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The background to this reference is that the petitioner/applicant is a practicing Advocate with a firm of lawyers in town. He carried out a number of transactions involving executions of mortgages, power of attorney and the registration of the same documents with the land registry. One of the persons on whose behalf the said transactions were allegedly carried out denied having authorized the transactions involving his land comprised in Mailo Register Mawokota Block 266 Plots 198 and 186 at Kayabwe. He filed a suit in the High Court challenging the transactions. He also lodged a complaint with the Law Council against the conduct of the petitioner as an advocate.

The matter was also reported to the police who carried out their own investigations. On 21<sup>st</sup> October 2009 the petitioner was arraigned with 11 counts. Three of the counts charged him with uttering false documents two counts for obtaining registration by false pretences and six counts related to holding out as an advocate and preparing instruments while not qualified.

The petitioner was availed a number of documents by the prosecution by way of advance disclosure and in preparation for his trial. On receipt of these documents, the petitioner was of the view that the said documents exonerated him at least on some of the counts which he wanted dismissed forthwith by the trial court without any hearing. A request was therefore made by counsel for the petitioner for the interpretation of the following articles of the

Constitution-Articles 28, 120(5), 126(1) and 126(2).

The following question was accordingly framed for our determination:

**“Whether in the plain , natural and true meaning of Articles 28, 44 (c ), 120(5), 120(6),126(1) and 126(2) of the Constitution, a court seized of a criminal matter, has the power to take cognizance of documents served on an accused by the prosecution, by way of advance disclosure, to make a finding that the prosecution amounts to an abuse of legal process and a violation of the accused’s right to a fair trial and if so whether such court on making such a finding has the power to summarily dismiss the charges levied against the accused.”**

We have perused the record of the proceedings of the lower court which were sent to this court for purposes of this reference. There is nothing on record to show that the documents that were served on the applicant/petitioner as advance disclosure were also on court record. The court had not received them as exhibits under the normal rules of admission of documents.

Article 137(5) of the Constitution is very clear in its wording. Before a question can be framed and sent to this court for determination it must arise out of the proceedings, and its determination must be done before the issues raised in the case are disposed of by the trial court. The question or questions must arise in the proceedings directly or by necessary

5 implication. The proceedings before the original court must show that a question as to the interpretation of the Constitution has arisen and the hearing of the case cannot proceed before the question is determined. This should be evident from the record of proceedings.

10 The articles of the constitution which were cited in this reference did not arise out of the proceedings. Whereas the defence cited the said articles in the submissions the prosecution was not afforded an opportunity to make any reply. Moreover we think that a court which is being requested for a reference must make a judicial decision after being satisfied that the interpretation of the Constitution is required.

15 According to the record of proceedings on 17/06/2010 when the parties were before court, counsel for the applicant/petitioner made lengthy submissions claiming that under Articles 28, 120(5), 126 (1)(2)(e) of the Constitution, the trial court had the power to dismiss the charges against the accused summarily without further hearing of the matter. He further  
20 claimed that the dispute between the accused and the complainant was a civil one and not criminal.

After his submissions he requested for a reference. Counsel for the prosecution applied for an adjournment to enable the prosecution make a reply to the matters that had been raised. The application for adjournment was opposed by counsel for the accused. The trial court then  
25 said:

***“The law is very clear that in case of any trial before any court of competent jurisdiction. An application is made that the matter be referred to the Constitutional court for interpretation of certain article. The court has no alternative but to stay proceedings and forward the file to the Constitutional Court for interpretation. Court proceedings stayed  
30 file forwarded to the Constitutional Court for interpretation.*”**

***Sgd: Wekesa John Patrick  
Magistrate Grade One.”***

With respect to the learned magistrate, he did not make a considered decision whether the interpretation of the Constitution had arisen in the proceedings or not. He shirked his obligation. He could only have taken that decision after listening to the reply by the prosecution and evaluating all the facts before him.

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We consider this reference to be one of those or a category which the lower courts have been sending to this court routinely without first considering whether a question for constitutional interpretation has arisen in the proceedings or not.

It is accordingly dismissed with costs. The file is returned to the lower court to commence the trial of the applicant/petitioner forthwith.

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**Dated at Kampala...21<sup>st</sup> .....day of...March.....2011**

**A.E.N.Mpagi-Bahigeine**

15 **Deputy Chief Justice**

**C.K.Byamugisha**

**Justice of Appeal**

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**S.B.K.Kavuma**

**Justice of Appeal**

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**A.S.Nshimye**

**Justice of Appeal**

30 **M.S.Arach-Amoko**

**Justice of Appeal**