petition, the petitioner was represented by Mr. Kakuru whilst Mr. OLuka, Principal State Attorney, appeared for the Attorney General.

In his submissions in reply, Mr. Oluka conceded all the impugned provisions of the various Acts except **section 14(2) of the Trial on Indictment Act and section 75(2) of the Magistrates Courts Act.** The aforesaid were the only contentious issues on
20 which both learned counsel addressed the Court.

I will now proceed to evaluate the evidence adduced by the parties and to consider the submissions of their counsel.

ISSUE NO. 1

On issue No. 1, Mr. Kakuru submitted that **sections 14,15(1) 15(2) 15(3) and 16 of the Trial on Indictments Act** were inconsistent with **Articles 20, 23(6), 28(1) and 28(3) of the**

Constitution. They are both unconstitutional and unlawful. He asked Court to nullify them. As Mr. Oluka had conceded to the other impugned sections, Mr. Kakuru concentrated on **sections 14 of Trial on Indictment Act and 75 of Magistrates Court Act.**

Section 14 (1) which reads as follows:-

10 ***“(1) The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognizance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date at such a time as is named in the bond”.***

“(2) Notwithstanding subsection (1), in any case where a person has been released on bail, the court may, if it is of the opinion that for any reason the amount of the bail be increased-

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- (a) issue a warrant for the arrest of the person released on bail directing that he or she should be brought before it to execute a new bond for an increased amount; and***
 - (b) commit the person to prison if he or she fails to execute a new bond for an increased amount”.***

Section 75 of Magistrates Court Act reads:-

Release on bail.

“ (1) A magistrate’s court before which a person appears or is brought charged with any offence other than the offences specified in subsection (2) may, at any stage in the proceedings, release the person on bail, on taking from him or her a recognizance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case to appear before the court, on such a date and at such a time as is named in the bond.

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(2) The offences excluded from the grant of bail under subsection (1) are as follows-

- (a) an offence triable only by the High Court;**
- (b) an offence under the Penal Code Act relating to acts of terrorism;**
- (c) an offence under the Penal Code Act relating to cattle rustling**
- (d) an offence under the Firearms Act punishable by a sentence of imprisonment of not less than ten years;**
- (e) abuse of office contrary to section 87 of the Penal Code Act;**
- (f) rape, contrary to section 123 of the Penal Code Act, and defilement contrary to sections 129 and 130 of the Penal Code Act;**
- (g) embezzlement, contrary to section 268 of the Penal Code Act;**

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- (h) **causing financial loss, contrary to section 269 of the Penal Code Act;**
- (i) **corruption, contrary to section 2 of the Prevention of Corruption Act;**
- (j) **bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and**
- (k) **any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.**

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(3) **A chief magistrate may, in any case other than in the case of an offence specified in subsection (2), direct that any person to whom bail has been refused by a lower court within the area of his or her jurisdiction, be released on bail or that the amount required on any bail bond be reduced.**

(4) **The High Court may, in any case where an accused person is appearing before a magistrate's court-**

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(a) **where the case is not one mentioned in subsection (2), direct that any person to whom bail has been refused by the magistrate's court be released on bail or that the amount required for any bail bond be reduced; and**

(b) **where the case is one mentioned in subsection (2), direct that the accused person be released on bail.**

- (5) ***Notwithstanding subsection (1), in any case where a person has been released on bail, the High Court may, if it is of the opinion that for any reason the amount of bail should be increased-***
- (a) ***issue a warrant for the arrest of the person released on bail directing that he or she should be brought before it to execute a new bond for an increased amount; and***
 - (b) ***Commit that person to prison if he or she fails to execute a new bond for an increased amount.***

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The other impugned statutory provisions **15(1) 15(2) 15(3) 16 Trial on Indictment Act 76 of Magistrates Court Act 25 Police Act and sections 219, 231 and 248 of UPDF** read as follows:-

Section 15 (1) reads as follows:-

Refusal to grant bail.

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“(1) Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of the court-

- (a) ***that exceptional circumstances exist justifying his or her release on bail; and***
- (b) ***that he or she will not abscond when released on bail”.***

Section 15(2) reads as follows:-

“An offence referred to in subsection (1) is-

- (a) **an offence triable only by the High Court;**
- (b) **an offence under the Penal Code Act relating to acts of terrorism or cattle rustling;**
- (c) **an offence under the Firearms Act punishable by sentence of imprisonment of not less than ten years;**
- (d) **abuse of office contrary to section 87 of the Penal Code Act;**
- (e) **rape, contrary to section 123 of the Penal Code Act and defilement contrary to sections 129 and 130 of the Penal Code Act;**
- (f) **embezzlement, contrary to section 268 of the Penal Code Act.**
- (g) **causing financial loss, contrary to section 269 of the Penal Code Act;**
- (h) **corruption, contrary to section 2 of the prevention of corruption Act;**
- (i) **bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and**
- (j) **any other offence in respect of which a magistrate’s court has no jurisdiction to grant bail”.**

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Section 15(3) reads as follows:-

“In this section, “exceptional circumstances” means any of the following-

- (k) ***grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;***
- (l) ***a certificate of no objection signed by the Director of Public Prosecutions; or***
- (m) ***the infancy or advanced age of the accused”.***

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Sections 16 reads as follows:-

Restriction on period of pretrial remand.

“If an accused person has been remanded in custody before the commencement of his or her trial-

- (a) ***in respect of any offence punishable by death, for a continuous period exceeding four hundred and eighty days:- or***
- (b) ***in respect of any other offence, for a continuous period exceeding two hundred and forty days, the judge before whom he or she first appears after the expiration of the relevant period shall release him or her on bail on his or her own recognizance, notwithstanding that he or she is***

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accused of an offence referred to in section 15(1), unless-

- (c) he or she has, prior to the expiration of that period, been committed to the High Court for trial; or**
- (d) the judge is satisfied that it is for the protection of the public that he or she should not be released for custody”.**

10 **Section 76 of Magistrates Courts Act** reads as follows:

Restriction on period of pretrial remand.

“If an accused person has been remanded in custody before his or her trial commences-

(a) in respect of any offence punishable by death, for a continuous period exceeding four hundred an eighty days; or

(b) in respect of any other offence, for a continuous period exceeding two hundred and forty days, the magistrate before whom the accused person first appears after the expiration of the relevant period shall release him or her on bail on his or her own recognizance, notwithstanding that he or she is accused of an offence referred to in section 75(1), unless-

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(c) he or she has, prior to the expiration of that period, been committed to the High Court for trial; or

(d) the magistrate is satisfied that it is expedient for the protection of the public that he or she should not be released from custody.

Section 25 of Police act reads as follows:-

Disposal of a person arrested by a police officer.

“(1) A police officer on arresting a suspect without a warrant shall produce the suspect so arrested before a magistrate’s court within forty-eight hours unless earlier released on bond.

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(2) Subsection (1) shall not apply to a person who is arrested in one police area and is not to be questioned within the area in which he or she was arrested until he or she is transferred to the area where the offence was committed within seven days”.

Sections 219 of Uganda Peoples Defence Forces Act reads as follows:

“Subject to sections 231 and 248, a military court may grant bail to a person charged with a service offence on the same considerations that govern the grant of bail in civil courts”.

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Sections 231 of Uganda Peoples Defence Forces Act reads as follows:

“In exceptional, circumstances, and on such conditions as it may impose, the appellate court may grant bail pending appeal except in cases

where the appellant has been sentenced to death or to a term of imprisonment exceeding five years”.

Sections 248 of Uganda Peoples Defence Forces Act reads as follows:

“In or during the exercise of its powers under subsection (1) of section, the General Court Martial-

(a) may exercise any of the powers conferred on it as an appellate court by this Act;

(b) may, pending the final determination of the case, release any convicted person on bail; except that-

(i) bail shall not be granted to a person sentenced to death or to imprisonment exceeding five years; and

(iii) If the convicted person is ultimately sentenced to imprisonment or detention, the time he or she has spent on bail shall be excluded in computing the period for which he or she is sentenced.

(c) may, if it thinks fit, call for and receive from the summary trial authority or Unit Disiplinary Committee before which the case was heard, a report on any matter connected with the case;

(d) shall not make any order to the prejudice of an accused person unless he or she has had an

opportunity to be heard in his or her own defence”.

It was contended by Mr. Kakuru that the aforesaid provisions narrow, abridge and negate the right to bail as prescribed by **Article 23(6) of the Constitution** in that they require an accused person to prove exceptional circumstances and to assure court that he or she will not abscond. As far as Mr. Kakuru is concerned, **Article 23 (6) supra** does not give any discretion to the court. The right to apply for bail is
10 fundamental and inherent under the Constitution **Article 20** reads as follows:-

“(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons”.

20 With regard to **section 75 of MCA (supra)** Mr. Kakuru’s complaint was that it is wrong for the Magistrates Courts Act to provide offences which are triable by the Magistrates Court but not bailable by them. This provision, counsel argued, also contravenes **Article 23 (6) of the Constitution (supra)** in that it infringes and limits the accused’s right to apply for bail. Mr. Kakuru did not see the rationale behind it. If a court has jurisdiction to try an offence it should have jurisdiction to grant bail.

He also wondered why if a magistrate court can remand an accused in cases triable by the High Court only, why should it not be given powers to grant bail to the accused in such cases. To Mr. Kakuru there is no convincing reason for depriving magistrates of such powers to grant bail. Counsel vehemently argued that fundamental human rights of the individual are inherent and not given by State.

10 In the premises, he prayed Court to nullify **section 14(2) of Trial on Indictment Act, section 75 of the Magistrates Courts Act** and all the impugned provisions in the petition which are inconsistent with **Articles 20, 23(1), 23 (6), 28(1) and 28(3) of the Constitution.**

In reply, Mr. Oluka did not agree with the submissions of Mr. Kakuru on the interpretation of **section 14(2) of Trial Indictment Act.** He submitted that the High Court is seized with powers to set conditions or order cancellation of bail. It has discretion to deny bail to an accused. Setting conditions for bail
20 or cancellations does not violate the right to a fair trial and presumption of innocence envisaged under **Article 28(3) of the Constitution.** To him, bail, can be cancelled at any point in time.

On **section 75 of Magistrate Court Act,** Mr. Oluka conceded that, in appropriate circumstances, the Constitution should be given wide interpretation. However, it should not be interpreted to conflict with other parts of Constitution. Counsel pointed out that both the High Court and magistrates' courts are given powers

under **section 75** to consider grant of bail. He argued that, according to our jurisdiction each court is given specific jurisdiction; for example, capital offences are triable only by the High Court.

Further, counsel argued that there is no cause for alarm because there are guidelines for granting bail at different stages of the trial. He referred this Court to **Article 23 of the Constitution (supra)** and prayed that the provisions of **section 75**
10 **Magistrate Court Act** and **section 14(2) of Trial on Indictment Act** should be upheld as they are within the confines of the law.

I carefully listened and I have considered the addresses of both learned counsel on the constitutionality of **section 14 (2) Trial on Indictment Act** and **section 75 of Magistrates Court Act** and noted all the arguments, they advanced. I have also had a careful perusal of the affidavit evidence and legal arguments advanced during the scheduling conference as well as the
20 relevant provisions of the law and authorities cited by the parties.

In matters involving interpretation of the Constitution or determination of the Constitutionality of Acts of Parliament courts are guided by well settled principles. One of the cardinal principles in the interpretation of constitutional provisions and Acts of Parliament is that the entire Constitution must be read as an integrated whole and no one particular provision should

destroy the other but sustain the other. See **TINYEFUZA VS ATTORNEY GENERAL CONSTITUTIONAL PETITION NO.1 OF 1996.**

Another important principle is that all provisions concerning an issue should be considered together to give effect to the purpose of the instrument see **South Dakota vs North Carolina 192, US 268, 1940 LED 448.**

10 Thirdly, the purpose and effect principle where the court considers the purpose and effect of an Act of Parliament to determine its constitutionality. See **THE QUEEN VS BIG DRUG MARK LTD (1996) LRC (CONST.) 332 ATTORNEY GENERAL VS SALVALON ABUKI CONSTITUTIONAL APPEAL NO. 1 OF 1998.**

Following the Constitution and in particular that part which protects and entrenches fundamental rights and freedoms, must be given a generous and purposive interpretation. **ATTORNEY GENERAL VS MODERN JOBE (1984) LRC 689 UNITY DOW VS ATTORNEY GENERAL OF BOTSWANA 1992 (LRC 662).**

20 With the above mentioned principles and others not mentioned in mind I will now proceed to consider not only **sections 14(2) of the Trial Indictment Act and section 75 of Magistrate Courts Act** but all the issues agreed upon by the parties at the scheduling conferencing.

In my view, the petition before court is mainly challenging the constitutionality and legality of the restrictions and limitations imposed on grant of bail by the impugned provisions of the above mentioned Acts of Parliament, namely, TIA, MCA, UPDF and Police

Act. The question for this Court to determine is whether they are inconsistent **with Articles, 20, 23(1), 28(1), 23(3) and 23(6) of the Constitution.** The petitioner sees the right to apply for bail as a fundamental and inherent right not given by the State. To the petitioner bail is a question of liberty. The petition is, hence, seeking nullification of those provisions to the extent of inconsistency.

As conceded by the Principal State Attorney, Oluka some of the
10 above mentioned impugned provisions are unconstitutional and inconsistent with the Constitution in some aspects as we shall see later but others are not. From the outset I would like to point out that this Court has pronounced itself on several aspects of the interpretation and application of the relevant laws governing bail, mainly, **Article 26(6) of the Constitution** but it seems there is still a lot to be done. It is, for example, the contention of Mr. Kakuru that the court has no discretion to deny an accused person bail. As far as he is concerned it is a fundamental human right inherent in the individual and is automatic. It should,
20 therefore, not be based on the impugned statutory provisions.

In the case of **TUMUSHABE VS ATTORNEY GENERAL CONSTITUTIONAL PETITION NO. 6 OF 2004**, this Court ruled that:-

“The law that governs bail in Uganda is contained in Article 23(6) (a) (b) and (c) of the Constitution. All other laws on bail in this country that are inconsistent with or which contravene this Article are null and void to the extent of inconsistency. The

Attorney General of Uganda needs to take closer look at sections 75 and 76 of MCA and sections 15 and 16 of TIA. There may be urgent need to bring them into conformity with Article 23(6) of the Constitution”.

The above mentioned observation by this Court notwithstanding, there was still need for this Court to rule unequivocally whether the bail provisions of the Trial on Indictment Act are still good law or not. This led to the pronouncements in Constitutional Ref. No. 10 20 of 2005, Uganda (DPP) vs Col. (RTD) Dr. Kiiza Besigye, when the DPP sought interpretation of **Article 23(6) (supra)** to determine whether the court has discretion to deny an accused bail.

Before I proceed to examine the implications of this Court’s ruling in Reference No. 20 of 2005, I consider it appropriate to reproduce the relevant provisions of the Constitution governing bail. They read as follows:-

“23 (1) No person shall be deprived of personal liberty except in any of the following cases -

Article 23(6) as amended by the Constitution (Amendment) Act 11/2005 reads:

(6) where a person is arrested in respect of a criminal offence -

(a) the person is entitled to apply to the court to be released on bail and the court may grant that person

bail on such conditions as the court considers reasonable;

(b) **in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable.**

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(c) **in the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the case is committed to the High court, that person shall be released on bail on such conditions as the court considers reasonable.”**

Article 28 which protects the right to a fair hearing states inter alia:

20 **“(3) Every person who is charged with a criminal offence shall -**

(a) **be presumed to be innocent until proved guilty or until that person has pleaded guilty.”**

A careful perusal of the Court’s ruling in the aforesaid reference reveals that, the Court gave the question of discretion under **Article 23(6) (supra)** a thorough and exhaustive interpretation. In my view it left no stone unturned. I will reproduce some of the relevant portions of the ruling where I consider it appropriate.

Applying some of the above mentioned principles on constitutional interpretation this Court held as follows:-

Under article 23(6)(a), the accused is entitled to apply for bail. The word “entitled” creates a ‘right’ to apply for bail and not a right to be granted bail. The word may create discretion for the court to grant or not to grant bail. The context in which the word ‘may’ is used does not suggest otherwise.

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Under article 23(6)(b) where the accused has been in custody for 60 days before trial for an offence triable by the High Court as well as a subordinate court, that person shall be released on bail on such conditions as the court considers reasonable. Here the court has no discretion. It has to grant bail because of the use of the phrase ‘shall be released on bail’, appearing therein. This is the opposite of the phrase ‘may be released on bail’ as appears in 23(6)(a) (supra). The word ‘shall’ is imperative or mandatory. It denotes obligation.

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As regards article 23(6)(c), where the accused has been in custody for 180 days on an offence triable by the High Court only and has not been committed to the High Court for trial, that person shall be released on bail on reasonable conditions. Like in 23(6)(b) the court has no discretion to refuse to grant bail to such a person”.

However, in both **article 23(6)(b) and (c)** the court has discretion to determine the conditions of bail.

In my view, the aforesaid Court's ruling should have put the question of discretion to rest. I see no reason for resurrecting it. After such an exhaustive consideration of the subject there is nothing to persuade me to find that bail is automatic. Relying on the purposive and effect principle (**supra**) I reiterate this Court's

10 holding that:-

“The context of Article 23 (6) (a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic” as it was contended by Mr. Kakuru.

Another scenario of which human rights lawyers in Uganda, including Mr. Kakuru have been critical of is under **Article 23(6) (c) of the Constitution**. This is where an accused person charged with offences triable only by the High Court but has not
20 spent the statutory period of 180 days on remand is seeking release on bail. In this case, the court still, has discretion to grant or not to grant bail if the accused fails to show exceptional circumstances as provided by the Trial on Indictments (Amendments) Act No. 9 of 1998 which read as follows:

“ (a) grave illness certified by a medical officer of the prison or other institution or place where the accused

is detained as being incapable of adequate medical treatment while the accused is in custody;

- (b) **a certificate of no objection signed by the Director of Public Prosecution or**
- (c) **the infancy or advanced age of the accused.”**

10 It is worthy noting that Act 9 of 1998 having been enacted 3 years after the 1995 of the Constitution, it must have been intended to operationalize **article 23(6) (c)** to provide for the applications seeking bail before the expiry of the statutory period as explained above.

Mr. Kakuru fears on the exercise of the court’s discretion is unfounded because even **section 15(1) of the Trial on Indictment Act left the court’s discretion intact.** The courts have clear guidelines as to how to exercise the discretion to grant or not to grant bail and the basis on which to be exercised.

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On cancellation of bail under **section 14(2) of the Trial on Indictment Act,** complaint of Mr. Kakuru is that the accused will not be condemned unheard as he suggested. When he or she is produced before court, he or she will be given opportunity to be heard. He or she would be required to show cause why the order sought for should not be granted. It is not correct, as suggested by Mr. Kakuru, that all the impugned provisions mentioned in this petition have the effect of negating the right to apply for release on bail as prescribed by **Article 23 (6) (a) of the Constitution.**

Clearly, the Court has a discretion to grant bail and impose reasonable conditions without contravening the Constitution.

With regard to Mr. Kakuru's complaint on about other restrictions on courts, in particular to require the accused to show that he will not abscond and proof of exceptional circumstances, in my view, the said requirements are justified. Besides they are not mandatory. Both High Court and subordinate courts are still free to exercise their discretion judicially and to impose reasonable conditions on the applicant. As was observed by this Court in Constitutional Reference No. 20 (**supra**) Page 12:-

“While the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially”.

Further, it is not disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to

address its mind to the objective of bail. It is equally an important judicial instrument to ensure the accused person's appearance to answer charge or charges against him or her.

The objective and effect of bail are well settled. The main reason for granting bail to any accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. We accept Mr. Kakuru's submission that under **Article 28(3) of the Constitution**, an accused
10 person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic. Its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him.

The provisions of **section 14 (2) of the TIA and 75 MCA**
20 requiring the court to set conditions and the guidelines stated therein are hence justified. It is, therefore, relevant, unless the offence is minor to take into account, certain matters, like, the gravity of offence, nature of accusation, antecedents of the accused person, and whether he has a fixed abode within the court's jurisdiction.

The aforesaid requirements do not in anyway infringe on the accused's rights under **Articles 20, 23 and 28**. Rights, be the

fundamental rights or not, must be enjoyed within the confines of the law. Violation of the accused's rights does not occur simply because the accused is required to assure court that he will appear to answer the charges. All that is required of the court is to impose reasonable conditions, acceptable and demonstrably justifiable in a free and democratic society as provided under **Article 43 (2) of the Constitution.**

10 Society must be protected from lawlessness. The court must guard against absconding because, there may be a danger of interfering with the evidence or witnesses. This Court has observed in Constitutional Ref No 20 of 2005 (**supra**) as follows:-

20 ***“The needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families and not least the effect on prison remand conditions if large numbers of unconvicted people are remanded in custody. In this respect various factors have to be born in mind such as the risk of absconding and interference with the course of justice. Where there is a substantial likelihood of the applicant failing to surrender for turn up for trial, bail may only be granted for less serious offences. The court must weigh the gravity of the offence and all the other factors of the case against the likelihood of the applicant absconding. Where facts come to light and it appears that there is substantial likelihood of***

the applicant offending while on bail, it would be inadvisable to grant bail to such a person”.

In the premises I am unable to agree with Mr. Kakuru that the requirement to establish exceptional circumstances under **section 14, 15 contravene Article 23(6)**, in that the provision merely provides guidance not direction. The guidelines are clearly stated when the court “may” exercise a discretion to deny bail or not, and when they can impose conditions.

- 10 On this issue I find that **sections 14(2), 15(1), 15(2) and 15(3) of TIA** not consistent with **Articles, 20, 23(1), 23(6), 28(1) of the Constitution.**

However, as it was conceded by Mr. Oluka, **section 16 of Trial Indictment Act** is null and void to the extent of its inconsistency with **Article 23(6) (supra)**. In the premises the answer to issue No.1 is partly in the negative and partly in affirmative.

ISSUE NO. 2

- 20 With regard to **section 75 (2) of the MCA**, it is not correct to say, on the evidence before court, that it contravenes the provisions of **Article 23(6)**. The accused’s right to bail is not absolute. It has to be enjoyed within the confines of the law. There has to be a constitutional balance of everybody’s rights. Denial to grant bail by **section 75 (2)** does not contradict the accused’s inherent right of innocence. I do not accept the argument that the limitation amounts to suggestion that, the accused is guilty of the offence he is charged with.

On **section 76**, it is to be noted that it predates the 1995 Constitution. In accordance with **Article 274 of the Constitution, section 76** may, be construed with modification and adoption to bring it into conformity with the Constitution. It would, therefore, be null and void to the extent it contravenes the Constitution.

The answer to issue No.2 is also partly in the affirmative and partly negative.

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ISSUE NO. 4

For convenience I will next consider **section 25(2) of the Police Act**. I accept that it contravenes **Article 23(4) of the Constitution**. It provides for a longer period before an accused is produced in court than the Constitution sets under **Article 23(4)**. It is, hence, null and void to that extent.

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Lastly on issue No.3, Mr. Oluka rightly conceded that **sections 219, 231 and 248 of the Uganda People's Defence Forces Act (UPDF)** contravene **articles 20, 23 (1), 23(6), 28(1) and 28(3) of the Constitution**. I accept that bail should not be refused mechanically simply because the prosecution wants such orders. Remanding an accused in custody is a judicial act. The court must in making such an order, address its judicial mind to it before depriving an accused person or suspect of his liberty. Conditions and restrictions imposed must be reasonable. I accept that the aforesaid impugned provisions of UPDF Act are inconsistent with **Articles 20, 23(1), 23(6), 28(1) and 28 (3)**

of the Constitution. They are null and void to the extent of inconsistency. Issue No. 3 must, therefore, succeed.

In the result, the petition would succeed in part with the following declarations:-

1. It is hereby declared that section 16 of Trial on Indictment Act contravenes Articles 23(6), 20 and 28 of Constitution and is null and void to the extent of inconsistency.

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2. That section 76 of MCA is null and void to the extent of inconsistency with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda in so far as it infringes on the constitutional rights to liberty and speedy trial.

3. That sections 219, 231 and 248 of UPDF Act, which subject accused persons to lengthy periods of detention are inconsistent with Articles 20, 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda.

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4. That section 25 (2) of the Police Act is inconsistent with Articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void to the extent of inconsistency.

Decision of the Court

Since all the justices on the Coram have agreed with the above holdings and proposed declarations this petition

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succeeds in part with the above mentioned declarations. Since the petition was brought in public interest there will be no order as to costs.

Dated at Kampala this ...**26th**day of ...**March**....2008

L.E.M. Mukasa-Kikonyogo
HON. DEPUTY CHIEF JUSTICE

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JUDGMENT OF G.M.OKELLO, JA

I have read in draft the judgment of my learned sister Justice Mukasa Kikonyogo, DCJ and I entirely agree. I have nothing useful to add.

Dated at Kampala this ...**26th** ..day of ...**March**..... 2008

20 G.M.OKELLO
JUSTICE OF APPEAL

JUDGEMENT OF HON. JUSTICE A.E.N.MPAGI-BAHIGEINE, JA

I have read in draft the judgement of my Lord Mukasa Kikonyogo - DCJ.

I fully concur and have nothing more to add.

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Dated at Kampala this ...**26th** day of ...**March**.. 2008

Hon. A.E.N.Mpagi-Bahigeine
Justice of Appeal

JUDGMENT OF C.N.B.KITUMBA, JA

I have had the benefit of reading in draft the judgment of my Lord Mukasa-Kikonyogo, DCJ.

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I entirely agree with it and have nothing more useful to add.

Dated this ...26th ..day ofMarch.....2008

C.N.B.Kitumba
JUSTICE OF APPEAL

JUDGMENT OF BYAMUGISHA JA

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I had the benefit of reading in draft from the lead judgment that was prepared by the learned Deputy Chief Justice.

I agree with it.

Dated at Kampala this ...26th .day of ...March....2008

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C.K.Byamugisha,
Justice of Appeal