

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA**

**CORAM: MPAGI-BAHIGEINE DCJ, BYAMUGISHA, KAVUMA
NSHIMYE & ARACH-AMOKO JJA.**

CONSTITUTIONAL PETITION NO.04/11(REFERENCE)
[Arising out of High Court -00-ACD Criminal case No.70/2010]

BETWEEN

DAMIAN AKANKWASA:::::::::::::APPLICANT/PETITIONER

AND

UGANDA:::::::::::::RESPONDENT

RULING OF THE COURT

This is a constitutional reference which was sent to this court for the interpretation of the following question:

Whether the charging and prosecution of the accused under section 20(1) of the Anti-Corruption Act No.6/09 for offences allegedly committed between August 2007 and February 2008 is inconsistent with Articles 28(7) and (12) of the Constitution.

The background to the reference is quite simple. The applicant/ petitioner is the former Executive Director of National Forest Authority. He was charged with an offence of Causing Financial loss contrary to the provisions of section 20 of the Anti-Corruption Act. It was alleged in the particulars of the offence that the accused between 13/08/07 and 29/02/08 he unlawfully allocated 100,000 cubic metres of round wood at Katugo Central Forest Reserve to Nile Plywood (U) Ltd for harvest at a rate of Shs 62,500/= per cubic meter instead of the

35 set price of Shs 82,500/= per cubic meter knowing or with reason to believe that such action
would cause financial loss of Ug. Shillings two billion [2,000,000,000/=] to National Forest
Authority.

When the applicant/petitioner appeared in court for taking plea on the charge against him, Mr
40 Okello-Oryem who appeared for the accused requested for the constitutional reference and
Mr Asubo who represented the Inspector General of Government consented to the reference.
The parties filed written submissions. Counsel for the applicant /petitioner submitted that this
court gave a wrong interpretation to Article 28(7) and (12) of the Constitution in the case of
Francis Atugonza v Uganda and therefore we should depart from it. He stated that the
45 provisions of the said article are absolute and derogating from them is prohibited under
Article 44(c) of the Constitution. Learned counsel further submitted that charging the
applicant/ petitioner under section 20(1) for offences allegedly committed between August
2007 and February 2009 before the enactment of the Anti-Corruption Act and before the
creation of the offence contravene Articles 28(7) and (12) of the Constitution. He further
50 stated that sections 11 and 20(1) of the Anti-Corruption Act are not a re-enactment of
Sections 87 and 269 of the Penal Code Act. He cited no authority to support his assertion. He
stated that the difference between the former and the new offences is mainly the enhancement
of sentence. He claimed that the re-enactment of the new offences cannot be a continuation of
the former offence. He invited court to allow the reference.

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Counsel for the respondent opposed the reference. He submitted that at the time when the
applicant/petitioner is alleged to have committed the acts constituting the offence, the said
acts constituted a criminal offence of causing financial loss under section 269 of the Penal
Code Act. The current offence of causing financial loss under the Anti-Corruption Act is the
60 same as that under the Penal Code Act. He conceded that section 269 of the Penal Code Act
was repealed by the Anti-Corruption Act. However, according to counsel, Article 28(7) of the
Constitution does not require that persons must be charged under existing laws. It only
requires that criminal charges be brought in respect of offences which are founded on acts or
omissions which at the time it took place constituted a criminal offence.
65 Learned counsel pointed out that words used in the two sections are similar and the titles are
the same except the sentence which was enhanced. He maintained that it was lawful to charge
the applicant/petitioner under section 20(1) of the Anti-Corruption Act.

We think it is necessary to set out the provisions of the Constitution and those of the
70 impugned section before determining the merits of the reference.

Article 28(7) and (12) of the Constitution provides:

***“(7) No person shall be charged with or convicted of a criminal offence which is founded
on an act or omission that did not at the time it took place constitute a criminal offence.***
(underlining added).

75 ***“(12) Except for contempt of court, no person shall be convicted of a criminal offence
unless the offence is defined and the penalty for it prescribed.”***

80 The repealed section 269 of the Penal Code Act provided as follows:

“Causing financial loss

85 ***(1) Any person employed by the Government, a bank, a credit institution, an insurance
company or public body, who in the performance of his or her duties, does any act
knowing or having reason to believe that the act or omission will cause financial
loss to the Government, bank, credit institution, insurance company, public body or
customer of a bank or credit institution is liable on conviction to a term of
imprisonment of not less than three years and not more than fourteen years.***

90 ***(2) In this section-***

- a) “bank” and “credit institution” have the meanings assigned to them by the
Financial Institutions Act;***
- b) “insurance company” means an insurance company within the meaning of
section 4 of the Insurance Act; and***
- 95 ***c) ‘public body’ has the meaning assigned to it by section 1 of the Prevention
of Corruption Act.”***

The current section 20 under the Anti-Corruption Act states:

100 **“Causing financial loss.**

(1)Any person employed by the Government, bank, a credit institution, an insurance company or a public body, who in the performance of his or duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or to a fine not exceeding three hundred and thirty six currency points or to both.

(2)In this section-

- a) “bank” or “credit institution” have the meanings assigned to them by the Financial Institutions Act; and*
- b) “insurance company” means an insurance company within the meaning of section 4 of the Insurance Act.”*

The requirement of Article 28(7) as we understand it is that for a person to be charged with a criminal offence under any legislation the facts or omissions allegedly committed must have constituted a criminal offence which is defined under the law and there has to be a sentence prescribed for it. The test to be applied is whether the acts or omissions allegedly committed by an accused person constituted a criminal offence at the time they were committed.

The acts which the applicant is alleged to have committed and which it is alleged caused financial loss to National Forest Authority occurred between 13th August 2007 and 29th February 2008. During this period there was a criminal offence of causing financial loss defined under section 269 of the Penal Code Act which has been repealed by the Anti-Corruption Act. There was also a punishment prescribed for it.

Section 20 of the Anti- Corruption Act in our view is a re-enactment of **section 269** of the Penal Code Act. The only difference between the two sections as counsel for the applicant submitted, the sentence in the latter Act was enhanced. We do not consider the difference in the sentence material. The facts constituting the offence meet the criteria of Article 28(7). Causing financial loss was a criminal offence between 13th August 2007 and 29th February 2008.

The applicant/petitioner was properly charged in our view.

This reference raises similar issues as those that were raised in Constitutional **Reference**

No.31/2010- Uganda v Atugonza Francis in which this court ruled that **section 11(1)** of the

Anti-Corruption Act was not inconsistent with Article 28(7) and(12) of the Constitution. The ruling in that reference applies to the instant reference with the result that we dismiss it with costs.

140 The record of the lower court is returned with the direction that the trial magistrate should proceed with the trial of the applicant/petitioner forthwith.

Dated at Kampala this...21st ...day of...April...2011

A.E.N.Mpagi-Bahigeine
145 **Deputy Chief Justice**

C.K.Byamugisha
Justice of Appeal

150 **S.B.K.Kavuma**
Justice of Appeal

A.S.Nshimye
Justice of Appeal

155 **M.S.Arach-Amoko**
Justice of Appeal