

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION NUMBER 0021 OF 2014**

**MALE MABIRIZI HASSAN ::::::::::::::::::::PETITIONER**

**VS.**

**ATTORNEY GENERAL:.....RESPONDENT**

**CORAM:**

**HON. MR. JUSTICE KENNETH KAKURU, JA/JCC**

**HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA/JCC**

**HON. MR. JUSTICE BARISHAKI CHEBORION, JA/JCC**

**HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA/JCC**

**HON. MR. JUSTICE STEPHEN MUSOTA, JA/JCC**

## JUDGMENT OF COURT

The petitioner filed a petition in which he made the following averments:-

- a. The act of the resident state Attorney, Buganda Road to go ahead with prosecuting the petitioner in a criminal case which is pending before the Director for Public Prosecutions (DPP) for a decision in respect of discontinuation of the proceedings is inconsistent with and in contravention of Articles 120(4) (b), 120(5), 21(1), 28(3) (c) and 44(c) of the Constitution.
- b. The act of the Buganda Road Grade 1 Magistrate, His Worship Kintu Simon Zirintuusa to continue with criminal proceedings through allowing a witness to testify against the petitioner after being notified that the case is before the DPP pending a decision

in respect of discontinuation of proceedings is inconsistent with and in contravention of Articles 28(3) (c), 44(c) and 120(4) (b) and 120(5) of the Constitution.

- 5 c. The act of the Magistrate Grade 1, Buganda Road, His Worship Kintu Simon Zirintuusa to allow a witness to testify against the petitioner in the same session where a charge sheet had been amended from one count to six counts is inconsistent with Articles 21(1), and 28(3) (c) and 44(c) of the Constitution.

The petitioner states that:

- 10 a. Article 120(4) of the Constitution empowers only the Director of Public Prosecutions (DPP) exclusively to make a decision to discontinue any criminal proceedings (including the power to continue the same.) He filed a complaint with the DPP requesting for discontinuance of the proceedings and it follows  
15 that no one else has the authority to continue with the proceedings and it follows that no one else has the authority to continue with the proceedings before the DPP has pronounced him/herself on the request. Therefore, the acts of the Resident State Attorney to proceed with the proceedings in form of  
20 amending the charge sheet and aligning a witness in court are inconsistent to and in contravention of Articles 120(4) (b), 120(5), 28(1), 44(c) and 21(1) of the Constitution.

- 25 b. Under Article 120(4) of the Constitution, the power to sustain and discontinue any criminal proceedings instituted by the DPP lies only with the DPP exclusively and such power is not shared with court. It therefore follows that where he made a request for discontinuance of the case in light of Article 120(5) of the Constitution and the DPP committed himself to handle the request and to reply him, court's continuance to take plea to a  
30 charge sheet amended from one count to six counts and allowing the state attorney to align a witness despite court's attention being drawn to the request is inconsistent with and in contravention of Articles 120(4) (b), 120(5), 21(1), 28(3) (c) and 44(c) of the constitution.

5 c. Article 28(1) of the Constitution entitles every person to a fair hearing while 28(3) (c) entitles such person to adequate time and facilities to prepare his defence both of which are guaranteed from derogation under Article 44(c) of the Constitution. When he turned up in court for mention having filed a request for discontinuation of proceedings with the DPP, to his surprise, he was required to take plea to five more charges and then a witness testified against him there and then. Such acts contravene Articles 21(1), 28(1), 28(3) (c) and 44(c) of the Constitution.

10 d. Article 21(1) of the Constitution guarantees the right to equality before and under the law, Article 28(1) guarantees the right to a fair hearing and specifically, Articles 28(3) (c) gives an accused person a right to and access to adequate facilities for preparation of his/her defence. Denying me access to the entire police file for whatever reason advanced contravenes Articles 21(1), 28(3) (c), and 44(c) of the Constitution.

The petitioner prayed for the following declarations and orders:

20 a. That the above acts of the Resident state Attorney and the Magistrate Grade 1, Buganda Road were inconsistent with and in contravention of Articles 21(1), 28(1), 28(3) (c), 44(c), 120(4) (b) and 120(5) of the Constitution.

25 b. An order that all proceedings in contravention of the above articles were null and void and thus order for his discharge and in the alternative, to direct fresh trial and direct the respondent to avail him the entire police file.

c. Costs of the petition.

30 The petition is supported by an affidavit sworn by the petitioner and filed in this Court on 30<sup>th</sup> July 2014 in which he narrates the background to the petition and the reasons that led him to file the petition. The respondent filed an answer to the petition which is also supported by affidavit of Batanda Gerald in which the respondent denied liability and prayed that the petition be dismissed due to the fact that it does not raise any issues for constitutional interpretation.

## Background

On 5<sup>th</sup> July 2013, the petitioner was arrested from his employer's office at Plot 1, Portal Avenue, Span House on allegations of theft of a land title through a financial transaction. The complaint had been lodged by Grevorson Services to which the petitioner's employers (Mk Financiers Ltd) had advanced soft loans on seven different occasions using the same security, being a land title. On 9<sup>th</sup> July 2013, the petitioner was arraigned before the Buganda Road Magistrate Grade 1, His Worship Kintu Simon Zirintuusa and charged with the offence of theft of a land title to which the petitioner pleaded not guilty and was granted bail.

On 11<sup>th</sup> July 2013, the petitioner filed a complaint with the DPP and requested for cancellation/discontinuance of the criminal proceedings against him for improper institution by the Resident State Attorney (hereinafter referred to as 'RAS'). On 22<sup>nd</sup> July 2013, the head of the complaint's desk at the DPP wrote to the petitioner confirming receipt of his complaint and promised to inform him of any progress within 15 days. On 21<sup>st</sup> February 2014, the head of complaint's desk wrote to the RSA, Buganda Road instructing him to direct police to obtain his certificate of good conduct and his employer's Money Lender's certificate which he provided. The RSA was also directed to obtain a statement of the bank manager of Pride Microfinance and that of the advocate who witnessed the transaction after which she would resend the file.

The petitioner's bail was extended to 29<sup>th</sup> June 2014 which was a Sunday and when he failed to appear, a warrant of arrest was issued against him. When the petitioner appeared for mention, the prosecution stated that there was a witness to testify and also, the charge sheet was amended. The petitioner protested pleading to the amended charge sheet because his request to the DPP to discontinue proceedings was still pending before the DPP. The charges were read to him and he pleaded not guilty. The petitioner requested for an adjournment for reasons that he needed to study the new charges and also, that it was unfair to continue with the

trial before the DPP pronounces himself on whether to discontinue the case or not.

When the trial proceeded and the testimony of PW1 was completed, the petitioner wrote to the RSA asking for a copy of the entire police file to enable him prepare his cross-examination and defence. The RSA replied on 18<sup>th</sup> July 2014 and acknowledged the petitioner's right to access the materials but declined to give the petitioner access to the police file for reasons that the file had confidential records of police investigations.

## **Representation**

At the hearing of the petition, the petitioner represented himself while Mr. Richard Adrole, Senior State Attorney, appeared for the respondent.

### **The case for the petitioner**

The petitioner argued grounds 1, 2, 3 and 4 concurrently.

He submitted that the petition calls upon this court to determine the effect of an application for discontinuance of criminal proceedings to the DPP pursuant to Article 120 of the Constitution.

That the question for this court to determine is whether a court of law can proceed with trial of a case when there is an application for a *nolle prosequere* pending before the DPP.

He argued that he was not at the magistrate's mercy to enjoy the rights he complains to have been infringed because they are inherent rights under Articles 20(1), 21(1) and 28 of the Constitution. It was the duty of the magistrate and the state attorney to respect, uphold and promote the petitioner's rights. Article 120 of the Constitution gives the DPP exclusive powers to order discontinuance of proceedings. The petitioner complained to the DPP and he was told in a reply that the complaint was being processed. However before the process was concluded, the charge was amended by the RSA adding 5 more counts. The petitioner argues that the action of the RSA and the magistrate who read out

the fresh counts to the petitioner was unconstitutional considering that there was a pending complaint before the DPP to enter a *nolle prosequere*.

5 The petitioner argues that the trial magistrate treated him unfairly compared to the state and the complainant both of whom were parties to the same case. The trial magistrate accepted the charge sheet to be amended yet it is a legally acceptable option to request for a *nolle prosequere* from the DPP which the petitioner had done. In addition, that the petitioner was arrested for 5 days which were  
10 outside the required 48 hours. The petitioner submitted that the trial was unfair because it was initially a contractual relationship which ended up being criminal and it prompted him to seek intervention of the DPP.

### **The case for the respondent**

15 Counsel submitted that Article 120 of the Constitution clearly sets out the functions of the DPP carried out by him personally or delegated accordingly. The power to discontinue proceedings before judgment is delivered, is reserved for the DPP and cannot be delegated. Regarding the petitioner's request to have the police file  
20 delivered to him, counsel argued that it is the preserve of the DPP and he cannot disclose certain information at that point for purposes of maintaining the integrity of the witnesses because there is a danger that the accused person may interfere or even harass the witnesses.

25 Counsel relied on **Constitutional Reference No. 6 of 2007 Soviet union and another vs. Attorney General** on the notion that an accused person charged with any criminal offense be presumed innocent and be accorded all material statements and exhibits to enable him or her prepare his or her defence without any  
30 impediments. However, he argued that such disclosure is subject to some limitations to be established by evidence by the state on the grounds of state secrets, protection of witnesses from intimidation, protection of the identity of the informers from disclosure or that

due to the simplicity of the case the disclosure is not justified for purposes for a fair trial.

Finally, that the petition does not raise any questions for interpretation and should be dismissed with costs.

5

## Issues

The parties filed conferencing notes and raised 5 issues for determination;

- 10 1. Whether the act of the Resident State Attorney of Buganda Road of prosecuting the petitioner pending a decision of the DPP on whether to discontinue the proceedings is inconsistent with and/ or in contravention of Articles 120(4) (b), 120(5), 21(1), 28(1) and (3) (c) and 44(c) of the Constitution.
- 15 2. Whether the act of the learned Magistrate Grade 1 of Buganda Road of proceeding with the criminal trial pending the decision of the DPP on whether to discontinue the criminal proceedings or not is inconsistent with and/or in contravention of Articles 28(3), (c), 44(c) and 120(4) (b) and (5) of the Constitution.
- 20 3. Whether the act of learned Grade 1 of Buganda Road of allowing a witness to testify against the petitioner in a session where a charge sheet had been amended from one count to six counts, is inconsistent with and in contravention of Articles 21, 28(3) (c) and 44 of the Constitution of the Republic of Uganda.
- 25 4. Whether the act of the Resident State Attorney of Buganda Road denying to avail an entire copy of the Police File to the Petitioner in preparation of his defence is inconsistent with and/or in contravention of Articles 21(1), 28(3) (c) and 44 of the constitution.
- 30 5. Whether the parties are entitled to the remedies sought.

## Resolution of the issues

In resolving the issues, we have taken into account the affidavit evidence of both parties, the submissions of the parties and the relevant constitutional principles and jurisprudence. The petitioner and Mr. Adrole argued all the issues jointly.

We are mindful that the burden to prove each of the grounds raised in a Constitutional Petition, that an act or omission offends some provision of the Constitution, rests on the person challenging the validity of the act or omission. In essence, the petition must disclose a cause of action to be proved by the petitioner. Justice Mulenga JSC (as he then was) held in the case of **Baku Raphael Obudra and Obiga Kania Vs Attorney General Constitutional Petition No. 1 of 2003** while referring to his judgment in **Ismail Serugo Vs Kampala City Council and Attorney General CPC No. 2 of 1998** that a petition discloses a cause of action if it describes the act or omission complained of and shows the provision of the constitution with which the act or omission is alleged to be inconsistent or alleged to have been contravened by the act or omission and prays for a declaration to that effect.

A liberal and broader interpretation should be given to a constitutional petition than is given to a plaint in a normal civil suit when determining whether a cause of action has been established. See **Davis Wesley Tusingwire Vs Attorney General Constitutional Petition No. 2 of 2013**.

Article 137(1) mandates that any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court. **Article 137(3) and (4)** provide that:

*“A person who alleges that;*

*(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or*

*(b) Any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this*



Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may\_\_

a) grant an order of redress; or

b) refer the matter to the High Court to investigate and determine the appropriate redress.”

## 10 **Principles of Constitutional interpretation**

Let us restate some of the time tested principles of constitutional interpretation we consider pertinent in the determination of the Constitutional Petitions before us. These have been laid down in several decided cases by the Supreme Court, this Court and Courts in other jurisdictions. They have also been expounded upon in a number of legal literature of persuasive authority.

1. 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. See: - Article 2(2) of the Constitution.

2. In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See:- **Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998.**(SCU)

3. The Constitution must be interpreted as a whole. This principle was settled in the case of **South Dakota V North**

**Carolina 192 US 268 (1940) 448** by the Supreme Court of the United States that “no single provision of the constitution is to be segregated from others and be considered alone but that all provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the purpose of the instrument”. Therefore in law, the Constitution is a wholesome legal document and all provisions must be regarded as constituting it. The normal logic in this canon is that in order to ascertain the true meaning and intention of the legislators, all relevant provisions must be considered. It is thus dangerous to consider any one particular human right provision in isolation of all others, and any Court which tries to do this is bound to get an inconsistent conclusion.

4. Where words are clear and unambiguous, they must be given their primary, plain, ordinary and natural meaning. Such language must be given in its common and natural sense and, natural sense means that natural sense which they bore before the Constitution came into force. The cardinal rule for the construction of Acts in the parliament is that they should be construed according to the situation expressed in the Acts themselves. The tribunal that has to construe an Act of a legislature or indeed any other document has to determine the intention as expressed by the words used...if the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver.
5. Narrow construction is to be preferred in case of derogation from a guaranteed right. It is not in doubt that save for the rights mentioned in article 44 which are stated to be non-derogable, the rest can be limited. But the power to do so is not at large and is not to be arbitrarily exercised by Courts. Indeed under article 43, it is stated that in the enjoyment of

the rights and freedom prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedom of others or the public interest. Public interest is in turn stated not to permit among others any limitation of the enjoyment of those rights beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this constitution.

6. A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and must be given an interpretation that realizes the full benefit of the guaranteed right (**Attorney General V Uganda Law Society Constitutional Appeal No. 1 of 2006 (SC)**).

7. The Constitutional Court has no jurisdiction in any matter which does not involve the interpretation of a provision of the Constitution. Also for the Constitutional Court to have jurisdiction, the petition must show on the face of it that the interpretation of a provision of the Constitution is required. An application for redress can be made to the Constitutional Court only in the context of a petition under Article 137 of the Constitution, brought principally for interpretation of the Constitution (**Attorney General v Tinyefuza Constitutional Appeal No. 1 of 1997**).

Issues 1 to 4 are interwoven and interrelated. We have therefore chosen to handle them together. For ease of reference and for completeness and context, we have set out in *extenso* the relevant text of the constitution that provides for the functions of the DPP below;

*120. Director of Public Prosecutions.*

*(1) There shall be a Director of Public Prosecutions appointed by the President on the recommendation of the Public Service Commission and with the approval of Parliament.*

(2) A person is not qualified to be appointed Director of Public Prosecutions unless he or she is qualified to be appointed a judge of the High Court.

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

(a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;

(b) to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial;

(c) to take over and continue any criminal proceedings instituted by any other person or authority;

(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.

(4) The functions conferred on the Director of Public Prosecutions under clause (3) of this article—

(a) may, in the case of the functions under clause (3)(a), (b) and (c) of this article, be exercised by him or her in person or by officers authorised by him or her in accordance with general or specified instructions; and

(b) shall, in the case of the functions under paragraph (d) of that clause, be exercised by him or her exclusively.

(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.

(6) *In the exercise of the functions conferred on him or her by this article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.*

(7) *The Director of Public Prosecutions shall have the same terms and conditions of service as those of a High Court judge.*

Mr. Mbirizi argues that the act of amending the charge sheet by the Resident State Attorney and adding other charges pending the response from the DPP on his request to drop the charges against him infringed his constitutional rights. The petitioner alleges that his rights under Articles 20(1), 21(1), 28(1), 28(3) and 44(c) of the constitution were infringed therein. For ease of reference, we reproduce below all the allegedly infringed articles of the Constitution;

*20. Fundamental and other human rights and freedoms.*

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

*21. Equality and freedom from discrimination.*

(1) *All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.*

*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.*

*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—*

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to fair hearing;

5 (d) the right to an order of habeas corpus.

Prosecution in a criminal trial commences when a charge sheet is sanctioned by either the DPP or by an officer authorized by the DPP. The power to sanction a charge, under Article 120 of the Constitution, can be delegated. In the case of the petitioner, the charges were sanctioned by the Resident State Attorney and the Magistrate Grade 1 proceeded to read out the charges to the petitioner (accused). The petitioner had earlier written to the DPP complaining about the said charges before the Magistrates Court. The contents of the letter are laid out *in extenso*;

15 ***“DATE: 10<sup>TH</sup> JULY 2013***

***TO: THE DIRECTOR FOR PUBLIC PROSECUTIONS,  
KAMPALA***

20 ***RE: COMPLAINT ABOUT IMPROPER SANCTION AND  
CRIMINAL PROCEEDINGS UNDER 6952/12. BUGANDA  
ROAD COURT CR. CASE 587/13, UGANDA V MALE HASSAN  
MABIRIZI.***

25 *I am the Managing director of MK FINANCES LTD and the  
ACCUSED in the matter above mentioned case in which two  
capacities you are addressed herein. This company seeks to  
register a complaint with your office and request you to call the  
above mentioned file for perusal so that justice can be done.  
This is a result of the Buganda road's Resident State Attorney's  
act of sanctioning the file on 8<sup>th</sup> July 2013 and my subsequent  
taking of plea on 9<sup>th</sup> July 2013 before Buganda Road Court  
Magistrate's Court.*

30 *I feel unfairly treated by such acts thus this later and my  
complaint is based on the foregoing grounds:*

1. I was charged with THEFT OF LAND TITLE yet from the file, it is evident that the complaint had for more than 5 times entered into written credit agreements with this company the last one being 25<sup>th</sup> October 2011 and the last loan being advanced on 20<sup>th</sup> November 2011 under an extension to the 25<sup>th</sup> October 2011 agreement. It therefore confuses my mind how theft can happen on something which was freely and in writing handed over to a creditor as security for money advanced as a secured loan to a debtor.

2. The agreement under which the land was sold which is clear that the seller is an equitable mortgage is dated 7<sup>th</sup> June 2013, six months after the expiry of the repayment period which was 21 days after the contract date within which period the debtor issued a Centenary Bank cheque No. 000799 in his effort to clear which bounced on 7<sup>th</sup> March 2012. Therefore, selling the land constituted no crime since it had been agreed in clause 4 of the contract.

3. As the practice is with Money Lending business, on the complainant's first contract with us on 24<sup>th</sup> August 2013, he signed a blank (without the name of the transferee) transfer form which was dated 24<sup>th</sup> September 2011 (including a 14 days grace period). From that transaction, the complainant came a habitual borrower who took a new loan after every clearance and therefore, the title, transfer form, Grevorson Services Registration documents and his copy of Identity Card which he initially deposited never moved out of our custody until the last loan. Therefore it is those transfer instruments that were all the same as those on the white page.

4. All the above facts were provided to the police in my statement and relevant documents attached but they ignored them. It was to our further surprises that the state attorney could sanction such a purely contractual and civil matter for criminal prosecution. The relevant documents are also hereto attached.

**I THEREFORE HUMBLY PRAY THAT:**

1. The file be called for perusal by your office to establish what would have been the right decision.
2. Court be requested that the criminal proceedings instituted against our managing director be stayed until you make a decision in 1. Above.
3. Upon perusal, to make a finding that the proceedings were improperly instituted since the relationship was contractual where if any party is aggrieved should seek civil remedies.
4. You order that the proceedings be cancelled for being improperly constituted.

I shall be grateful if justice is done so that the complainant does not make use of public resources to meet his contractual and civil wants. Thank you

.....  
**MALE H. MABIRIZI K.KIWANUKA**

**ACCUSED & MANAGING DIRECTOR, MK FINANCING LIMITED.**

Copy sent: RESIDENT STATE ATTORNEY, BUGANDA ROAD, KAMPALA”



The constitutional provision that lays out the functions of the DPP clearly states that the DPP shall not be subject to the direction or control of any person or authority. (Article 120 (6) of the Constitution) It is our considered opinion that the DPP cannot be moved by anybody to fulfill the functions laid out in Article 120 of the Constitution.

Under Article 120(4) (b) of the Constitution, the power to discontinue proceedings at any stage before judgment is delivered is exercised solely and exclusively by the DPP. One of the principles of constitutional interpretation as already stated above, is where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense. Article 120 gives the DPP powers to exercise functions without direction of any person but also having regard to public interest. According to the case of **Twinobusingye Severino v. Attorney General Constitutional Petition No. 47 of 2011**, where several provisions of the Constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred over the other.

We further restate that in interpreting the Constitution, the rule of harmony or completeness requires that Constitutional provisions should not be looked at in isolation. Rather, the Constitution should be looked at as a whole with no provision destroying another but supporting each other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution. (**Paul Semogerere v. Attorney General Constitutional Appeal (supra); Attorney General v. Susan Kigula and Others Constitutional Appeal No. 03 of 2006 (SC)**).

The DPP reserves the right to discontinue proceedings before judgment is delivered but does not do so under coercion. In addition, the petitioner's letter to the DPP entails evidence that should be adduced by the petitioner at the trial and not to be used

to discontinue proceedings. He alleges that the issues leading to the charges are civil in nature.

It cannot be a correct proposition of the law that where a civil suit is pending between two parties, no criminal proceedings may be instituted against one of the parties arising from the same facts and the reverse is true. It was held by the Justices of the Supreme Court in **Sarah Kulata Basangwa Vs Uganda Criminal Appeal No. 3 of 2018** while upholding the Court of Appeal decision that;

*“We are in agreement with the Court of Appeal that criminal proceedings may emanate from the same facts but it doesn’t deter prosecutors to institute criminal proceedings because the facts are similar to that of civil case.”*

Owing to the above, we do not agree with the petitioner that the continuance of his trial while awaiting response from the DPP on a request to discontinue proceedings was an infringement of his rights and therefore unconstitutional. The petitioner did not face any kind of discrimination at the Magistrates Court and as such, none of his rights under Articles 21(1), 20(1), 28(1) and 44(c) of the constitution were infringed.

The petitioner argued that the failure to avail him the entire police file to enable him prepare his defence is inconsistent with and/or contravenes Articles 21(1), 28(3) (c) and 44(c) of the constitution. The constitution provides under Article 28 (3) (c) that;

*Every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his or her defence.*

The petitioner’s request for the police file was denied by the Resident State Attorney for reasons that the file had confidential records of police investigations. The issue of disclosure was extensively covered in the case of **Soon Yeon Kong Kim and another Vs Attorney General Constitutional Reference No. 6 of 2007** in which it was held that;

5 “..... the instant case is about whether the plain, ordinary, and practical meaning of Article 28 (1) (3) (a) (c) (d) and (g) entitle an accused person before a Magistrate’s Court to a pre-trial disclosure of the copies of the statements made to police by the would be witnesses for the prosecution and copies of exhibits the prosecution would rely on at the trial.

10 We have stated here above that Article 28(1) and (3) require an accused person charged with any criminal offence to be presumed innocent and to be afforded all material statements and exhibits to enable him or her prepare his or her defence without any impediment. This is pretrial disclosure.

15 Such disclosure is subject to some limitation to be established by evidence by the state on grounds of state secrets, protection of witnesses from intimidation, protection of the identity of informers from disclosure or that due to the simplicity of the case, disclosure is not justified for purposes of a fair trial. This means that an accused person is prima facie entitled to disclosure but the prosecution may by evidence justify denial on any of the above grounds. It’s the trial courts discretion whether the denial has been established or not.”

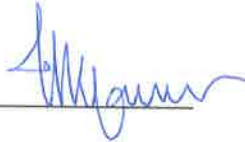
20 From the above excerpt, an accused person is entitled to disclosure by the prosecution but the disclosure is limited where there is need to protect the identity of witnesses, state secrets and protection of the identity of informers. However, the decision of whether the denial is justified is in the trial court’s discretion. **See Soon Yeon Kong Kim and another Vs Attorney General (supra)**. The record does not show whether the trial Magistrate adjudicated on the matter or not. It is our considered view that this matter does not raise any questions for constitutional interpretation.

30 Given that we have found no breach of any constitutional provision or any question for constitutional interpretation, it goes without saying that we find no merit in the Petitioners’ allegation that his rights were derogated from by the actions of the Resident State

Attorney and the trial Magistrate. The petition is thus dismissed with costs.

Dated this 16<sup>th</sup> day of Jan 2019 20

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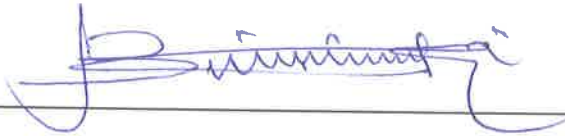


**HON. MR. JUSTICE KENNETH KAKURU, JA/JCC**

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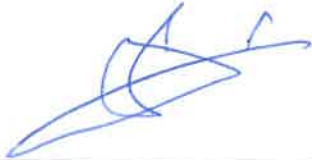


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