

5 **THE REPUBLIC OF UGANDA**

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

**CONSOLIDATED CONSTITUTIONAL PETITION NO. 42 & 52 OF 2012**

**Coram: Justice Kenneth Kakuru, Geoffrey Kiryabwire, Barishaki  
Cheborion, Stephen Musota, Kibeedi Muzamiru, JJCC**

10 **1. NAPHATAL WERE**  
**2. JOHN PAUL BASABOSE.....PETITIONERS**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENTS**

15 **JUDGMENT OF CHEBORION BARISHAKI, JCC**

**Back ground**

The petitioners were former employees of M/s MTN (U) Ltd working as senior Logistics Manager and Accounts Manager respectively at the time of their investigation for alleged crimes and eventual arraignment in court. When they were charged for committing crime, MTN discontinued them from its employment. They were investigated under Anti-Corruption Court Case Ref. No E/242/2012 and charged with embezzlement and conspiracy to defraud MTN of USD. 3,800,000 contrary to section 19 (b) (iii) of the Anti- Corruption Act, 2009 and section 309 of the Penal Code Act respectively in criminal case No.141/2012. The respondent subsequently amended the above charge sheet and added A3 and A4 who were Directors with M/s Three Ways Shipping Services (Group) Ltd.

5 Later, the petitioners were charged on a different charge sheet vide Anti-Corruption Case No. E/329/2012 (Court Case File No.147/2012) with counts of embezzlement and conspiracy to defraud MTN of USD. 645,413.26 and Ushs. 199,350,182/=.

The petitioners entered pleas of not guilty on all charges and were released on  
10 bail. The two matters are still pending at the Anti- Corruption Court.

The petitioners in both Constitutional Petition No. 42 and 52 of 2012 stated that the aforementioned acts and omissions were inconsistent with and in contravention of the Constitution and thus petitioned this court seeking the following declarations:

- 15 i. *The acts and conduct of the Director of Public Prosecutions in directing Police investigations and instituting charges against the petitioners in Anti-corruption court case No. E/242/2012 (Criminal case No. 141/2012); Uganda vs. John Paul Basabose and Naphtal Were, are in contravention of Articles 20(2), 21(1), (2), (3), 42 and 120 (5) and (6) of the*  
20 *Constitution.*
- ii. *The selective act and conduct of the DPP aforesaid is an abuse of legal process and undermines both the administration of justice and the right to a fair hearing in contravention of Article 120 (5), Article 28 and Article 44 (c) of the constitution of the Republic of Uganda.*
- 25 iii. *That further, the selective act and conduct of police investigations, charging with a view to prosecute the petitioner with the exclusion of the*

- 5            *implicated MTN executive committee members is not only discriminatory but is also evidence of MTN executive management's control and influence over the Director of Public Prosecutions contrary to Articles 21(1), (3) and Article 120 (6) of the constitution of the Republic of Uganda.*
- 10           *iv. The DPP should cause and direct comprehensive police investigation into the matter and all culprits be indiscriminately dealt with.*
- v. A permanent injunction against the respondent or the Uganda Police or other enforcement officers or employees restraining them from any further discriminatory acts of investigation, charging and prosecution in respect of the above matter.*
- 15           *vi. General damages for the inconvenience and injury suffered*
- vii. Costs of the petition.*
- viii. Any other or further declaration as court may deem fit.*

Both Petitions 42 & 52 of 2012 were supported by affidavits of the petitioners but the respondent filed an answer to only petition No. 42.

20    The relevant parts of Naphatal Were's affidavits are as follows;

6. *That I am being investigated by the police with the offence of embezzlement contrary to section 19(1) of the Anti-Corruption Act [A copy of the police Bond release is attached hereto and marked as Annexure "A"].*

7. *The DPP has now directed that I be charged with embezzlement pursuant to the*

25    *Anti- Corruption Case No. Acc-co-105-2012, E/242/2012 U versus John Paul*

5     *Basabosa & 4 others [A copy of a memo with the D's direction is attached hereto and marked as Annexure "B"]*

8. *That it is alleged that since the period of 2009-2012, about 125 fake invoices were raised indicating that the sum of US\$3,800,000 (United States Dollars Three Million Eight Hundred Thousand) had been paid from MTN Bank accounts to that*  
10 *of Three Ways Shipping Company Ltd.*

9. *That it is further alleged that on receipt of the said money, Three Ways Shipping Company Ltd would pay it to me and some other accused persons*

11. *That the Logical Matters I handled in relation to the said transactions was under the direction, control, Knowledge and consent of MTN executive*  
15 *management and without their laborious approval process, no single sum of money could have been remitted from the MTN Bank Account to the Shipping Company.*

11. *That the logistical matters we handled and payments made in relation to the said transactions were under the direction, control, knowledge and consent of the*  
20 *MTN Uganda Limited executive management and there is overwhelming evidence to this effect.*

13. *That none of the above Officers of MTN who were mandatory signatories to the payment process, and who therefore masterminded the alleged loss of money to MTN, the basis of which charges are now being preferred against me are subject*  
25 *of any police investigations or at all.*

5 14. That accordingly, the act and conduct of the Director of Public Prosecution in selectively directing the investigation and charging me pursuant to the Anti-corruption court case No. Acc-co-105-2012, E/242/2012 U versus John Paul Basabosa & 4 others is in contravention of Articles 20(2), 21(1), 2, (3), 42 and 120(5) and (6) of the constitution of the Republic of Uganda.

10 15. The selective act and conduct of the DPP aforesaid is an abuse of Legal process and undermines both the administration of Justice and the right to a fair hearing in contravention of Article 120(5), Article 28 and Article 44(c) of the constitution of the Republic of Uganda.

15 13. That further, the selective act and conduct of investigations, charging with a view to prosecute the petitioners with the exclusion of implicated MTN executive committee members is not only discriminatory but is also evidence of MTN executive management's control and influence over the Director of Public Prosecutions contrary to Articles 21(1), (3) and Article 120(6) of the constitution of the Republic of Uganda.

20 The Respondent's answer to petition No.42 of 2012 was accompanied by the affidavit of Ms. Acio Caroline Marion a state Attorney in the respondent's Chambers in which she denied all allegations in the petition and described it as misconceived.

In rejoinder the petitioner stated that;

5     3. That in the main petition, I seek interpretation of the constitution *visa vis* the acts and /or omissions of the agencies/bodies of the respondent in particular regard to rights of equality under the law or non-discrimination; right to a fair hearing; commission of illegalities in the conduct of investigations and preferring of charges and the independence of the office of the Director of Public Prosecutions.

10    DPP.

4. That in doing so I state that the complainant, in criminal cases preferred against me and others, MTN (U) Ltd, has had over bearing and domineering influence over the DPP in preferring charges or making the decision to prosecute me and others, and also not to prosecute others.

15    5. That it is evident that the DPP is under the direction and control of M/s MTN (U) Ltd which affects the independence in that office, the public interest and due process in administering Justice.

6. That before Court, in the Affidavit in Rejoinder by me dated 25<sup>th</sup> February, 2013, I produced two pieces of evidence of this; the Memorandum of understanding  
20    dated 10<sup>th</sup> September, 2012 (Annexure "F" and the complainant's advocates letter to DPP dated 26<sup>th</sup> September, 2012 (Annexure" F2").

7. That I wish to bring to the attention of court the fact that the said memorandum of Understanding, at the Centre of the prosecution or non-prosecution of employees of M/s MTN Uganda Ltd and its business relations, has been held by the high  
25    court to be illegal. A copy of the judgment of the High court dated 23<sup>rd</sup> May, 2014 is attached and marked "J".

5     10. *That the memorandum of Understanding and letter above of 26<sup>th</sup> September, 2012 are contrary to criminal law in Uganda and the constitution as set out in the petition.*

### **Representation**

At the hearing of the petition, the petitioner was represented by Mr. Mulema  
10     Mukasa whilst Mr. Geoffrey Madete State Attorney represented the Attorney General.

Court was informed that the first petitioner Naphatal Were had passed on. The hearing proceeded since the other petitioner was still alive.

The following three issues were framed for determination;

- 15     1. *Whether the acts and conduct of the Director of Public Prosecutions in directing Police investigations and instituting charges against the petitioners in Anti-corruption court case No. E/242/2012 (case File No. 141/2012) and court case No.147/2012); Uganda vs. John Paul Basabose and Naphtal Were, were in contravention of Articles 20(2), 21(1), (2), (3), 42 and 120 (5)*  
20     *and (6) of the Constitution.*
2. *Whether the acts and conduct of the Director of Public Prosecutions complained of are in contravention of Articles 120(5), 28 and 44 (c) of the constitution.*
3. *What are the remedies available, if any?*

5 The principles for constitutional Interpretation have been set out and applied by the Supreme Court and this Court in the numerous decisions. Some of them that may be applied to guide the determination of this petition are: -

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  
10 in contravention of the constitution is null and void to the extent of its inconsistencies
2. The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of Harmony, the rule of completeness and exhaustiveness  
15 and the rule of paramountcy of the written constitution.
3. 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.
4. The words of the written Constitution prevail over all unwritten  
20 conventions, precedent and practices.

Counsel for the petitioners submitted that the contravention and the inconsistencies in the petition were premised on four points; first on equality under the law or equal treatment of all persons before the law or non-discrimination, the right to a fair hearing or inviolability or non derogability of  
25 the right of fair hearing and Article 120 which requires the DPP to act without control or direction by any person or department.



5 He contended that there must be justice in criminal matters during pre-trial and during trial and that this must stem from article 120 which gives the DPP powers to make independent decisions at all stages of the trial including at pre-trial. That the decision to investigate and prosecute the petitioners was not consistent and in consonance with the constitution because the petitioners were  
10 not treated equally with other suspects as stipulated in Article 21 of the Constitution because the complainant had over bearing and domineering influence over the DPP in preferring charges or making the decision to prosecute the petitioners and also not to prosecute others.

Counsel submitted that unlike in other jurisdictions, this country does not have  
15 legislation that operationalizes Article 120 of the Constitution which creates room for the DPP to act unconstitutionally. That other constitutional offices like the IGG and the Human Rights Commission had Acts of parliament which operationalize them. That in 2011 an attempt was made by stakeholders to delineate the powers of the DPP in directing police investigations and institution  
20 of criminal proceedings but all was in vain.

That the DPP had broad powers which were susceptible to abuse because in exercising them he was in the habit of disregarding certain principles and laws especially the provisions of article 21 of the Constitution on equality of all persons before the law. He contended that the system of payments within the  
25 complainant's company, MTN (U) Ltd showed that the petitioners were not signatories to payment and they could therefore, not have been the master minds

5 of the alleged crimes. That the DPP was selective in his prosecution by charging the two petitioners and leaving out the other eleven suspects amounted to cherry picking which amounted to selective prosecution which is unconstitutional.

Counsel further submitted that in the exercise of his duties the DPP was under the influence of MTN which through its lawyers Kampala Associated Advocates  
10 tried to influence the DPP on who to and not to charge yet by law the DPP is supposed to be impartial and not to operate under the direction of any person.

Counsel referred court to an MOU between MTN and Three-way shipping limited which was held to be illegal because it contravened the law by providing that members of three-way Shipping could not be prosecuted if they abide by the  
15 MOU. That this was proof that there was overbearing influence by the complainant to stop certain people from being charged.

He adverted that the DPP's office was not above the law and in executing its work, it had to take the interests of administration of justice into account and follow due process and referred to Articles 28, 120 (5), 42 and 20 (2) of the  
20 Constitution

Counsel referred court to ***Mohit vs DPP of Mauritius, Privy Council, Appeal No. 31 of 2005*** in which the Privy Council was interpreting section 73(3) of the constitution of Mauritius, which is in pari materia with Article 120 of the Constitution of Uganda for the proposition that the DPP must exercise his/her  
25 powers legally, rationally and if he or she does not, then the decision would be

5 open to judicial review. The DPP must use his or her discretion fairly and reasonably and must consider all relevant factors before preferring charges.

On issue 3, Counsel prayed that this court allows the petition and grants, the orders prayed for as well as costs in the consolidated petition.

The respondent's Counsel adopted their earlier filed conferencing notes and  
10 authorities for both petitions. She submitted that the DPP enjoys prosecutorial discretion and in this case, he followed evidence that was placed before him by the police. Counsel cited ***Prof Gilbert Balibaseka Bukenya vs A. G Constitutional Petition No. 30 of 2011*** for the proposition that preferring charges is a matter for the prosecutor who makes the decision to prosecute  
15 anybody depending on the facts of the case before him or her as to whom to criminally charge in a court of law.

### **Determination**

I have carefully listened and considered the submissions of both Counsel on the constitutionality of the DPP's acts. I have also perused the affidavits as well as  
20 the relative provisions of the law and authorities cited by the parties.

The petitioner argued issues 1 and 2 together and I will resolve them together.

### **Issues 1 & 2**

The petitioner faults the conduct of the DPP in directing police investigations and later when he instituted charges against the petitioners in criminal cases No.  
25 141 of 2012 and 147 of 2012 at the Anti- Corruption Court. That the said actions

5 of the DPP contravened Articles 20(2), 21 (1), (2), (3), 28, 42, 44 (c) and 120 (5) and (6) of the Constitution. The said Articles of the Constitution provide thus;

Article 20(2) of the Constitution provides that 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.

10 Article 21(1) of the Constitution provides that 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.

Article 21(2) bars discrimination against any person on grounds of sex, race, colour, ethnic origin, tribe, birth, creed, religion, social or economic standing,  
15 political opinion or disability. Clause (3) of Article 21 defines what amounts to discrimination.

Article 28 in as far as is relevant to the petition provides that 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  
20 or tribunal established by law.

Article 42 provides for the right to just and fair treatment in administrative decisions and the right to refer an unjust decision to court.

Article 44 (c) makes the right to a fair hearing non derogable.

- 5 The Directorate of Public Prosecutions is set up under Article 120 (5) & (6) of the Constitution whose salient parts provide that;
- (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.
- 10 (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;
- 15 (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
- 20 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 are—

5 (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 authorized 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.

10 (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  
15 any person or authority.

One of the principles of Constitutional interpretation is that 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.

20 Counsel for the petitioners referred to Annexure B to the affidavit in support of petition No.42 which is an internal Memo containing a legal opinion rendered to the DPP by Acio Caroline Marion, an Attorney in the DPP's office which gives a synopsis of the case and contended that there must be justice in criminal matters at pre-trial and during the trial itself. In the Memo, Acio opined that  
25 there are irregularities in invoices which were so apparent yet it passed through

5 the MTN controls and payments were made, thereby making all those who handled them at MTN suspects.

In paragraphs 12 and 13 and of the Affidavit in support of the petition, Naphtali Were deponed as follows;

10 *“That the MTN Executive Management which approved all payments and are the complainants on behalf of MTN at the same time included; Head Procurement, Assistant Accountant (Payable), Senior Manager, Finance operations, Chief Finance Officer, General Manager, Human Resource, General Manager, Legal for Corporate affairs, the Chief Executive Officer, the Chief Information Officer, Head business Risk Management, the General*  
15 *Manager Sales/ Distribution; and the Chief Marketing Officer. That none of the above Officers of MTN who were mandatory signatories to the payment process, and who therefore masterminded the alleged loss of money to MTN, the basis of which charges are now being preferred against me are subject of any police investigations or at all. That for this reason, the act and conduct*  
20 *of the Director of Public Prosecution in selectively directing the investigation and charging him in the Anti-corruption court in case No. E/242/2012 Uganda versus John Paul Basabosa & 4 others was in contravention of Articles 20(2),21(1),2, (3),42 and 120(5) and (6) of the constitution.”*

Petitioner Were further stated that the directors of three-way Company had  
25 taken responsibility and promised to make good the loss but recommended that the two petitioners be charged pending completion of the outstanding inquiries

5 to ascertain the extent of involvement of other MTN employees and those of three ways Company. That despite this admission, the DPP had gone ahead to investigate and prosecute them alone which in his view negated the independence of the DPP

Counsel for the respondent submitted that the DPP had exercised its  
10 Constitutional mandate lawfully and cited **Prof Gilbert Balibaseka Bukenya vs A.G Constitutional Petition No. 30 of 2011** where this Court while dealing with a similar complaint made against the IGG stated that;

15 *"It was well established that the IGG has wide statutory powers to investigate and prosecute cases involving corruption, abuse of authority or public office under Article 225 of the constitution and section 8 of the IGG Act See; Gordon Sentiba v IGG; SCCA NO.6 /2006. Preferring charges is a matter for the prosecutor who makes the decision to prosecute anybody depending on the facts of the case before him or her as to whom to criminally charge in a court of law. Whilst this court would view victimization or*  
20 *unequal treatment before the law with disfavor, the suggestion that one could resist prosecution on the ground that others he wishes to be jointly charged with him are not so jointly charged, would, in our view be contrary to the established principles of our criminal justice system."*

Under the Constitution, the DPP is a public officer and like any other public  
25 officer, he has to exercise his powers in accordance with the Constitution. In doing so, he is enjoined to have regard to the public interest, the interest of the



5 administration of justice and the need to prevent abuse of legal process. If he/she does not meet these requirements, then he/she can be sanctioned.

The petitioners accuse him of unfairness, discrimination, impartiality and lack of independence.

The Constitution gives the DPP wide powers to direct police to investigate any  
10 information of a criminal nature and report to him/her expeditiously. The investigations are carried out by interrogating people, obtaining documents or materials relating to the investigation and taking statements from the suspects. The DPP is also enjoined to institute criminal proceedings.

The rationale behind the office of the DPP directing investigations is to give  
15 guidance to police investigators on which evidence is relevant to the case and the information so collected enables the DPP decide whether there are reasonable grounds to prosecute the accused.

In the respondent's affidavit in support of the Answer to petition No. 52 of 2012, the deponent stated that the petitioner conspired with others and defrauded MTN  
20 of USD \$3,800,000 by raising fake invoices and later shared the proceeds. She referred court to Annexures "A and "B" to the said affidavit. These annexures are police statements.

The petitioner avers in the affidavits in support of petitions no.52 and 42 of 2012 that they never received the said money and that MTN Uganda Limited's  
25 management were at all material times aware of the several transactions between

5 the company and Eagle Logistics Solution Uganda Limited. That logistical matters and payments made in relation to the said transactions were done under the direction, control, knowledge and consent of the management of MTN Uganda and that there was overwhelming evidence to prove their involvement.

10 Petitioner Were further deponed that none of the officers of MTN who were mandatory signatories to the payment process and who master minded the alleged loss of money to MTN which formed the basis of charges preferred against them were subjected to police investigations. That this was selective prosecution which amounted to impartiality and discrimination.

15 Prosecution requires the prosecutor to engage in a series of tasks. First he has to decide whether a particular act or omission by a would be accused falls within the ambit of the criminal law. He will then consider amongst other things the evidence on file and assess the reliability of such evidence in court, the credibility of the would be witnesses to be called by the prosecution and the persuasiveness of any potential lines of defence likely to be raised on behalf of the accused. The  
20 evidentiary test here as one former DPP in England, Sir Norman Skelhorn put it "our acid test was whether, on the evidence before us, if that evidence stood up in court and was not eroded, there was in our considered opinion a likelihood that a conviction would result." **See: Challenges in Crime in the 21st Century Challenges to Prosecutorial Discretion; at the 11th Heads of Prosecuting Agencies Conference 20 – 22 March 2012 held in Mauritius.**  
25

5 Once this exercise is over, the Prosecutor has then to decide whether to prosecute or not or the case may be more appropriately dealt with by means of a caution or by taking no further action at all. He/she will take into account a number of factors before coming to a final decision including the surrounding circumstances of the offence, its seriousness, whether there exists any  
10 extenuating circumstances, whether the accused has a clean criminal record, whether the prosecution would serve as a deterrent and whether the consequences of prosecution would be out of all proportion to the seriousness of the offence or the penalty a court would be likely to impose

The discretionary exercise of power by the prosecutor does not stop at the pre-  
15 trial stage. It carries on even after the trial has started. He has to present his case in a form that is both comprehensible and capable of being persuasive beyond reasonable doubt if the prosecution is to result into a conviction. He will be expected to make critical decisions as to what evidence to lead, what witnesses to call, what questions to ask and what objections to make. He may also have to  
20 decide whether to drop some of the counts on the charge sheet and whether to accept a guilty plea in return for a lesser offence. These considerations were a subject of deliberations by the Heads of Prosecuting Agencies at their 11<sup>th</sup> Conference held in 2012 in Mauritius.

The DPP has powers and discretion to charge whatever number of people in a  
25 given chain of crime basing on the facts, circumstances and evidence in each particular case. The petitioner's assertions that by charging only two of them

5 and leaving out the 11 officials of MTN amounted to discrimination and unequal treatment cannot stand. The petitioner recorded a statement which is evidence of his alleged criminal conduct and proof that he was accorded an opportunity to say his part of the story. He actually aided the said investigations. It is clear from the record that the evidence against the petitioners was sufficient to  
10 warrant the DPP charging them of the said offences.

There is no credible evidence to show that in preferring the said charges and in making the decision to prosecute the petitioners, the DPP did not consider all the material in the police file including the roles played by the MTN staff.

The petitioners were charged based on evidence that was available and pointing  
15 at them as persons who dealt with the money. I find that the DPP exercised his mandate and discretion properly in charging and prosecuting the petitioners and no provision of the Constitution was contravened.

The petitioners' Counsel submitted that in the exercise of his duties, the DPP was under the influence of MTN. That it was the MTN officials who directed who  
20 to be charged and how the police carried out the investigations which was a subversion of the DPP's constitutional mandate and duty.

Counsel for the petitioners cited **Hugh Glenister vs President of the Republic of South Africa & Others, Constitutional court Case CCT 48/10 [2011] ZACC 6** where the court of South Africa held that;

5       *"This court has indicated that " the appearance or perception of independence plays an important role" in evaluating whether independence in fact exists.(S v Van Rooyen [2002] ZACC 8; 2002(5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 32, endorsing the finding in Valente v The Queen (1986) 24 DLR (4<sup>th</sup> ) 161 (SCC) at 172 that the test for independence should*  
10       *include public perception....Whether a reasonably informed and reasonable member of the public will have confidence in an entity`s autonomy protecting features is important to determining whether it has the requisite degree of independence."*

Independence of the DPP connotes that he must be able to function effectively  
15       without undue influence, control and direction of any person or authority. In combating white collar crime as in this case, the DPP does not work alone, he need not only rely on the cooperation of suspects and the public but also the complainant who affords information which the DPP may not be able to find anywhere else.

20       Counsel for the petitioner referred court to annexure F2 to the Affidavit in rejoinder to petition which is a letter by the DPP`s office and the MOU between MTN and Three ways Company. He contended that the two documents were proof that the DPP was acting under the direction and control of MTN the complainant to prosecute the petitioners.

25       The letter referred to was requesting the DPP to discontinue the said proceedings against members of Three ways shipping Company and lift the freezing court

5 orders against the Complainant's bank accounts so as to enable the MOU between the complainant and Three way to be implemented. The MOU was to the effect that Three ways pays back the stolen monies and the complainant in return recommends to the DPP not to institute criminal proceedings against three way officials.

10 This in my view, did not amount to directing or interference because this was a mere request. It is within the DPP's right and power to say no to such requests. At the time the said letter or when the MOU were executed, no personel of three ways had been charged. The DPP merely exercised his discretion which in my view was done properly and within the law.

15 In **Dr. Tiberius Muhebwa vs Uganda Constitutional Petition No. 09 of 2012 and Constitutional Petition No. 10 of 2008 and Jim Muhwezi & 3 Others vs Attorney General and Inspector General of Government**, the court cautioned against the stopping of criminal trials on allegations that the trial would not be free and fair. In the latter case, court noted that;

20 *"The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would rush to the Constitutional court with a request to stop the prosecution*  
25 *pending hearing his challenge against the prosecution. In due course, this court would find itself engaged in petitions to stop criminal prosecutions and*

5        *nothing else. This could result into a breakdown of the administration of the criminal justice system and affect the smooth operation of the Constitutional Court”*

In any event, the petitioners had the right of challenging the actions of the DPP by bringing judicial review proceedings as was so held in **Mohit vs DPP of Mauritius** (Supra)

Section 36 (1) of the Judicature Act Cap 13 provides that the High Court may make an order, as the case may be, of—mandamus, requiring any act to be done; prohibition, prohibiting any proceedings or matter; or certiorari, removing any proceedings or matter to the High Court.

15 In the case of **Matalulu v DPP (2003) 4 LRC 712**, court stated as follows:

20        *“It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers.”*

It would have been proper for the petitioners to challenge the process and charges in the High Court which was to try the matter.

5 I find that in charging and prosecuting the petitioners, the office of the DPP exercised its constitutional mandate without the direction or control of any person or authority. There was no contravention of articles 20(2), 21 (1), (2), (3), 22, 28, 42, 44(c) and 120 (5) of the constitution as alleged by the petitioner

In light of the above findings, issues 1&2 of the petition fail. I do not find it  
10 necessary to resolve issue 3.

The petition fails.

Because the matters in issue touch on the public interest, each party shall bear its own costs.

I so order.

15 Dated this.....19<sup>th</sup>.....day of.....March.....2021.



**Cheborion Barishaki**

**Justice of the Constitutional Court**



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HON. MR. JUSTICE STEPHEN MUSOTA, JCC


HON. MR. JUSTICE KIBEDI MUZAMIRU, JCC

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JCC

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Cheborion Barishaki, JCC.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this 19<sup>th</sup> day of March 2021.

  
.....  
HON. MR. JUSTICE GEOFFREY KIRYABWIRE  
JUSTICE OF THE CONSTITUTIONAL COURT

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

*(CORAM: Kenneth Kakuru, Geoffrey Kiryabwire, Cheborion Barishaki,  
Stephen Musota, Muzamiru Mutangula Kibeedi, JJA/ JJCC)*

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA/JCC**

I have had the benefit of reading in draft, the judgment of my brother Justice Cheborion Barishaki, JA/JCC.

I agree with his analysis, reasoning and orders he has proposed. This petition must fail and be dismissed with no orders as to costs.

Dated this 19<sup>th</sup> day of March 2021



**Stephen Musota**

**JUSTICE OF APPEAL/CONSTITUTIONAL COURT**

# THE REPUBLIC OF UGANDA

## IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Kakuru, Kiryabwire, Cheborion, Musota & Kibeedi, JJA/JCC)

### CONSOLIDATED CONSTITUTIONAL PETITION No. 42 & 52 OF 2012

1. NAPHATAL WERE

2. JOHN PAUL BASABOSE .....PETITIONERS

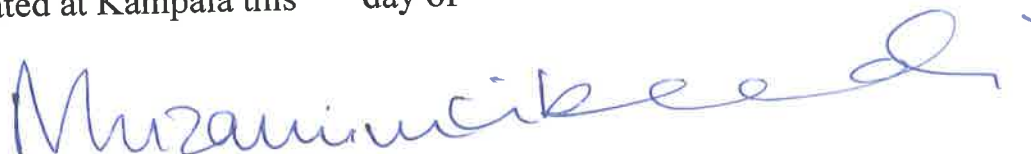
VERSUS

ATTORNEY GENERAL .....RESPONDENT

#### Judgment of Muzamiru Mutangula Kibeedi, JA/JCC

I have had the advantage of reading in draft the lead Judgment prepared by my Learned Brother, Cheborion Barishaki, JA/JCC. I concur with his reasoning and the Orders he has proposed.

Dated at Kampala this      day of      2021



**Muzamiru Mutangula Kibeedi**

**JUSTICE OF APPEAL/ CONSTITUTIONAL COURT**

5  
THE REPUBLIC OF UGANDA  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA  
CONSTITUTIONAL PETITION NO. 42 & 52 OF 2012

1. WERE NAPHTAL

10 2. JOHN PAUL BASABOSE ..... PETITIONERS

VERSUS

ATTORNEY GENERAL .....RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC

Hon. Mr. Justice Geoffrey Kiryabwire, JA/ JCC

15 Hon. Mr. Justice Cheborion Barishaki, JA/JCC

Hon. Mr. Justice Stephen Musota, JA/JCC

Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA/JCC

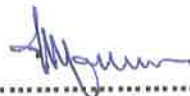
JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ ICC

20 I have had the benefit of reading in draft the judgment of my learned brother  
Cheborion Barishaki, JCC.

I agree with him that, this petition has no merit and ought to fail. I also agree with  
him that no order be made as to costs.

25 As the other justices on the Coram also agree, this petition stands dismissed with no  
orders as to costs.

Dated at Kampala this .....19<sup>th</sup>.....day of .....March..... 2021.



.....  
Kenneth Kakuru  
30 JUSTICE OF APPEAL/CONSTITUTIONAL COURT