

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

**(CORAM: KATUREEBE, TUMWESIGYE, KISAAKYE, JJSC,
ODOKI, TSEKOOKO, OKELLO AND KITUMBA, AG. JJSC)**

CONSTITUTIONAL APPEAL NO. 01 OF 2012

BETWEEN

UGANDA.....APPELLANT

AND

THOMAS KWOYELO (ALIAS LATONI).....RESPONDENT

**An Appeal from the decision of the Constitutional Court at
Kampala (Twinomujuni (RIP), Byamugisha (RIP), A.S. Nshimye,
M.S. Arach-Amoko, JJA) dated 22nd September, 2011 in
Constitutional Reference No. 36 of 2011**

JUDGMENT OF OKELLO, AG. JSC.

I have had the benefit of reading in draft the Judgment of learned Chief Justice Katureebe, just delivered. I agree with his conclusion and with the orders he has proposed. I, however, have brief observations to make on two points for emphasis only; firstly whether the Amnesty Act infringes on the powers and independence of the DPP and, secondly whether in declining to grant to the respondent a certificate for grant of amnesty, the DPP discriminated against the respondent.

Background

The background facts to this appeal are set out in detail in the lead Judgment; I, therefore, need not repeat them here.

The first point which I wish to observe on is covered under ground 2 which was couched in the following words:

“ The Constitutional Court erred in law and fact in finding that the impugned sections of the Amnesty Act do not infringe on the powers of the DPP or interfere with his independence.”

Ms Muteesi, learned Principal State Attorney, complained in this ground about the interpretation by the Constitutional Court of sections 2 and 3 of the Amnesty Act that they do not infringe on the powers of the DPP, since he, the DPP could still prosecute persons who are declared by the Minister under Section 2 A of the Act to be ineligible for amnesty. Learned Counsel contended that that interpretation is wrong because Sections 2 and 3 prohibit prosecution by the DPP of any rebel for all crimes including grave breaches, war crimes, crime against humanity etc. It was her further submission that section 2A subjects the DPP's decision to prosecute on the Minister's discretion to declare ineligibility, yet, under Article 120 (6) of the Constitution of Uganda the DPP is not subject to the control of any person or authority in the exercise of his or her functions.

Mr Alaka, learned Counsel for the respondent denied that Section 2 of the Amnesty grants a blanket amnesty to all rebels for all crimes. He contended that the Minister of Internal Affairs has powers under section 2A to declare some rebels ineligible for amnesty. Counsel further denied that the Amnesty Act either infringes on the powers of or interferes with the independence of

the DPP. He pointed out that Section 3 (4) of the Act enjoins the DPP to investigate the cases of all persons charged with or held in custody for criminal offences before causing the release of only those who qualify for grant of amnesty under the Act, if they renounce the rebellious activity mentioned in section 3.

The issue raised from the above arguments is whether the impugned sections (2 & 3) of the Amnesty Act infringe on the powers of and interfere with the independence of the DPP guaranteed in Article 120 (3) and (6) of the Constitution.

The Constitutional Court held on this point that:

“ We do not think that the Act was enacted to whittle down the prosecutorial powers of the DPP or to interfere with his independence as Ms. Muteesi submitted. The DPP can still prosecute persons who are declared in eligible for amnesty by the Minister responsible for Internal Affairs or those who refuse to renounce rebellion.”

To appreciate the effect of the Amnesty Act on the prosecutorial powers and independence of the DPP, it is necessary to look at the impugned provisions of the Act vis-a vis the powers and functions of the DPP as set out in Article 120 (3) (4) (5) and (6) of the Constitution.

The functions of the DPP are set out in Article 120 (3) as follows:

“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 a 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 DPP 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 officer authorized by him or her in accordance with general or specific instruction; and

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

5) In the exercise of his or her power 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.”

Amnesty Act

The relevant sections of the Amnesty Act are set out here below for ease of reference:

“2 Declaration of Amnesty

1) An amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the Government of the Republic of Uganda by:-

- a) actual participation in combat;
- b) collaborating with perpetrators of the war or armed rebellion; or
- c) committing any other crime in the furtherance of the war or armed rebellion; or
- d) assisting or aiding the conduct or prosecution of the war or armed rebellion.

3) **Grant of Amnesty**

A reporter shall be taken to be granted amnesty declared under Section 2 if the reporter:-

- a) reports to the nearest army or police unit, a chief, or member of the executive committee of a local government unit, a magistrate or a religious leader within the locality;
- b) renounces and abandons involvement in the war or armed rebellion;
- c) surrenders at any such place or to any such authority or person any weapons in his or her possession; and
- d) is issued with a certificate of amnesty as shall be prescribed in negotiations to be made by the Minister.

2) Where a reporter is a person charged with or is under lawful detention in relation to any offence mentioned in Section 3, the reporter shall also be deemed to be granted amnesty if the reporter:-

- a) declares to a prison officer or to a judge or magistrate before whom he or she is being tried that he or she has renounced the activity referred to in Section 3, and

b) declares his or her intention to apply for the amnesty under this Act.

4) Subject to sub-section (3), the Director of Public Prosecutions shall investigate the cases of all persons charged with or held in custody for criminal offences and shall take steps to cause to be released all persons involved in such cases who qualify for grant of amnesty under this Act, if those persons renounce all activity mentioned in Section 3, in which they have been involved.

5)

6) A reporter who has complied with any of the provisions of sub-sections (1), (2), (3), (4) and (5) applicable to him or her shall be granted a certificate to be specified by regulations as evidence of the grant of the amnesty.”

It is clear to me from section 2 (1) above that amnesty is granted to Ugandan rebels for specific crimes. The crimes are: actual participation in combat, collaborating with the perpetrators of the war or armed rebellion and assisting or aiding the conduct or prosecution of the war or armed rebellion. The other crimes for which amnesty is granted under this Act are those stated in paragraph (c) of sub-section (1) of section 2 above. These are crimes committed “in the furtherance of the war or armed rebellion.”

The imposing question then is what are these other crimes committed in the furtherance of the armed rebellion. In my understanding, these are crimes which are committed to promote the cause of the rebellion. They are for example, attack on military unit or police station or even killing members of the security to acquire guns and ammunitions to prosecute the war or armed rebellion; attack on financial institutions to acquire money to

finance the rebellion. This does not include any other crimes committed in the course of or during the rebellion, for instance, willful killing of innocent people who are not agents or even members of government security agencies; rape, causing serious bodily harm or injuries to innocent persons; wanton destruction of properties of innocent persons, etc. These crimes are not crimes committed in the cause of or in the furtherance of the rebellion and are therefore not covered under the Amnesty Act.

Section 3 (3) of the Act, reproduced above, imposes a duty on the DPP to grant a certificate for grant of amnesty to a person who is charged with a criminal offence or is in lawful custody, upon being satisfied that the person falls within section 3 of the Act. That is, that the person has renounced rebellion surrendered any weapons in his or her possession and has not committed any crime outside the provisions of section 3. Once the DPP satisfies himself or herself after carrying out the duty imposed on his or her office by section 3 (4) of the Act, to investigate cases of all applicants who are in lawful custody he is free to cause the release of only those who qualify for amnesty.

However, where upon carrying out his or her duty under section 3 (4) of the Act, the DPP finds that an applicant for amnesty had in the course of the rebellion committed crimes which do not fall within the provisions of section 3, he is free under the Amnesty Act to invoke his or her powers under Article 120 (3) of the Constitution to institute criminal proceedings against that person. He does not need to wait for the Minister to declare ineligibility or to wait for those who refused to renounce rebellion. A proper interpretation of the above provisions of the Amnesty Act shows that the decision of the DPP to prosecute is not depended on the Minister's declaration of ineligibility. I, therefore, agree that the

impugned sections (2-3) of the Amnesty Act do not infringe on the prosecutorial powers of the DPP or interfere with his independence. I would disallow that ground.

This now leads me to the second point which is whether in declining to grant to the respondent a certificate for grant of amnesty, the DPP thereby discriminated against the respondent. This point is covered in grounds 9-11. The grounds are couched in these words:-

“9) The Constitutional Court erred in law and in fact in finding that the Director of Public Prosecutions did not give any objective and reasonable explanation why he did not sanction the respondent’s application for amnesty.

10) The Constitutional Court erred in law in holding that the Amnesty Commission and the Director of Public Prosecutions did not accord the respondent equal treatment under the Amnesty Act, and that their actions were inconsistent with Article 21 (1) & (2) of the Constitution.

11) The Constitutional Court misdirected itself and erred in law and fact when in absence of evidence it found that the DPP had sanctioned the grant of amnesty to 24,066 people and that of 274 people were granted amnesty in 2010 which was “apparently sanctioned by the DPP” and it wrongly relied on this finding to decide that there was unequal treatment of the respondent.”

These grounds relate to the finding of the Constitutional Court that the DPP subjected the respondent to unequal treatment under the Amnesty Act. Ms. Muteesi’s complaint was that there was no evidence that the DPP had sanctioned the amnesty of 24,066 people as inferred by the respondent. Learned Principal State Attorney contended that the DPP’s sanction is only required under section 3 (2) of the Amnesty Act where a rebel is under lawful custody or has been charged with offence. Learned counsel submitted that to talk

about unequal treatment of different people, there must be same circumstances. She explained that the people claimed had been given different treatment from that given to the respondent must be shown had been in lawful custody and had been charged with similar offences like the respondent but that they had been granted amnesty while the respondent had been denied. She concluded that there was no such evidence and prayed that the grounds be allowed.

Mr Onyango, another counsel for the respondent, submitted on this point. He supported the finding of the Constitutional Court and contended that the respondent had been treated unequally before the law and was not afforded equal protection of the law. Counsel pointed out that the DPP had rejected the respondent's application for amnesty but sanctioned the grant of amnesty to a number of people in similar circumstances like the respondent before and after the respondent's application. In Counsel's view, the different treatment contravened article 21 of the Constitution of Uganda.

Learned counsel further contended that where there was discrimination, it must be justified. He cited **Muller & Anor Vs Namibia (2002) AHRLR (HRC 2002)** to support that view. He argued that in the instant case, the DPP had not given any justification for his actions. Learned counsel cited article 7 of the Universal Declaration of Human Rights, and articles 26 and 27 of the International Covenant on Civil and Political Rights (ICCPR) for the proposition that all persons are equal before the law and are entitled without discrimination to equal protection of the law.

It was counsel's further submission that various international treaties and conventions also provide for amnesty. He cited

Azanian People's Organisation & 7 others Vs the President of South Africa and others (CCT 17/96) where Article 6 (5) of *Protocol II to the Geneva Convention 1949* was considered by the Constitutional Court of South Africa. That Protocol makes a distinction between international conflicts and non-international conflicts. With regard to the latter, Article 6 (5) provides that:-

“At the end of hostilities, authorities in power shall endeavor to grant the broadest amnesties to persons who have participated in the armed conflict.”

Counsel concluded his submissions by praying that the appeal be allowed.

- The issue raised from the above arguments of counsel is whether the DPP in declining to grant to the respondent certificate of grant of amnesty when he granted the same to other applicants in similar circumstances like the respondent, discriminated against the respondent.

The Constitutional Court after considering the record before it stated that:

“The applicant applied for himself in 2010. In that year 274 people were granted amnesty which was apparently by the DPP.

The DPP did not give any objective and reasonable explanation why he did not sanction the application of the applicant for amnesty like he did in other cases. The applicant required a legal right to be granted amnesty or pardon under the Amnesty Act, like everyone else who renounced rebellion. Indeed in terms of Section 3 (2) of the Act, the applicant, as a reporter “shall also be deemed to be granted amnesty” once he declared to the prison officer that he had renounced rebellion and declared his intention to apply for Amnesty

under the Act. The DPP on his part shirked his obligation under the Act.

We think it is rather late in the day for the DPP to claim his Constitutional independence using the applicant. He has failed to furnish any reasonable or objective explanation why the applicant should be denied equal treatment under the Amnesty Act.

We are satisfied that the applicant has made out a case showing that the Amnesty Commission and the Director of Public Prosecutions have not accorded him equal treatment under the Amnesty Act. He is entitled to a declaration that their acts are inconsistent with Article 21 (1) and (2) of the Constitution and thus null and void. We so find.”

The cited Article 21 (1) and (2) of the Constitution read as follows:-

“Equity 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.

2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.”

Clause 3 of this article defines the word “*discriminate*” for the purpose of this article to mean, to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

- There is no evidence on record showing the sphere on which the alleged unequal treatment between the respondent and the other former rebels (reporters) was based.

Be that as it may, I agree with Ms. Muteesi that for there to be unequal treatment, the circumstances must be the same. The respondent deposed in paragraph 21 of his affidavit dated 16th August 2011, that 26,162 former rebels had been granted amnesty after they had renounced rebellion. He supported that assertion by a report from the Amnesty Commission which he attached to his affidavit as annexure D. The report was showing the number of reporters /persons who had by then been granted amnesty. The respondent further deposed in paragraphs 11 and 12 of his said affidavit about Brigadier Kenneth Banya and Brigadier Sam Kolo respectively. He stated that the two were also commanders in the LRA and were higher in rank than him. They had been captured by the UPDF in battle field but had been granted amnesty after they had renounced rebellion. It was argued that sanctioning the amnesty for those former rebels particularly for the two senior commanders of the LRA but denying the respondent certificate for amnesty was unequal treatment under the Amnesty Act contrary to Article 21 (1) and (2) of the Constitution.

It is important to note that a certificate for amnesty from the DPP under section 3 (3) of the Act is required only for a reporter who is charged with or is held in lawful custody to be prosecuted for any of the offences mentioned in section 3 of the Act. The grant of the certificate for amnesty is not a matter of formality. The DPP grants such a certificate only after investigating each case as required under section 3 (4) and upon being satisfied that the reporter falls

under section 3 and that the said reporter is not charged or detained to be prosecuted for any offence not falling within section 3.

- In the instant case, there is indeed no evidence showing that all the 26,162 reporters had not been charged or held in lawful detention for prosecution for any of the offences mentioned in section 3 nor that their applications for amnesty had been sanctioned by the DPP. The Constitutional Court observed that "*the DPP on his part shirked his obligation under the Act. We think that it was rather late in the day for the learned DPP to claim his constitutional independence using the applicant.*"

With the greatest respect, I disagree with the above statement. It is an unjustifiably strong statement without any evidence to support it. If all those reporters had been charged with or detained in lawful custody to be prosecuted for any of the offences mentioned in section 3, and the DPP had sanctioned their amnesty, then, the logical presumption is that the DPP had investigated the cases of all of them and had satisfied himself that each one of the applicants fell under section 3, and that none of them had been charged with any offence which do not fall within section 3 and therefore had qualified for amnesty under the Act. The same applied to Brigadier Kenneth Banya and Brigadier Sam Kolo.

Much as the two had been senior commanders of the LRA, and had been captured by the UPDF in battle field, the DPP must have investigated their individual cases, as required of him by section 3 (4) of the Act and had satisfied himself that the two fell within section 3 and that in the course of the rebellion, none of them had committed any other crimes which fell outside section 3. It followed that upon their renouncing rebellion, they became

qualified for amnesty under the Act. The procedure adopted by the DPP to sanction their amnesty was provided under the law. It is not different from the one applied to decide on the respondent's application. The only difference was that after investigation, the DPP found that the respondent had in the course of the rebellion committed other crimes which do not fall within section 3.

Even if the DPP had not investigated the cases of those reporters, including those of Brigadier Banya Kenneth and Brigadier Kolo Sam, when he ought to, if all the reporters fell under Section 3 of the Act, the Constitutional Court had not cited any legal justification or basis for stopping him (DPP) from subsequently complying with the law by investigating the case of the respondent as required of him by law. That subsequent compliance with the law does not render his act different treatment to the respondent within article 21 (1) and (2) of the Constitution of Uganda. Moreover paragraph xxix of the National Objectives and Directive Principles of State Policy enjoins all citizens of Uganda to uphold and defend the Constitution and the law. Article 126 (1) also requires Courts established under this Constitution to exercise judicial power in the name of the people and **in conformity with law** and the values, norms and aspirations of the people.

- In my opinion, there is no evidence that the DPP treated the respondent differently when he declined to sanction the respondent's application for amnesty, having been satisfied that the respondent had committed other offences that do not fall within section 3 of the Act. I would allow these grounds.

For the reasons given above, I agree that the appeal be allowed in part.

Dated at Kampala this.....day of.....20.....

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G.M. OKELLO

AG. JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

CORAM: KATUREEBE, C.J; TUMWESIGYE; DR. KISAAKYE; JJ.SC
DR. ODOKI; TSEKOOKO; OKELLO; KITUMBA AG. JJ.SC

CONSTITUTIONAL APPEAL NO: 06 OF 2012

BETWEEN

UGANDA :..... APPELLANT

AND

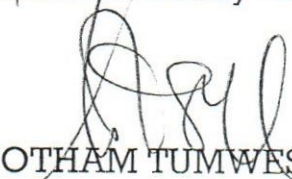
THOMAS KWOYELO :.....RESPONDENT

[Arising from the Ruling of the Constitutional Court (Twinomujuni, Byamugisha, Nshimye, Arach-Amoko and Kasule JJ.A) dated 22nd September 2011, in Constitutional Petition No. 36 of 2011 (Reference)]

JUDGMENT OF TUMWESIGYE, JSC

I have had the benefit of reading in draft the judgment of my Lord the learned Chief Justice B.M Katureebe. I agree with his judgment and the orders he has proposed.

Dated at Kampala this 8th day of April 2015


JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: *KATUREEBE, TUMWESIGYE, KISAAKYE, ODOKI CJ,
TSEKOOKO, OKELLO & KITUMBA, J.J.S.C.*)

CONSTITUTIONAL APPEAL NO.01 OF 2012

BETWEEN

UGANDA.....APPELLANT

AND

THOMAS KWOYELO RESPONDENT
(ALIAS LATONI)

*(Arising from the Ruling of the Constitutional Court, (Twinomujuni,
Byamugisha, Nshimye, Arach-Amoko, Kasule, JAA) dated 22nd
September, 2011, in Constitutional Petition No. 36 of 2011 (reference)]*

JUDGMENT OF KITUMBA AG.JSC

I have had the benefit of reading in draft the judgment of my Senior learned brother Katureebe JSC and I entirely agree with it and the orders proposed therein.

I would like, however, to comment on the powers/functions of the Director of Public Prosecutions as provided by Article 120 of the Constitution.

According to Clause 3 of Article 120 of the Constitution; some of the functions of Director of Public Prosecution are:

- “(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”.*

Clause 6 of the same Article provides:

“(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”.

I am of the considered view that having the above provisions of the Constitution in mind after the Director of Public Prosecutions had studied the respondent's case decided that he did not qualify for Amnesty under the Amnesty Act. He did not have the duty to give reasons to anybody let alone the respondent why he had decided to charge him with criminal offences under Article 14 of the Geneva Conventions Act (Cap 363) Laws of Uganda.

Criminal liability is individual liability and the fact that other Lord's Resistance Army senior commanders who had participated in the rebellion were given amnesty and not prosecuted for the same

offences is no proof of discrimination against the respondent according to Article 21 of the Constitution.

In carrying out his functions of prosecuting criminal offenders the Director of Public Prosecutions may charge and prosecute some of the apparently joint offenders to a crime and use others as witnesses. When that happens it should not be a subject of challenge in courts of law.

I agree that the appeal be allowed in part.

Dated at Kampala... 8thday of... April.....2015



CNB KITUMBA

AG JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

**(CORAM: KATUREEBE, TUMWESIGYE, KISAAKYE, JJ.SC; ODOKI,
TSEKOOKO, OKELLO, AND KITUMBA, AG. JJ.SC)**

CONSTITUTIONAL APPEAL NO. 01 OF 2012

BETWEEN

UGANDA ::: APPELLEANT

AND

THOMAS KWOYELO ::: RESPONDENT

*[Appeal from the ruling of the Constitutional Court at Kampala
(Twinomujuni, Byamugisha, Nshimye, Arach-Amoko, and Kasule, JJ.A)
dated 22nd September 2011, in Constitutional Petition No. 36 of 2011(Reference)]*

JUDGMENT OF DR ODOKI, AG JSC

I have had the advantage of reading in draft the judgment prepared by my learned brother, Katureebe, JSC, and I agree with it. I also concur in the orders he has proposed.

Dated at Kampala this 8th day of April 2015.



Dr B J Odoki
AG JUSTICE OF SUPREME COURT