

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT AT KAMPALA

CONSTITUTIONAL PETITION NUMBER 0008 OF 2012

ANDREW KIBAYA :::::::::::::::::::::::::::::::::::APPLICANT

VS.

UGANDA:::RESPONDENT

CORAM:

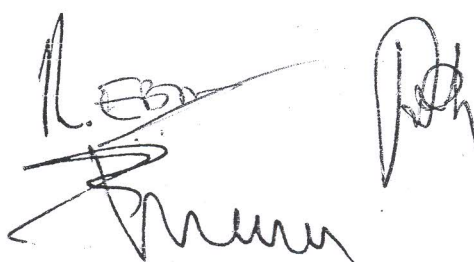
HON. MR. JUSTICE A.S. NSHIMYE, JA

HON MR. JUSTICE REMMY KASULE, JA

HON.MR. JUSTICE ELDAD MWANGUSYA, JA

HON. MR. JUSTICE RUBBY AWERI OPIO, JA

HON. JUSTICE PROF. LILLIAN EKIRIKUBINZA TIBATEMWA, JA

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JUDGMENT OF THE COURT.

Introduction.

This Constitutional Reference was brought under **Article 137 (5) of the Constitution** at the request of Counsel for the Applicant. It arises from proceedings in a criminal matter that was before the Chief Magistrate's Court of Buganda Road in **Criminal Case No. 1092 of 2009**. The criminal proceedings were before his Worship Deo Sejjemba.

The Applicant was charged with several counts relating to forgery, uttering forged documents and offences under the Advocates Act.

The trial proceeded for over 16 days during which nine prosecution witnesses were called, examined in chief and cross examined. When the prosecution called its 10th witness (PW 10) Counsel for the Applicant objected to PW10's evidence on account of the fact that the evidence of the said witness had not been the subject of advanced disclosure and admission and that consequently, its admission would be a violation of the accused's right to a fair trial and that essentially the adducing of a new hand writing expert's evidence was an abuse of process. Following the objection, the learned Chief Magistrate ruled that PW10's evidence be excluded. The prosecution then sought an adjournment to enable it call its next witness.

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On resumption of the court proceedings, counsel for the prosecution stated that although the hitherto anticipated witness was available, the prosecution was unable to proceed because the Director of Public Prosecutions (DPP) had decided to discontinue proceedings against the accused. The DPP was acting under powers given to him under **Section 121 of the Magistrates Court Act (MCA), Chapter 16 of the Laws of Uganda** which provides as follows:

“Withdraw from prosecution in trials before Magistrates Courts.

In any proceedings before a magistrate’s court the prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any persons; and upon that withdrawal -

- (a) If it is made before the accused person is called upon to make his or her defence, he or she shall be discharged, but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him or her on account of the same facts;*
- (b) If it is made after the accused person is called upon to make his or her defence, he or she shall be acquitted.”*

Counsel for the accused (applicant in this Court) objected to the withdrawal. He argued that **Section 121 MCA** had to be read together with relevant provisions of the Constitution to wit **Article**

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28(1) Right to a fair hearing; **Article 44(c)** which renders the right to a fair hearing non-derogable; **Article 120(3)(d)** which empowers the DPP to discontinue criminal proceedings at any stage before judgment is delivered and **Article 120(5)** which enjoins the DPP in the exercise of his or her powers under **Article 120**, to have regard to public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

Counsel contended that a withdrawal of the case at this stage of the trial process was tantamount to an abuse of court process. The prosecution would be using the court process to reset itself so as to re-arrest, re-charge and attempt to re-try the accused. He argued that if the State could not prove its case, the Court has power to order a closure of the prosecution case so that the accused can be acquitted. He further argued that to the extent that **Section 121** of the Magistrates Courts Act does not appear to give court discretion on how to handle applications under the said section, that section is unconstitutional. Counsel prayed that the matter be referred to the Constitutional Court under **Article 137 (5) (b)** for interpretation of the following framed questions:

1. Whether a trial Magistrate presiding over criminal proceedings before him or her initiated by the DPP, can refuse or decline to effect a withdraw of Criminal Proceedings and discharge the accused from prosecution against him (accused) when the DPP has discontinued the Proceedings in writing under his or own signature under **S.121 MCA** and **Article 120(3) (d)** of the

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Constitution, when judgment has not been pronounced in matter.

2. Whether **S.121 of the MCA** is inconsistent with the provisions of the Constitution.

We note that **Article 137 (1)** of the Constitution provides that:

Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

Article 137 (5) provides that:

Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court-

(a) may, if it is of the opinion that the question involves a substantial question of law; and

(b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.

At the hearing of the reference, the Applicant was represented by Mr. David K. Mpanga of A.F Mpanga Advocates. The Respondent was represented by Ms. Nyangoma Esther, a State Attorney in the chambers of the Attorney General and Mr. Simon Peter Semalemba from the office of the Director Public Prosecutions.



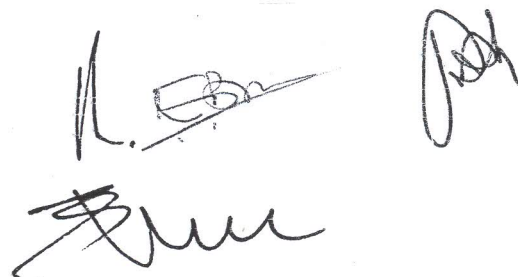
Submissions of Counsel for the Applicant.

Counsel for the applicant made oral submissions in court and also filed written submissions in rejoinder to the respondent's written submissions in rejoinder. Counsel for the applicant argued that a trial magistrate presiding over criminal proceedings initiated by the DPP can decline to effect a withdrawal of criminal proceedings pursuant to a letter or a written instrument under **Section 121** of the MCA. In essence he argued that although **Section 121** of the MCA Article is identical to **Article 120 (3) (d)** which empowers the DPP to ~~discontinue~~ criminal proceedings at ~~any stage~~ before judgment is delivered, it must be subjected to the following Constitutional provisions: **Articles 28(1)** Right to a fair hearing; **Article 44(c)** which renders the right to a fair hearing non derogable; and **Article 120(5)** which enjoins the DPP in the exercise of his or her powers under **Article (120)**, to have regard to public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

For ease of reference we have reproduced here below, the relevant Articles of the Constitution.

28. Right to a fair hearing.

"1. 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."

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44. Prohibition of derogation from particular human rights and freedoms.

“Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

(c) the right to fair hearing;”

120. Director of Public Prosecutions

“(3) The functions of the Director of Public Prosecutions are the following-

(d) to discontinue at any stage before judgment is delivered, any criminal proceedings to which this article relates, instituted by himself or herself or any other person or authority, except that the Director of Public Prosecutions shall not discontinue any proceedings commenced by another person or authority except with the consent of the court.

(5) In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.”

He further argued that although **Section 121 MCA** accurately reflects **Article 120 (3) (d)** of the Constitution, the other Constitutional provisions cited above (**28, 44, 120 (5) and 126**) empower a Magistrate to look behind **Section 121** for purposes of

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protecting an accused person's rights, for purposes of supervising the DPP's exercise of his executive power and for purposes of protecting the integrity of the process of court.

Counsel submitted that the Judiciary has a duty under **Article 126 (1) of the Constitution** which deals with the power of the Judiciary and **Article 126 (2) (e)** which provides for substantive justice to be administered without undue regard to technicalities, to protect the integrity of court proceedings.

For ease of reference we have here below reproduced the relevant parts of **Article 126**.

126. Exercise of judicial power.

"(1) Judicial power is derived from the people and shall be excised by the courts established under this Constitution in the name of the people and in conformity with law and values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles-

(e) substantive justice shall be administered without undue regard to technicalities."

It was further argued that those Articles read together in a natural and plain meaning and in consistence with the well-established line of authorities which establish the doctrine of complementarily in interpreting the constitution, give a trial magistrate presiding over

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criminal proceedings initiated by the DPP, power to decline to effect a withdrawal of criminal proceedings pursuant to a letter or a written instrument under **Section 121 of the MCA**. Counsel concluded that in light of the other articles, the power of the DPP to withdraw prosecutions that he or she has initiated is not unfettered, instead the plain, natural and ordinary meaning of **Article 120 (5)** is that the Article sets out parameters for the DPP in the exercise of his or her power.

Counsel argued that **Article 120[6]** of the constitution does not render the DPP a 'god' or a dictator with absolute powers. That the Article must be read together with other articles cited mentioned above and in the context of a trial, it must be read together with **Article 28, 44 (c), 120 (5) and 126 (2) (e)** of the Constitution.

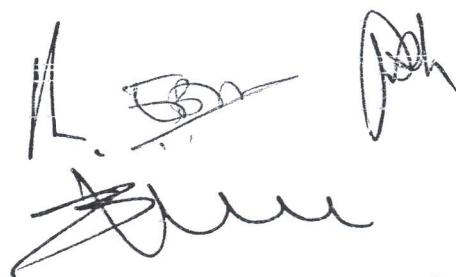
Counsel argued further that this limitation leads to the question: who will guard the DPP to ensure that the DPP abides by **Article 120(5)**; that he/she does not use his or her powers in a manner that is contrary to the administration of Justice or in a manner that is essentially an abuse of legal process? Counsel submitted that although the Constitution does not expressly state so, it is the Judiciary under **Article 126(1) and Article 126(2) (e)** which can and must protect an accused person's right to a fair and speedy trial and secondly it is the Judiciary which must protect court proceedings. Consequently, the Court is duty bound to consider a letter signed under **Section 121 of the MCA** in light of the facts of a particular case. Counsel noted that in the relevant case, the trial

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had run for more than 16 days and 9 prosecution witnesses had testified against the accused. The prosecution then sought to take advantage of **Section 121 (a) of the MCA** which does not bar a subsequent retrial of an accused on the same facts. Counsel submitted that in the said circumstances the withdrawal was part of a hidden agenda to cause a re-prosecution of the applicant on the same facts. He argued that the withdrawal was an abuse of process and he disagreed with the contention by the State that upon a presentation of a letter of withdrawal under **Section 121**, the trial Magistrate had no option but to honor the withdrawal.

Counsel submitted further that contrary to the State's submission, a Magistrate is constitutionally empowered to order the State to close its case if the withdrawal would be an abuse of process or be contrary to the administration of Justice. The essence of Counsel's argument was that in such circumstances, counsel for the accused would be allowed to address the magistrate on the factors which showed that a particular withdrawal was essentially an abuse of process. In the event that the defence succeeded in "proving" its case, Court would then oblige the State to close its case. This was because the judiciary being an ultimate arbiter in the administration of justice, should have the discretion to either grant or refuse the Director of Public Prosecution from withdrawing from the prosecution of criminal case.

The Applicant's Counsel cited various authorities from England which establish that the judiciary has inherent power to protect its

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own processes from being degraded and misused. He submitted that whereas in England the court's relevant powers are considered inherent, in Uganda the same powers are explicitly expressed in **Article 126 (1) and (2) of the Constitution**.

Counsel prayed that Court answers Question (1) in the affirmative and Question (2) in a qualified affirmative.

Submissions of Counsel for the Respondent.

On the other hand, Counsel for the Respondent in their written submissions argued that issue 1 should be answered in the negative. It was submitted that under **Article 120 (3) (d)**, the Constitutional powers of the Director of Public Prosecutions to withdraw from prosecution of any person charged before a magistrate's court were un-fettered since **Article 120(6)** of the Constitution provides that in the exercise of the functions conferred upon him or her, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.

The respondent's Counsel also referred Court to **Article 120 (5)** of the constitution which provides that the Director of Public Prosecutions in exercising his or her powers shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process.

Counsel argued that the DPP is a Public Prosecutor and has supervisory role over the prosecutorial process and provides an automatic check and balance to prevent cases of little merit from

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proceeding and abusing the legal process or offending public interest and the administration of justice.

According to Counsel for the Respondent, the Court's duty is not to re-appraise the grounds which led the Director of Public Prosecutions to request withdraw from prosecution, but to consider whether the DPP applied his or her mind as a free agent, uninfluenced by irrelevant and extraneous considerations.

In support of his arguments, Counsel cited the case of **MARSHALL VS THE DIRECTOR OF PUBLIC PROSECUTIONS (Jamaica) [2007] UKPC 4(24 January 2007)** which relied on Lord Bingham of Cornhill in **RV DPP ex parte Manning (2000)3 WLR 474** who stated thus:

".. in exercising his powers, the Director of Public Prosecutions exercises an informed judgment on how a case against the defendant, if brought, would be likely to fare in the context of a criminal trial before a jury. It will often be impossible to stigmatize a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law....."

Respondent's Counsel concluded that answering question 1 in the affirmative as prayed by Counsel for the applicant would be seeking to amend the Constitution and curtailing the Director of the Public Prosecutions' constitutional mandate.



In regard to the question whether **Section 121 of the MCA** is inconsistent with the Constitution, Counsel for the Respondent noted that on behalf of the applicant, it was contended that the Section had to be read together with **Articles 28(1), 44(c), 120(3)(d), 120(5), and 126(5), (2)(e)**. He further referred to the argument of the applicant that the Prosecution was withdrawing in order to make advantage of **Section 121(a)** which does not bar a retrial subsequent to the proceedings discontinued. In summary, that this was contravening the applicant's rights to a fair and speedy hearing, which is non-derogable.

Respondent's Counsel also referred to the submission of the Counsel for the accused during the trial that their concern was that the state was trying to use the process of court in order to reset itself so as to re-charge and retry the accused.

While agreeing that indeed section **121(a)** does not bar the prosecution from bringing subsequent proceedings against the accused person who has been discharged, on account of the same facts, Counsel for the Respondent pointed out that nevertheless, it is not in every case of withdrawal and discharge that the DPP subsequently reinstates cases. Counsel submitted that in light of this, counsel for the applicant was just speculating that his client would be re-arrested and charged.

Counsel argued further that there is no way the withdrawal from proceedings and subsequent discharge would violate the right of the accused to a speedy and fair hearing. He further argued that it

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would for instance even be wrong to argue that this would be double jeopardy. Counsel based his argument on the doctrine that a court of law will not adjudicate on hypothetical and or speculative questions and cited the case of **The East Africa Court of Justice in Appeal No. 4 of 2012-LEGAL BRAINS TRUST (LTBT) LIMITED V ATTORNEY GENERAL OF UGANDA** (pages 11-17) which pronounced itself on the issue of hypothetical and speculative cases thus:

“ ..A court will not hear a case in the abstract, or one which is purely academic or speculative in nature about which there exists no underlying facts in contention. The reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts...”

In response to the respondent's submission that it is not a court's duty to re-appraise the grounds which led the Director of Public

Prosecutions to withdraw from prosecution, but rather to consider whether the DPP applied his or her mind as a free agent, uninfluenced by irrelevant considerations, counsel for the Appellant submitted that this in fact is the gist of the applicant's case.

He reiterated his earlier submission that based on **Article 126 (2) (e)** of the Constitution, it is the duty of court to protect a litigant's Constitutional right to a fair hearing as well as to protect the integrity of proceedings before it. He concluded that in light of the



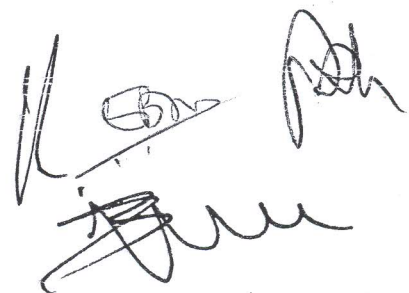
facts of this case, this Honourable Court has the power to look into the exercise of the DPP's powers to ensure that the DPP's decisions do not infringe the Applicant's right to a fair trial or amount to an abuse of process.

Resolution of Court

In resolving each of the two issues we are cognizant of the cardinal principle found in **Article 2 (2) of the Constitution** which provides that:

The Constitution is the supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency.

Our deliberations have also been guided by several now widely accepted principles of constitutional interpretation. First, we are alive to the principle established by the Supreme Court in **Baku Rapheal Obudra and Another v Attorney General, Constitutional Appeal No. 1 of 2003** that where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention of and seeks a declaration to that effect. A liberal and broader interpretation should be given to a constitutional petition



than is given to a plaintiff in a normal civil suit when determining whether a cause of action has been established.

The applicant has brought to the fore **Section 121 of the MCA** and juxtaposed it with several Articles in the Constitution, thereby disclosing a cause of action.

We are also aware of numerous court decisions in jurisdictions world over to the effect that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. It must be presumed that the legislature understands and correctly appreciates the needs of its society.

We are specifically alive to the authority of this Court; **Akankwasa Damain v Uganda Constitutional Petition/Reference No. 05 of 2011 (CC)** to the effect that:

There is a rebuttable presumption that every piece of legislation is constitutional and the onus of rebutting the presumption rests on the person who is challenging its constitutionality.

Issue 1: Whether a trial Magistrate presiding over criminal proceedings before him or her initiated by the DPP, can refuse or decline to effect a withdraw of Criminal Proceedings and discharge the accused from prosecution against him (accused) when the DPP has discontinued the Proceedings in writing under his or own

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signature under **Section 121 MCA and Article 120 (3) (d) of the Constitution**, when judgment has not been pronounced in matter.

The essence of the argument of counsel for the applicant was that to the extent that **Section 121** of the Magistrates Courts Act does not appear to give court discretion on how to handle applications under the said section, that section is unconstitutional.

He submitted that although **Section 121 of the MCA** is identical to **Article 120 (3) (d)** it must be subjected to other Constitutional provisions, to wit **Articles 28(1); Article 44(c); Article 120(5)**. He further argued that these other Constitutional provisions empower a Magistrate to look behind **Section 121** for purposes of protecting an accused person's rights, for purposes of supervising the DPP's exercise of his executive power and for purposes of protecting the integrity of the process of court.

Counsel submitted that the Judiciary has a duty under **Article 126 (1) of the Constitution** which deals with the power of the Judiciary and **Article 126 (2) (e)** which provides for substantive justice to be administered without undue regard to technicalities, to protect the integrity of court proceedings.

Counsel submitted further that a Magistrate is constitutionally empowered to order the State to close its case if the withdrawal would be an abuse of process or be contrary to the administration of Justice, because the judiciary being an ultimate arbiter in the administration of justice, should have the discretion to either grant

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or refuse the Director of Public Prosecution from withdrawing from the prosecution of criminal case.

On the other hand, Counsel for the Respondent argued that answering question 1 in the affirmative as prayed by Counsel for the applicant would be seeking to amend the Constitution and curtailing the Director of the Public Prosecutions' constitutional mandate. He prayed that issue 1 should be answered in the negative.

It is our finding that **Section 121 of the Magistrates Courts Act** from which a trial magistrate derives his or her power in a criminal trial is definitive as to the jurisdiction of the court when the DPP terminates a trial by withdrawing a prosecution. If the withdrawal is made before an accused person is called to make his or her defence he or she shall be discharged while if it is made after the accused person is called upon to make his or defence, he or she shall be acquitted. On the other hand, the power of the DPP apart from **Section 121 of the Magistrates Court Act** is derived from the Constitution. The Constitution does not give any jurisdiction to the court to do anything beyond termination of the trial and discharging or acquitting the accused as dictated by **Section 121**. On termination of the trial by the DPP, there is nothing left of the court to try and as we shall indicate, all an accused can do is bring a separate action to bring the DPP to account under **Article 120 (5)** of the Constitution.

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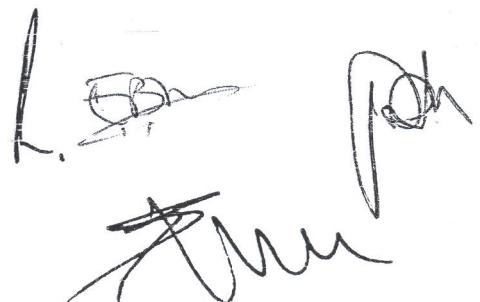
Under this Article, already set down in this judgment, the Director of Public Prosecutions is enjoined to have regard to Public interest, the interest of the administration of justice and the need to prevent abuse of the legal process in exercise of his power under this Article. It is a constitutional command.

An accused person who feels that the DPP in exercise of his constitutional mandate has abused the legal process as is alleged in this petition, could not be precluded from taking legal action to have the abuse investigated in a full trial before a court of competent jurisdiction like the Constitutional Court.

The trial court is not empowered to reject a withdrawal and order the DPP to close the case because once the DPP has terminated a trial by withdrawing from prosecuting a case, the Magistrate's court is bound by **Section 121 of the Magistrates Court Act** to discharge or acquit the accused depending on the stage of the trial. The power of the court is clearly spelt out under the section and the question that court can look behind the Section to protect the interests of an accused does not arise. Apart from interests of an accused, the DPP has other interests to consider as enjoined by Article 120 (5).

We would, therefore answer question No.1 in the negative.

Issue 2: Whether S.121 of the MCA is inconsistent with the provisions of the Constitution.

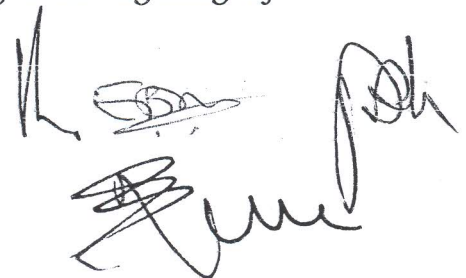
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We will deal with this issue by answering two questions: does the DPP's withdrawal of proceedings against an accused before judgment is pronounced, followed by subsequent re-trial automatically lead to denial of an accused's right to a fair hearing? Would the re-trial constitute an abuse of court process in cases where the withdrawal is effected after numerous witnesses have given their testimony and have been cross-examined?

We are being called upon to directly discuss the extent to which Courts should concern themselves with matters which are by the Constitution and Law, assigned to the jurisdiction and powers of the Executive.

The issue is also well expounded by Uganda's Supreme Court in the case **Attorney General vs Major General David Tinyefunza, Constitutional Appeal No. 1 of 1997** where from the judgment of His Lordship Justice George W. Kanyeihamba the rule appears to be that where Courts feel obliged to review administrative decisions of the executive which are under challenge on the grounds that the rights or freedoms of individuals are being infringed or threatened, courts do so sparingly and with the greatest of reluctance. After reviewing a number of authorities on the principle of separation of powers the learned Justice came to the following conclusion:


"The doctrine of separation of powers demands and ought to require that unless there is the clearest of (evidence) that the circumstances of a case call for intervention for the purpose of determining Constitutionality and legality of



action presently denied or imminently threatened, courts must refrain from entering arenas not assigned to them either by the Constitution or Laws of Uganda. It cannot be over emphasized that it is necessary in a democracy that Court refrains from entering into areas of disputes best suited for resolution by other government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly causing injury thereby." (Emphasis added)

The above passage was cited with approval by this Court, in the case of **Hon. Maria Matembe and 2 Others vs Attorney General (Constitutional Petition No. 02 of 2005)** (Unreported) where the petitioners were challenging the Constitutionality of certain acts of the Attorney General/Minister of Justice and Constitutional Affairs who had tabled a bill commonly referred to as the "Omnibus Bill" to amend various provisions of the Constitution and sought intervention of the Court. After citing the above passage from the case of **Attorney General Vs Major General David Tinyefunza (supra)** the Constitutional Court pronounced itself as follows:

"We are of the considered opinion that in the instant case the Courts should strictly observe the above principle. The Constitution does not require this Court to supervise the functioning of the Legislature in every aspect and at all the stages of its work. The greatest care must be taken to ensure that as far as possible the principle of separation of



powers is duly observed by the three arms of government to avoid unnecessary erosion of each other's Constitutional functions otherwise good and balanced governance may be unduly hampered."

Under **Article 120 of the Constitution** the functions of the DPP include institution and discontinuation of Criminal Proceedings. In performance of these functions and so long as he is operating within his 'field' the hand of the DPP should not be forced to take any action against the other. *The only exception would be if he exceeded his powers or acted unjustly causing injury thereby as stated in the case of **Tinyefunza (Supra)**.*

There is no evidence that discontinuance of the criminal proceedings in **Criminal Case No. 1092 of 2009** would cause injury. The fear that the DPP may re-instate proceedings against the Petitioner is purely speculative. It is not in every case of withdrawal that the case is re-instated. We see no ground for this Court's intervention in the trial at this stage; we see no grounds for the trial Magistrate to order for the closure of the Prosecution's case instead of a withdrawal which is in the DPP's field of operation.

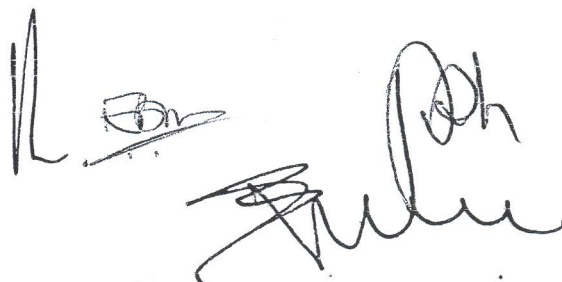
The other aspect of this case is the allegation that the DPP's withdrawal of the case after adducing evidence amounts to an abuse of the Court processes. But as already discussed a withdrawal of a case **before judgment is delivered** is provided for under the Constitution. There was nothing the DPP did in this particular case that has been proved to be an abuse of the Court

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process and thus unconstitutional so as to warrant intervention of the Court.

We are also inclined to agree with Counsel for the Respondent that the allegations of the Petitioner, that in withdrawing the case at this stage, the DPP would be using the court process to re-arrest and re-try the accused was mere speculation. So is the allegation that a reinstated case would contravene the Petitioner's right to a fair trial. There is no certainty that the applicant will be re-prosecuted by the State. The Court is thus not in position to evaluate whether or not during the trial, the right of the applicant to a fair and speedy hearing would be violated. The question of whether a person accused facing criminal charges has been granted a fair and speedy trial can only be determined if indeed a trial takes place. It is only then that the process can be evaluated. Consequently on this issue, the application fails and the issue is answered in the negative.

Does the withdrawal and subsequent re-trial constitute an abuse of legal process? Again there is no certainty that the applicant will be re-prosecuted by the State. Court is not in position to evaluate whether or not during the trial, the nature of proceedings would be an affront to due process. The question can only be determined if indeed a trial has taken place. It is only then that the process can be evaluated.

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Declarations and Orders.

1. **Section 121 of the Magistrates Courts Act** is a replica of **Article 120 (3) (d) of the Constitution**, it cannot thus be declared unconstitutional.
2. A party aggrieved by the decision of the DPP to discontinue proceedings in a criminal trial can petition the Constitutional Court under **Article 137** for determination of whether in the particular circumstances, the decision of the DPP was in contravention of any provision of the constitution and/or a ~~violation of constitutional rights of an individual.~~
3. A party aggrieved by the decision of the DPP to discontinue proceedings in a criminal trial can apply to a court of competent jurisdiction for redress in line with Article 50 (1) of the ~~Constitution.~~
4. In the instant case before Court, we see no ground for this Court's intervention in the trial at this stage and no grounds for the trial Magistrate to order for the closure of the Prosecution's case instead of a withdrawal which is in the DPP's area of jurisdiction. We would order that the file be returned to the Chief Magistrates Court for completion of proceedings.

Dated at Kampala, this ^{20th}.....Day of.....November 2015.



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HON. MR. JUSTICE A.S. NSHIMYE, JA

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HON MR. JUSTICE REMMY KASULE, JA

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HON.MR.ELDAD MWANGUSYA, JA

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HON. MR. JUSTICE RUBBY AWERI OPIO, JA