THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CONSTITUTIONAL APPEAL NO.07 OF 2005

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIAMBA, KATUREEME, OKELLO, JJ.SC, EGONDA NTENDE, AG. JJ.SC).

BETWEEN

ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA :::::::::::::::::::::: APPELLANT

AND

13. MASALU MUSENE WILSON
14. KEITIRIMA JOHN AUDES
15. SEKAGYA RONALD ::::::::: RESPONDENTS
16. MUHIIRWA ALAARI K.

[Appeal from the Judgment of the Constitutional Court (Hon. Lady Justice A.E.N Mpagi-Bahigeine, S.G. Engwau, A. Twinomujuni, J.A) delivered at Kampala on the 23rd day of February, 2004 in Constitutional Petition No. 05 of 2004].

JUDGMENT OF THE COURT

This is an appeal against a decision of the Constitutional Court whereby that court held by a majority of 3 to 2 that the imposition of income tax on the salaries of the Respondents as Judicial officers was inconsistent with and in violation of article 128(7) of the Constitution, and that their salaries, allowances, privileges and retirement benefit and other conditions of service must not be subject to any form of taxation whatsoever. The appellant, the Attorney General of Uganda was dissatisfied with that decision, hence this appeal.

The facts of the case are as follows: The 1st, 2nd, 3rd and 4th Respondents were judicial officers as Registrar, Chief Magistrate, Magistrate Grade 1 and Magistrate Grade 11 respectively. They were aggrieved by the implementation of Section 4(1) of the Income Tax Act whereby their salaries were subjected to income tax deductions. They petitioned the Constitutional Court, alleging that the application of that section of the Income Tax Act to their salaries was inconsistent with Article 128(7) of the Constitution which, according to them protected the salaries of Judicial officers from being varied to their disadvantage .

They sought declarations that:

1. the application of Section 4(1) of the Income tax Act to judicial officers was inconsistent with Article 128(7) of the Constitution,
2. Judicial Officers salaries, allowances and retirement benefits and other emoluments must not be taxed.

They also sought an order of court that judicial officers are entitled to their full pay without variation to their disadvantage with the coming into effect of the 1995 Constitution. They further prayed for costs of the petition. The court granted the first two prayers, and ordered that the judicial officers be paid their full pay without deduction of tax with effect from the date of the judgment. The court made no order as to costs.

The appellant appealed against the above declarations and order. The respondents cross-appealed against the order not to tax their emoluments having effect from the date of the judgment, asserting that it should commence from the coming into effect of the 1995 Constitution. They also cross-appealed against the order not to award them costs.

The appellant filed 3 grounds of appeal as follows:-

1. *"That the learned Justices of Appeal erred in law and in fact when they held that the application of section 4(1) of the Income Tax Act of 1997 to Judicial Officers is inconsistent with and contravenes Article 128(7) of the Constitution.*
2. *"That the learned Justices of Appeal erred in law and in fact when they declared and ordered that the Judicial officers salaries, allowances, privileges and retirement benefits and other conditions of service must not be subjected to any taxation whatsoever.*
3. *"That the learned Justices of Appeal erred in law and in fact when they ordered that Judicial Officers are entitled to their full pay without variation to their disadvantage as from the date of the judgment."*

The appellant also prayed for costs of the appeal. In their cross-appeal, the respondents filed two grounds as follows:

1. *"The learned Justices of the Constitutional Court erred in law by failing to grant the respondents costs of the petition without assigning any reasons thereof.*
2. *"The learned Justices of the Constitutional Court erred in law and in fact, by failing to order that the respondents are entitled to their full pay without variation with the coming into effect of the 1995 Constitution, yet having made a finding that their constitutional rights have been infringed since 1995."*

The respondents also prays for costs of the appeal and cross-appeal. Both parties filed written submissions.

The appellant argued grounds one and two together. The appellant submitted that the application of section 4(1) of the Income Tax to the salaries of the respondents was not inconsistent with or in violation of Article 128(7) of the Constitution as held by the majority of the learned Justices of the Constitutional Court. The appellant supported and fully associated himself with the dissenting Judgments and rulings of C.N.B Kitumba and C.K. Byamugisha, JJ.A. In his view, taxation of salaries of Judicial officers was not a variation of their salaries. The respondents had never enjoyed the privilege of tax exemption, as had been enjoyed by Judges prior to the coming into effect of the 1995, Constitution, and their continued taxation was not in conflict with the constitution. He argued that payment of tax is a duty imposed on all citizens by the Constitution unless there was a specific exemption accorded to a person or persons within the Constitution or under the relevant law. The respondents enjoyed no such exemption either within the Constitution or under any other relevant law. The appellant further submitted that the words "vary" and "taxation" are different and

cannot be used interchangeably. One ought to follow the principle of constitutional interpretation that in determining the constitutionality of a statute, the effect and purpose of its provisions should be considered. He invited this court to follow the reasoning of Kitumba, J.A, in this regard.

The appellant further submitted that the constitutional Court had misdirected itself when they relied on the case of ***EVANS -Vs- GORE, ACTING COLLECTOR OF INTERNAL REVENUE 253. U.S.*** 245 (1920) to hold that a Judges salary could not be taxed because such taxation amounted to diminishing of his salary.

He cited the later case of ***UNITED STATES -Vs- TERRY J. HATTER, JR. JUDGE, UNITED STATES DISTRICT COURT 532 U.S (2001),*** wherein the Supreme Court of the United States has overruled EVANS and held that imposition of a general tax which was payable by all citizens, was not a diminution of a Judges salary and was not unconstitutional. The appellant prayed that this court be persuaded by HATTER since it had expressly overruled EVANS.

For the respondents, their counsel fully supported the decision of the majority of the Justices of the Constitutional Court that the application of Section 4(1) of the Income Tax Act to Judicial Officers salaries was unconstitutional, and that salaries, allowances, privileges and retirement benefits of Judicial Officers must not be subject to any taxation whatsoever. Counsel argued that Article 128(7) of the Constitution entrenched the independence of the Judiciary and covered all Judicial Officers including both members of the higher bench and lower bench. They submitted further that Article 128(7) was not meant to benefit only the Judges who enjoyed the tax exemption benefits before the coming into force of the 1995 Constitution, but that by itself that Article extended a tax exemption to all Judicial Officers. They contended that to argue otherwise would mean that the benefit of tax exemption would apply to only those Judges who were in office at the time of the Constitution. Counsel argued further that the lower judicial officers had a heavy workload as a result of changes in the law which had conferred on them higher jurisdiction and therefore they needed the tax exemption as further remuneration for a heavier work schedule. In the alternative, counsel argued that since the Judicial Officers had already had the benefit of tax exemption from the date of the Judgment, it could not now be taken away from them.

We have carefully considered all the submissions of counsel. We agree that Article 128(7) is meant to be a pillar for the independence of the Judiciary. The need for Judicial Officers to be well compensated so as to uphold their

independence cannot be overstated. We agree with Mpagi-Bahigene, J.A, when she states in her lead judgment;

> ***"The underlying principle of the entire Article 128 is the issue of judicial independence and security of tenure, the latter being among the traditional safeguards of the former. This means amongst other things that the term of office, emoluments and other conditions of service of Judicial Officers generally shall not be varied or altered to their detriment or disadvantage. This is an elementary safeguard to be found in most developed legal systems where it took many historic struggles to establish on a firm footing as the most fundamental of all safeguards of Judicial officers security of tenure. When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the executive or at the whims of the legislature, the independence of the judiciary is the first victim. The rationale under article 128(7) is that there should be adequate salaries and pensions for judicial officers commensurable with their status, dignity and responsibility of their office."***

These sentiments are also very strongly carried in the Judgment of Twinomujuni; JA., who goes to great length to quote from the judgments in EVANS to show that imposition of tax on a Judges salary amounts to a variation to the disadvantage of the Judge and therefore renders it unconstitutional.

With great respect, we think that the learned Justices are mixing up two distinct issues. The first one is about the need for adequate remuneration. That cannot be gainsaid. Judicial officers need to be adequately remunerated given the unique nature of their work and status in society, and the need to protect and preserve their independence. The second is whether that remuneration, whether adequate or not, can be varied to the disadvantage of the judicial officer. The

crucial word there is ***"vary"*** as used in article 128(7) of the Constitution. For purpose of clarity we reproduce Article 128(7) as follows:

> ***128 (7) "The salary, allowances, privileges and retirement benefits and other conditions of service of a Judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage."***

There is no specific exemption from taxation conferred on Judicial officers, as is the case with, for example, the salary of the President under Article 106(4) which states: "The President is exempted from direct personal taxation on allowances and other benefits except on the official salary." These clear words mean that whereas the allowances and other benefits of the President are exempted from direct personal taxation, his salary is not so exempted. Yet article 106(6) is virtually a replica of Article 128(7). It states:-

> ***106(6)"The salary, allowances and other benefits granted to the President under this Article shall not be varied to the disadvantage of the President while he or she holds office."***

These provisions use the word "vary" on the other hand Article 158(1) states:

> ***"Where any salary or allowance of the holder of any office is charged on the Consolidated Fund, it shall not be <u>altered</u> to his or her disadvantage after he or she has been appointed to that office."***

Counsel for the appellant argued that these provisions show that the Constitution makes a distinction between taxation and variation of emoluments. Where it sought to confer a tax exemption it provided so expressly as in the case of the Presidents salary.

We agree. In our considered opinion, had the framers of the Constitution wanted to confer a tax exemption on emoluments of Judicial officers, they would have said so expressly. To equate variation with taxation would mean that all those officers covered by article 158(1) would also enjoy a tax exemption. It would

also import an unnecessary and uncalled for conflict between article 106(4) and 106(6), as Mpagi-Bahigeine, and Twinomujuni, JJ.A attempt to do. Twinomujuni, JA., goes further to try to show that Article 158(1) is different from 128(7) because it uses the word "alter" which he states to be different from the word "vary". In our view the words ***"vary"*** and ***"alter"*** can be used interchangeably as they mean the same thing. ***BLACKS LAW DICTIONARY*** defines ***"alter"*** Thus:

> ***"To make change in: to modify: to vary in some degree;" to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed , to increase or diminish."***

On the other hand, the ***OXFORD ADVANCED LEARNERS DICTIONARY*** defines "vary" thus:

> ***"To make changes to something to make it slightly different."***

Clearly, the drafters of the Constitution used the words "vary" and "alter" interchangeably to mean the same thing, i.e., the emoluments of the persons concerned could not be changed to their disadvantage. For the salary of the President, the Constitution stipulates clearly that it shall not be taxed. The issue therefore is whether requiring Judicial officers to pay tax under section 4(1) of the Income Tax Act amounts to a variation of their salaries to their disadvantage.

The learned Justices of the Constitutional Court relied heavily on the EVANS case (supra). That case was interpreting a clause in the American Constitution which is similar in material respects to Article 128(7) of our Constitution. It provides as follows:-

> ***"The Judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall at stated***

times, receive for their services a compensation, which shall not be diminished during their continuance in office".

The issue was whether taxation of a Judges salary was a diminution of his compensation contrary to the above provision. The Supreme Court of the United States held that such taxation was indeed a diminution of a Judges compensation and unconstitutional. This decision was followed by the majority of Justices of the Constitutional Court.

However, it apparently was not brought to the attention of the Constitutional Court that there had been considerable changes in the law in the United States since 1920 when EVANS was decided. That decision received much criticism in subsequent cases both in the United States and other Commonwealth countries and was eventually overruled. In ***OMALLEY -Vs- WOODROUGH, 307 U.S 277 282 (1939,*** the Supreme Court of the United States adopted the reasoning of the dissenting Justices in EVANS that Judges are not immune from sharing with other citizens the material burden of the government, and therefore their payment of a non-discriminatory tax laid generally on all citizens was not a diminution of Judges salaries.

The reasoning in 0MALLEY was adopted in ***UNITED STATES —Vs- TERRY HATTER J. JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CLALIFONIA — 532 U.S. (2001)***. The Supreme Court in this case overruled EVANS in so far as it holds that the compensation clause forbids Congress to apply a generally applicable, non-discriminatory tax to the salaries of Federal Judges. The court laid down authoritatively the principle that a non-discriminatory tax that treated judges the same way it treated other citizens is not forbidden by the compensation clause. The court did support the reasoning in EVANS with regard to the independence of the Judiciary and the need to protect it, but did not think that requiring a Judge to pay a tax that all other

citizens were required to pay was in any way an affront to the Judges independence.

In the Canadian Case of ***THE QUEEN —Vs- BEAUREGARD [1986] 2 S.C.R 56***, a Judge of the Supreme Court of Quebec appointed in July 1975 challenged a December 1975 law requiring him to contribute 6% of his salary to pension costs for being inconsistent with section 100 of the Canadian Constitutional Act 1867 which provided as follows:-

> ***"The salaries, allowances, and pensions of the Judges of the Superior, District and County Courts shall be fixed and provided by the Parliament of Canada."***

The 1975 statute required that Judges appointed prior to February 1975 should contribute 1.5% of their pay to pension costs which prompted the Judge to also claim that his equality rights under the Canadian bill of rights were being infringed, because he was being treated differently from other incumbent judges. The Supreme Court rejected this challenge. The Court held that although financial security was an important part of judicial independence, and although the law in issue targeted Judges only, this did not damage Judicial independence. Canadian Judges were Canadian Citizens and must bear their fair share of the financial burden of administering the country. The court did not find the financial obligations imposed on Judges touching on the true purpose of judicial independence which is freedom from manipulation and the separation of powers. The 1975 law was held to be merely establishing a "conventional form" of pension and which did so with a considerable raise in salaries. According to Dickson, C.J, who delivered the majority judgment, although Parliamentary power in section 100 of the Constitution Act was not absolute, what was to be guarded against were "decisions with sinister motivations and discrimination against Judges."

As the learned Justices of the Constitutional Court opined, decisions of the Superior courts of other countries on matters of law similar to our own are of high persuasive value. Twinomujuni,

JA, in applying EVANS, stated as follows:-

> ***"I have gone to this length to show the similarity of the American provisions to ours and to opine that the decisions of the United States Supreme Court, which I am going to discuss below are not merely persuasive but ought to be given much more weight than that usually accorded to foreign authorities."***

We agree, but wish to add that decisions of Superior Courts from the Commonwealth, e.g. Canada, also ought to be given considerable weight. But where those decisions have since been overruled and are no longer law in those countries, then they cannot be adopted by our courts, unless one clearly distinguishes them.

In our view the Constitutional Court erred when it followed the decision in ***EVANS*** which had long been overruled by ***HATTER.*** We drew the attention of counsel for the respondent to ***HATTER*** which had been cited by counsel for the appellant, but counsel made to no attempt to explain or distinguish the two cases.

We are of the considered opinion that the decisions in ***HATTER*** and in ***BEAUREGARD*** from U.S.A and Canada, respectively, are very persuasive and ought to be applied in interpreting Article 128(7) of the Constitution. We do not think that requiring judicial officers to pay tax like all citizens do is *per se* an affront to the independence of the Judiciary. In that regard we agree with the opinion of Kitumba, JA, when she states in her dissenting judgment:

"Counsel for the petitioners strong contention was that Article 128(7) was enacted to ensure the independence of the judiciary. It prohibits variation of judicial officers salaries and taxation is such variation. In fact the whole of Article 128 of the Constitution is on independence of the judiciary. I am of the considered view that taxation of a judicial officials salary is not variation of salary. It is a compliance with a Constitutional duty. Taxation per se does not and would not take away the independence of judiciary. It would not amount to subjecting that taxpayer to the whims of the tax officials, as argued by counsel for the Petitioners. The duty is upon the employer to withhold the tax from the employment income. (See section 116 of the Income Tax Act). It is the accounting officer of the Judiciary to effect the taxation and remit the tax to the Uganda Revenue Authority. It is my humble view that there is no likelihood of the judicial officer and the tax officials of coming into contact and thereby exposing the judicial officer to the dangers of being compromised……

I agree that maintenance of the independence of the Judiciary is a cardinal principle of the rule of law. Taxation of the judicial officers salaries and allowances is not interference with that independence. Judicial officers in the two East African Countries of Kenya and Tanzania and many Commonwealth Countries do pay tax on their emoluments. I cannot say that the independence of the Judiciary does not exist in those countries. It is also common knowledge that the government for the common good of the country should use money taxed from citizens income. When that is put into consideration one would not

be right to say that the taxation of the judicial officers is to vary salaries to their disadvantage. I am not persuaded by the decision in EVANS —Vs- GORE. I will not follow it."

Although she apparently did not know it, in effect the learned Justice was following the decisions in ***HATTER*** and ***BEAUREGARD*** which reflect the current state of the law in those countries. We are persuaded by the reasoning in those decisions. Accordingly we find that the majority in the Constitutional Court erred in law and fact when they held that section 4(1) of the Income Tax Act was inconsistent with and in contravention of Article 128(7) of the Constitution. A fortiori, the decision that the respondents salaries cannot be subject to tax whatsoever cannot stand.

We wish to add, however, for clarity that the Income Tax Act did provide for the Minister of Finance to grant a tax exemption to any person. The Cabinet of Uganda did decide in 1991 to extend exemption from payment of tax to Judges. The language of the statutory Instrument that was subsequently passed is very clear. It reads in part:

GENERAL NOTICE NO.140 OF 1997

THE INCOME TAX DECREE (DECREE 1 OF 1974)

NOTICE

PURSUANT to the provisions of subsection(2) of section 12 of the Income Tax Decree, NOTICE HEREBY GIVEN that income in respect of gains from employment payable to the Chief Justice, Deputy Chief Justice, Principal Judge, a Justice of the Supreme Court, a Justice of Court of Appeal or a Judge of the High Court is exempted from tax."

Clearly this applied to these Judges as a class irrespective of whether they were in office at the time the exemption was given. When the law refers to ***"a Justice of the High Court"*** it can only mean that any person holding that office is affected. What the government did was to extend a special privilege to Judges

by introducing a new term of service, i.e. exemption from tax. This recognised that Judges were liable to pay tax but were allowed an exemption as permitted by law.

This new term of service was in force at the coming into force of the 1995 Constitution. Therefore, in accordance with Article 128(7) of the Constitution it could not be taken away from the class of Judges as this would amount to a variation of their terms and conditions of service to their disadvantage.

Unfortunately, judicial officers of the lower Bench like the respondents had not yet had the privilege of tax exemption extended to them as at the coming into force of the Constitution. Therefore, they were not enjoying the that privilege i.e, tax exemption. Of course it is one thing to argue that this privilege should be extended to all judicial officers as a measure to enhance their salaries but it is quite another to say that to tax their salaries is a variation of those salaries to their disadvantage. The two concepts are different.

In the result grounds 1 and 2 of the appeal must succeed. That in effect also disposes in ground 3 of the appeal as well as the counterclaim cross appeal.

We note in this case, that as a result of the decision of the Constitutional Court, no tax has been withheld from the salaries of all Judicial Officers from the date of that judgment. In their written submissions, counsel for the respondents submitted that since the government (Appellant) had not sought a stay of execution of the judgment of the Constitutional Court and had fully implemented that decision by not taxing their salaries, government could not now seek to tax their salaries as this was a benefit now being enjoyed and to take it away would cause them a great injustice as this might lead to demands for refund of the tax that has not been withheld. The appellant/Attorney General acknowledged the fact that he had not sought a stay of execution and that the respondents were enjoying the benefit of tax exemption. He attributed his failure to seek a stay of

exemption to ***"an inadvertent error on the part of the appellant"***. Most curiously, the appellant sought to blame the implementation of the decision of the court on the Judicial Service Commission who had done so ***"without prior consultation and approval from the Ministry of Finance."*** We think this argument by the Attorney General is ill conceived and meant to mislead. As pointed out by Kitumba, JA, the withholding of tax from salaries is done by the Accounting Officer of the Judiciary. The Accounting Officer is an appointee of the Secretary To Treasury and reports to that office. The Judicial Service Commission has nothing to do with the payment of salaries or withholding of taxes. This was an unacceptable excuse by the Attorney General who represents the whole government of Uganda, including the Judicial Service Commission. Indeed the Attorney General is a member of the Judicial Service Commission.

However, as we have already noted, the appellants and other judicial officers of the rank of Registrar or magistrate have been enjoying the privilege of tax exemption for over three years. The appellant did not apply for stay of execution of the judgment of the Constitutional Court and the Government has in its wisdom not been taxing the emoluments of the said judicial officers. It would be unconscionable and contrary to the spirit of provisions of Article 128 (7) of the Constitution to remove the tax exemption.

With regard to the issue of costs, we think this was a matter of public interest and each party should bear its own costs.
Dated at Mengo this 14th day of October 2008.

B. Odoki
Chief Justice

J.W.N. Tsekooko
Justice of the Supreme Court

J.A. Mulenga

Justice of the Supreme Court

G.W. Kanyeihamba

Justice of the Supreme Court

Bart M. Katureebe

Justice of the Supreme Court

G. Okello

Justice of the Supreme Court

F. Egonda Ntende

Ag. Justice of the Supreme Court