THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; TUMWESIGYE; KISAAKYE; NSHIMYE; MWANGUSYA; OPIO-AWERI; & MWONDHA, JJ.S.C.]

CONSTITUTIONAL APPEAL NO 03 OF 2009

BETWEEN

FOUNDATION FOR HUMAN RIGHTS INITIATIVE ::] APPELLANT

AND

THE ATTORNEY GENERAL ::] RESPONDENT

[Appeal from the Judgment of Justices of the Constitutional Court (Mukasa-Kikonyogo, DCJ, Okello, Mpagi-Bahigeine, Kitumba, & Byamugisha, JJA) dated 26th March 2008 in Constitutional Petition No. 20 of 2006]

JUDGMENT OF DR. KISAAKYE, JSC

The appellant, the Foundation for Human Rights Initiative (hereinafter referred to as FHRI) is a Non Governmental Organization. It filed this appeal challenging the Judgment of the Constitutional Court in Constitutional Petition No. 20 of 2006 wherein Court found, among others, that sections 14(2), 15(1), 15(2) of the Trial on Indictments Act and section 75(2) of the Magistrates Courts Act did not contravene the Constitution.

Before considering the submissions and merits of this appeal, it is necessary to provide a brief background to this appeal. On 18th July 2006, FHRI filed Constitutional Petition No. 20 of 2006 under Article 137(3) of the Constitution of Uganda against the Attorney General. In its Petition, FHRI alleged as follows:

(a) *That sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act are inconsistent with Articles 20, 23(1), 28(1) and 28(3) of the Constitution of the Republic of Uganda, in so far as they impose restrictions, and limitations on the person's right to liberty, freedom of movement, the right to a fair and speedy trial and the presumption of innocence.*

(b) *That sections 75(2) and 76 of the Magistrates Courts Act are inconsistent with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda, in so far as they exclude certain offences from the grant of bail, thereby infringing on the constitutional right to liberty, the right to a fair and speedy trial, and the right to bail.*

(c) *That sections 219, 231 and 248 of the UPDF Act, which subject accused persons to lengthy periods of detention, are inconsistent with Articles 20, 23(6), 28(1), and 28(3) of the Constitution of the Republic of Uganda and as such violate the inherent rights and freedoms of the individual which are guaranteed by the said Constitution.*

(d) *That section 25(2) of the Police Act, which permits the police to detain a suspect for seven days without being charged in a court of law, is inconsistent with Article 23(4) of the Constitution and is an infringement of the right to liberty and the presumption of innocence.*

Based on the above allegations, FHRI prayed for the following declarations and orders from the Constitutional Court:

(a) *That sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act are inconsistent with Articles 20, 23(6), 28(3) of the Constitution and as such are null and void.*

(b) *That sections 75(2) and 76 of the Magistrates Courts Act are inconsistent with Articles 20, 23(6), 28(1) and 28(3) of the Constitution and as such are null and void.*

(c) *That sections 219, 231 and 248 of the UPDF Act are inconsistent with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution and as such are null and void.*

(d) *That section 25(2) of the Police Act is inconsistent with Articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void.*

(e) *Costs for the Petition.*

The Attorney General conceded to the unconstitutionality of section 15 of the Trial on Indictment Act but denied all the other allegations in the Petition.

The parties agreed upon four issues for determination by the Constitutional Court. On 28th March 2008, the Constitutional Court partially allowed the Petition and declared as follows:

(a) That sections 14(2), 15(1), (2) and (3) of the Trial on Indictments Act were not inconsistent with Articles 20, 23(1) & (6) and 28(1) of the Constitution;

(b) That section 16 of the Trial on Indictments Act was null and void to the extent of its inconsistency with Article 23(6) of the Constitution.

(c) That section 75(2) of the Magistrates Courts Act was not inconsistent with the Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution and did not contravene Article 23(6) of the Constitution.

(d) That section 76 of the Magistrates Courts Act was null and void to the extent it contravened the Constitution, and that in accordance with Article 274 of the Constitution, it could be construed with modification to bring it in conformity with the Constitution.

(e) That sections 219, 231, and 268 of the Uganda People's Defence Forces Act were inconsistent with Articles 20, 23(1) &23 (6), 28(1) &28 (3) of the Constitution and were therefore null and void to the extent of their inconsistency.

(f) That section 25(2) of the Police Act was null and void to the extent that it provided for a longer period of detention before an accused could be produced in Court than set under Article 23(4) of the Constitution.

The Constitutional Court did not make any order as to costs on grounds that the Petition was brought in public interest.

Dissatisfied with part of the decision of the Constitutional Court relating to sections 14(2), 15(1), (2) and (3) of the Trial on Indictments Act (hereinafter referred to as TIA), and section 75(2) of the Magistrates Courts Act (hereinafter referred to as MCA), FHRI appealed to this Court on six grounds set out later in this Judgment. FHRI prayed that this appeal be allowed with costs in this Court and the Constitutional Court.

Medard Ssegona, Dorothy Kabugo and Irene Akurut represented FHRI at the hearing of this appeal, while Oluka Henry, Principal State Attorney represented the Attorney General. Both parties filed written submissions.

FHRI's counsel argued grounds 1, 2, 6, and 3 separately and in that order and grounds 4 and 5 jointly. On the other hand, the Attorney General combined and argued grounds 1 and 2 together, ground 3 separately, grounds 4 and 5 together and lastly ground 6 of appeal.

I will consider grounds 1, 2 and 3 separately, grounds 4 and 5 together and ground 6 separately.

Principles of constitutional interpretation relevant in this Appeal.

Before I proceed to consider the merits of this appeal, it is vital to lay out the principles of constitutional interpretation that will guide this Court in determining this appeal.

Courts have overtime also developed principles which aid in the interpretation of the provisions of a Constitution.

The first principle which I find relevant in this appeal is that in determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. If the purpose of an Act is inconsistent with a provision of the Constitution, it shall be declared unconstitutional. Similarly, if the effect of implementing a provision of the Act is inconsistent with a provision of the Constitution, that provision of the Act shall be declared unconstitutional. This principle was followed by this Court in ***Attorney General v. Salvatori Abuki Constitutional Appeal No. 1 of 1998***.

The second principle of constitutional interpretation relevant to this appeal is that a constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and must be given an interpretation that realizes the full benefit of the guaranteed right. This principle has been underscored in several decisions of this Court including ***Attorney General V Uganda Law Society, Constitutional Appeal No. 1 of 2006*** and ***Attorney General v. George Owor, Constitutional Appeal No. 01 of 2011***.

Turning to this appeal, this Court will therefore have to construe the contested provisions vis-à-vis the provisions of the Constitution bearing in mind the principles laid out above before we can confirm or reverse the findings and declarations of the Constitutional Court. I now proceed to highlight and consider the parties' respective submissions under each ground of appeal.

Ground 1 of Appeal

This ground was framed as follows:

> ***"That the learned Justices of Appeal erred in law when they held that Section 14(2) of the Trial on Indictments Act does not contravene Article 28(1) of the Constitution of the Republic of Uganda."***

FHRI submitted that section 14(2) of the TIA violated Article 28(1) of the Constitution. FHRI contended that section 14(2) of the TIA contravened Article 28(1) of the Constitution because an accused person's conditions for release on bail can be changed at the instance of the State or at the Court's own volition, without affording the accused a hearing.

Counsel also submitted that section 14(2) of the TIA allows the same Court to increase the amount previously thought reasonable, before hearing the accused. In counsel's view, this grants Court wide powers to increase the amounts required beyond what may be reasonable.

FHRI's counsel further contended that the wording of section 14(2) of the TIA allows Court to form an opinion that the amount of an accused person's bail should be increased without first according the accused person an opportunity to be heard. FHRI also contended that it was only after Court has formed an opinion that the amount of an accused person's bail should be increased that Court issues a warrant of arrest to cause the accused person to appear before it.

FHRI's counsel faulted the learned Justices of the Constitutional Court for holding that when an accused person was produced before Court to execute a new bond for an increased amount, he or she would be accorded an opportunity to be heard and required to show cause why the order sought should not be granted.

Furthermore, FHRI further submitted that section 14(2) (a) of the TIA requires an accused person appearing in Court to execute a new bond for the increased bail. FHRI's counsel contended that this is arbitrary, because upon failure to execute the bond, the accused is given no other option under the subsection, except committal to prison. FHRI's counsel further reasoned that section 14(2) of the TIA was at variance with section 14(1) of the TIA, which requires the High Court to take from an accused recognizance for an amount that is considered reasonable in the circumstances, before it releases him or her on bail.

FHRI's counsel prayed to this Court to find and declare section 14(2) of the TIA null and void, to the extent that it contravenes Article28(1) of the Constitution.

The Attorney General refuted FHRI's submissions. Relying on the doctrine of the purpose and effect of an Act of Parliament enunciated in the case of **Queen v. Big Drug Mart Ltd [1985] 1 S.C.R 295**, the Attorney General contended that the purpose and effect of section 14(2) of the TIA was to set conditions under which an accused person can be released on bail. The Attorney General further submitted that this principle guided the Constitutional Court when it observed that, *'the conditions upon which one can be granted bail are grounded in one being given the opportunity to be heard.'*

The Attorney General disputed FHRI's contention that section 14(2) of the TIA takes away an accused person's right to be heard because it allows the High Court to issue a warrant of arrest or commit a person to prison and increase the amount of bail. The Attorney General contended that section 14(2) of the TIA only grants Court ways and means of administering and managing criminal cases, taking into consideration, among others, the gravity of the crime and the chance of absconding of the accused person.

The Attorney General further argued that the application and use of section 14(2) of the TIA was not ad hoc, but rather was based on a judicial hearing, where the accused is given the right to be heard. He further contended that this hearing was for both the accused and the Prosecutor to justify and/or to rebut the grant and/or rejection of bail. The Attorney General also contended that when the accused is heard, then the argument that this is contrary to Article 28 of the Constitution cannot be sustained.

Lastly, the Attorney General submitted that section 14 (2) of the TIA was justified under Article 43(2) (c) of the Constitution, where an accused person who is still presumed innocent, is fairly heard.

Consideration of Ground 1 of Appeal

Article 28 (1) of the Constitution provides as follows:

> ***"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."***

On the other hand, section 14(2) of the TIA provides as follows:

> ***"Notwithstanding subsection (1), in any case where a person has been released on bail, the court may, if it is of the opinion that for any reason, the amount of the bail should be increased—***
>
> ***(a) Issue a warrant for the arrest of the person released on bail directing that he or she should be brought before it to execute a new bond for an increased amount; and***
>
> ***b) Commit the person to prison if he or she fails to execute a new bond for an increased amount."***

In dismissing FHRI's submissions on section 14 (2) of the TIA, Kikonyogo, DCJ who wrote the lead Judgment held as follows:

> ***"On cancellation of bail under section 14(2) of the Trial on Indictments Act, the complaint of Mr. Kakuru is that the accused will be condemned unheard...When he or she is produced before Court, he or she will be given opportunity to be heard. He or she will be required to show cause why the order sought for should not be granted."***

The language and words of section 14(2) of the TIA would appear to grant powers to the Court to act without giving an accused person a fair hearing before his or her terms of bail are varied. The above observation notwithstanding, I am unable to agree with FHRI submissions that a Court which is considering whether to increase an

accused person's bail or not under section 14(2) of the TIA would do so without giving such an accused person a fair hearing.

Article 28(1) of the Constitution requires the Court to give one a fair hearing before it makes its decision. On the other hand, Article 44 of the Constitution provides that the right to a fair hearing is non-derogable. The right to a fair hearing involves, among others, an accused person knowing what he or she is being accused of, to enable him or her adequately prepare for his or her defence. The Constitution binds all institutions and actors, Courts of law inclusive. In light of these provisions, there is therefore no way a Court of law established and functioning under the 1995 Constitution would hold a bail review hearing in the absence of an accused person or reach a decision without first hearing from the accused person.

It should further be noted that the TIA was originally promulgated as a Decree in the President Idi Amin era. The TIA came into force on 6th August, 1971, 24 years before the coming into force of the 1995 Constitution, which is currently in force in Uganda. This makes the TIA an existing law, which is a subject of Article 274 of the Constitution. This Article provides in the relevant part as follows:

> ***"Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."***

While the TIA has since been amended, the language in section 14(2) has never been amended to bring it into consonance with our Constitution.

Thus, Article 274 requires Courts to construe section 14(2) of the TIA with such modification as is necessary to require that an accused

person must be present and be heard, before the Court can hear and decide to review and/or change the terms of his or her bail.

I also wish to note that it is not in dispute that the High Court has power to grant bail as provided for under section 14(1) of the TIA. A Court of law, which has the power and jurisdiction to make an order, has the power, under the appropriate circumstances to rescind that order or revise the conditions it set earlier. Thus, circumstances may arise which may necessitate Court to revisit and revise the conditions upon which it granted bail to an accused person. For instance, if it is subsequently determined after the grant of bail, that there is a high risk of the accused absconding and not showing up for trial. However, the Court is required to follow Articles 28 and 44 of the Constitution when revising these conditions to ensure that the revision is done within the confines of the Constitution.

In conclusion on ground 1, it is my finding that when section 14(2) of the TIA is read together with the provisions of Articles 28, 44 and 274 of the Constitution as I have already elaborated above, it is clear that section 14 (2) is not inconsistent with the provisions of Article 28(1) of the Constitution.

I therefore agree with the learned Justices of Appeal that section 14 (2) of the TIA is not inconsistent with Article 28 (1) of the Constitution.

Accordingly, I would find that section 14(2) of the TIA, as modified by Articles 274, 28 and 44 of the Constitution requires an accused person to be heard before the Court increases his or her bail amount. I so hold.

Ground 2 of Appeal

This ground was framed as follows:

"That the learned Justices of Appeal erred in law when they held that Section 15 of the Trial on Indictments Act which

requires an applicant for bail to prove exceptional circumstances before the order can be made does not contravene Article 23(6) of the Constitution of the Republic of Uganda."

I note that some of FHRI's submissions went outside the scope of ground 2 as framed and extended to other Articles such as 21, 23 (1), 28 (3) (a) & (b) and 43 (2) (c) that were allegedly contravened by section 15 of the TIA. I further note that FHRI did not seek leave of this Court to amend its ground 2 of appeal to incorporate the above provisions. I shall therefore restrict myself to FHRI's contentions on the constitutionality of section 15 vis-à-vis Article 23 (6) of the Constitution.

FHRI contended that the Attorney General conceded before the Constitutional Court that section 15 was unconstitutional. FHRI faulted the learned Justices of the Constitutional Court for failing to declare this section as unconstitutional following this concession.

Counsel for FHRI further submitted that by requiring an accused person to prove exceptional circumstances, section 15 of the TIA denied such an accused person the right to apply for bail. Counsel for FHRI submitted that the effect of the requirement to prove these exceptional circumstances was that any accused person who did not meet them was automatically barred from exercising his or her right to apply for bail.

Counsel also submitted that section 15 of the TIA takes away the judicial discretion of the Court to grant bail by restricting the Court's power to grant bail only to the three listed exceptional circumstances provided for in this section.

Counsel contended that automatically barring an accused person who does not meet the above criteria from exercising his or her right to apply for bail and restricting the Courts' power to grant bail only on three

listed exceptional circumstances was contrary to Article 23(6)(a) of the Constitution.

Counsel further contended that restricting Court to consider only these three exceptional circumstances implied that Court could not consider other reasons that may exist to warrant grant of bail. Counsel for FHRI also contended that Courts should be left to exercise their discretion in respect of bail as opposed to restricting them to only three instances.

In conclusion, counsel for FHRI prayed to this Court to declare section 15 of the TIA as null and void to the extent that it contravened Article 23(6) of the Constitution of Uganda.

Counsel for the Attorney General admitted that section 15 of the TIA was one of the sections he had conceded to at the Constitutional Court as being unconstitutional. However, in his submissions before this Court the Attorney General backtracked on his concession on the unconstitutionality of section 15 of the TIA.

The Attorney General disputed FHRI's contentions about section 15 of the TIA. The Attorney General argued that the purpose of these exceptional circumstances was to give purpose and effect to the mischief that section 15 of the TIA intended to cure. The Attorney General added that the effect of these exceptional circumstances was to prevent the accused jumping trial and to show the gravity of the offence.

Against this premise, the Attorney General submitted that these exceptional circumstances were not merely brought into play to limit and/or take away the rights of the accused person, but rather to reflect the gravity of the offences and the implications of the offence on society.

The Attorney General prayed that Court finds that section 15 of the TIA does not contravene Article 23(6) of the Constitution.

Consideration of Ground 2 of Appeal

A perusal of the Record of Appeal shows that during the hearing of the Petition at the Constitutional Court, counsel for the Attorney General conceded that section 15 of the TIA was unconstitutional. The Constitutional Court however disregarded the Attorney General's concession, made its own analysis and later found that section 15 of the TIA was constitutional.

I will first consider the question whether the Constitutional Court erred when it considered the constitutionality of section 15 of the TIA after the Attorney General had conceded to it.

The Petition, from which this appeal arose, originated under Article 137 of the Constitution. Under this Article, the Constitutional Court is vested with power to interpret and declare whether an Act of Parliament is inconsistent with or contravenes the Constitution. The Constitutional Court therefore had a duty to consider and resolve all the claims made in the Petition presented before it and to determine whether the impugned legal provisions were unconstitutional or not. The Constitutional Court cannot therefore be faulted for disregarding a party's concession.

Agreeing with FHRI's submissions would have the effect of usurping the power of the Constitutional Court to interpret the Constitution. This is because the Constitutional Court would be turned into a Court that endorses what the parties had agreed to, without going into the merits of the case.

I therefore find that the Constitutional Court did not err when it disregarded the concession by the Attorney General that section 15 of the TIA was unconstitutional.

I shall now turn to consider the merits of ground 2 of appeal. A review of this ground raises two fundamental contentions regarding the constitutionality or otherwise of section 15 of the TIA.

The first contention is that section 15 of the TIA contravenes Article 23(6) of the Constitution because it restricts an accused person's right to apply for bail by requiring a bail applicant to prove exceptional circumstances. The second contention is that section 15 of the TIA contravenes Article 23(6)(a) because it interferes with the discretion of the Court to grant bail on such terms as the Court considers reasonable.

Turning to the first contention, I note that Article 23(6) of the Constitution guarantees the right of an accused person to apply for bail as follows:

"Where a person is arrested in respect of a criminal offence-

(a) the person is entitled to apply to the Court to be released on bail and the Court may grant that person bail on such conditions as the Court considers reasonable;

(b) ...;
(c) ..."

On the other hand, Section 15 of the TIA as amended by the Trial on Indictments (Amendment) Act, 2008 provides as follows:

(1) Notwithstanding Section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of the court—

(a) that exceptional circumstances exist justifying his or her release on bail; and

(b) that he or she will not abscond when released on bail.

The offences referred to under section 15(2) include offences such as murder, aggravated robbery, treason, terrorism, aggravated defilement, rape, and offences under the Firearms Act.

Section 15(3) of the TIA proceeds to define exceptional circumstances as follows:

(3) In this section, "exceptional circumstances" means any of the following—

(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody;

(b) a certificate of no objection signed by the Director of Public Prosecutions; or

(c) the infancy or advanced age of the accused.

I note that under Article 23(6)(a) of our Constitution, all accused persons have a right to apply for bail. This notwithstanding, I also note that under Article 23(6)(a), there is no automatic right to be granted bail to every accused person who applies for bail.

I further note that section 15 of the TIA which is challenged by FHRI does not in any way address itself to the accused person's right to apply for bail which is guaranteed under Article 23(6) of the Constitution. Rather, the major focus of section 15 of the TIA is on the considerations the Court may consider in the course of determining a bail application. Needless to say, the accused person's right to apply for bail remains preserved. Section 15 of the TIA only comes into operation when the Court is considering a bail application. That is after an accused person has exercised his or her right to apply for bail.

I therefore find that section 15 does not take away an accused person's right to apply for bail that is guaranteed by Article 23(6) of the Constitution. My finding is further grounded on the fact that section 15 of the TIA existed prior to the promulgation of the Constitution in 1995. Article 2 thereof preserves the supremacy of the Constitution while Article 274 of the same Constitution saves existing laws and requires them to be construed in such a way as to bring them in conformity with the Constitution. It would therefore follow that Article 23(6) of the Constitution which guarantees an accused person's right to apply for

bail cannot be rendered inoperative by a mere provision of a Statute (the TIA).

I shall now turn to consider the second contention of FHRI under this ground which is whether section 15 of the TIA interferes with the discretion of the Court to grant bail on such terms as the Court considers reasonable. Two questions arise under this contention. The first is whether the requirement for an accused person to prove exceptional circumstances contravenes Article 23(6) of the Constitution. The second one is whether the requirement that a Court may refuse to grant bail to an accused person unless he or she proves exceptional circumstances and that he will not abscond, takes away the Court's discretion to grant bail under Article 23(6) of the Constitution.

I turn to consider the first question. In holding that the requirement for exceptional circumstances was not inconsistent with Article 23(6) of the Constitution, Kikonyogo, DCJ who wrote the lead Judgment of the Constitutional Court held as follows:

> ***"With regard to Mr. Kakuru's complaint on about other restrictions on Courts in particular to require the accused to show that he will not abscond and proof of exceptional circumstances, in my view, the said requirements are justified. Besides they are not mandatory.***
> ...
> ***Rights, be the fundamental rights or not, must be enjoyed within the confines of the law. Violation of the accused's rights does not occur simply because the accused is required to assure Court that he will appear to answer the charges.***
> ...
> ***Society must be protected from lawlessness. The Court must guard against absconding because there may be a danger of interfering with the evidence or witness.***
> ...
> ***In the premises, I am unable to agree with Mr. Kakuru that the requirement to establish exceptional circumstances under section 15 contravene Article 23 (6) in that the provision merely provides guidance not direction."***

Article 23(6)(a) vests in Courts power to grant or decline a bail application made before it. The same Article requires that a grant of bail should be on such terms as the Court considers reasonable. Although Article 23(6)(a) of the Constitution does not give guidance on how Courts are to determine this reasonableness, it is my view that embedded in the reasonableness test is the need for the Court to weigh all relevant factors before granting bail to an accused person.

Furthermore, under Article 126 of the Constitution, judicial power is derived from the people and must be exercised by the Courts established under the Constitution in the name of the people and in conformity with the law, and with the values, norms and aspirations of the people. This Article establishes the supreme importance of the people who are the major beneficiaries of our justice system.

With respect to bail matters, it therefore follows that whereas Court is supposed to bear in mind the rights of an accused person when considering his or her bail application, Court should not lose sight of the needs and interests of society to prevent and punish crimes committed within its midst. This Article imposes on Courts the duty to ensure that they do not only consider the rights of an accused person applying for bail. Rather the Court should also consider the interests of society at large. This in turn calls for the need to balance the competing interests of the accused person on the one hand and society on the other hand. To ensure this balance, Courts must at all times when dealing with a bail application bear in mind this fundamental aspect under Article 126 of the Constitution with regard to exercise of this judicial power.

Furthermore, it should be noted that the TIA was enacted by Parliament which is constituted by the peoples' representatives. These peoples' representatives enacted section 15 (1) of the TIA which requires that before Court can grant bail to a person accused of serious crimes such

as murder, aggravated robbery, treason, terrorism, aggravated defilement, rape, and offences under the Firearms Act, exceptional circumstances should exist justifying his or her release on bail and that he or she will not abscond when released on bail.

I note that section 15 (3) of the TIA is categorical that *'...exceptional circumstances means any of the following.'* I am aware that the use of the word 'means' in this section appears to be restrictive in character.

The above awareness notwithstanding, I also note that section 15 of the TIA also predates the 1995 Constitution. It is however saved as an existing law under Article 274 of the Constitution which enjoins Courts to construe existing laws, to bring it in conformity with the Constitution. Such construction requires that if Court finds it necessary to consider exceptional circumstances in the course of hearing a bail application involving offences listed under section 15(2) of the TIA, Court should not restrict itself to only considering the exceptional circumstances provided for under section 15 (3) of the TIA. Other 'exceptional circumstances' might exist. At the end of the bail hearing, the Court will have to satisfy itself whether it is proper to grant bail and if so, to do so on such terms as the Court considers reasonable.

I shall now proceed to consider whether the requirement of an accused person to prove exceptional circumstances interferes with the Court's discretion under Article 23(6) of the Constitution.

In holding that section 15 of the TIA did not interfere with judicial discretion of Court to grant bail, Kikonyogo, DCJ held as follows:

> ***"Mr. Kakuru's fears on the exercise of the Court's discretion is unfounded because even section 15(1) of the TIA left the Court's discretion intact... Both High Court and subordinate courts are still free to exercise their discretion judicially and to impose reasonable conditions on the applicant.***
> ...

In the premises, I am unable to agree with Mr. Kakuru that the requirement to establish exceptional circumstances under section 15 contravene Article 23 (6) in that the provision merely provides guidance not direction. The guidelines are clearly stated when the Court 'may' exercise a discretion to deny bail or not, and when they can impose conditions. On this issue I find that sections ...15 (1), 15 (2) and 15 (3) of the TIA not inconsistent with Articles ... 23 (6)...of the Constitution."

A review of Article 23 (6) (a) shows that Court has discretion to either grant bail or not grant bail. This is evident in the use of the 'may' in this Article. The same Article guides that Court can grant bail *'on such conditions as the Court considers reasonable.'*

FHRI argued that section 15 of the TIA cited earlier in this Judgment interferes with the judicial discretion of Court to grant bail to an accused person. I note that section 15 (1) of the TIA also uses the word 'may' as opposed to 'shall'. In my view, the use of the word 'may' is instructive in resolving the question whether section 15 takes away the judicial discretion of a Court to grant bail.

This Court has not yet interpreted the use of the word 'may' in our legislation. However, in the Australian case of ***Massy v. Council of the Municipality of Yass (1922) 22 SR (NSW) 499***, Cullen CJ held as follows:

"The use of the word 'may' prima facie conveys that the authority which has power to do such an act has an option to do it or not to do it."

In another Australian case of ***Johnson's Tyne Foundry Pty Ltd v. Shire of Maffra [1949] ALR 89 at 101***, it was also held as follows:

" 'may', unlike 'shall', is not a mandatory but a permissive word although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a

mandatory word may be deprived of the obligatory force and become permissive in the context in which it appears."

Lastly, in the New Zealand case of ***Daemar v. Soper [1981] 1 NZLR 66 at 70*** the Court was interpreting the use of the word 'may' in section 147 (1) of the Summary Proceedings Act 1957. Section 147 (1) provided that *'when an information has been laid, any district court judge, justice or registrar (not being a constable) may issue a summons to the defendant in the prescribed form.'* The Court held as follows:

"The word 'may' where it appears in s 147 of the Summary Proceedings Act 1957 does confer a discretion upon the district judge, justice or registrar (as the case may be) as to whether or not he will issue summons upon the information which has been laid. It is also our opinion that the nature of that discretion is...a discretion which must be exercised in a judicial manner"

The above three persuasive authorities support my finding that the use of the word 'may' in section 15 (1) of the TIA preserves the power of the Court to either grant or not to grant bail. Thus, by using the word 'may' in section 15(1) of the TIA and not 'shall', the High Court retains its discretion to either grant or not grant bail even where these exceptional circumstances listed under section 15(3) of the TIA are not proved in respect of the listed offences in section 15(2) of the TIA.

In my view section 15 of the TIA is one of the enabling provisions that the legislature enacted to guide Courts on how to approach the issue of bail in respect of certain offences. The requirements under section 15 on the part of a bail applicant and on the Court for proof of exceptional circumstances and ensuring that an accused will appear for his or her trial do not contravene Article 23(6)(a) of the Constitution. Section 15 not only preserves the right of an accused person to apply for bail but also the Court's power to grant bail.

In conclusion on ground 2 of appeal, I have found no merit in FHRI's contentions that section 15 of the TIA interferes with the discretion of Court to grant bail. It is therefore my finding that section 15 of the TIA: (a) does not take away the right of an accused person under Article 23(6) to apply for bail before the High Court; (b) does not violate the Constitution by requiring an accused person to prove that exceptional circumstances exist to justify his or her release, where he or she is charged with serious offences triable by the High Court; and (c) does not fetter the Court's discretion to grant bail to an accused person.

In light of these findings I would hold that section 15 of the TIA does not contravene Article 23 (6) of the Constitution. Ground 2 therefore fails.

Ground 3 of Appeal

This ground was framed as follows:

> ***"That the learned Justices of the Constitutional Court erred in law in holding that Section 75(2) of the Magistrates Courts Act which provides for offences triable by Magistrates Courts but are not bailable by them does not contravene Article 23(6) of the Constitution of the Republic of Uganda."***

Counsel for FHRI faulted the finding of the Constitutional Court with respect to the constitutionality of section 75(2) of the MCA. Counsel submitted that section 75(2) of the MCA was a clog to an accused person's right to apply for bail in as far as it denied Magistrates power to grant bail for offences they had power to try. Counsel contended that there was no basis why a person charged with an offence triable by a Magistrate's Court could not apply for bail before that Magistrate.

Relying on Article 23(6) of the Constitution, FHRI's counsel contended that Courts are allowed to hear bail applications, irrespective of whether the Court is a High Court or a Magistrate's Court. Counsel therefore argued that section 75 (2) of the MCA interfered with the Magistrate's discretion to grant bail.

Counsel for FHRI further contended that if a Magistrate had power/jurisdiction to remand a person accused of an offence triable only by the High Court then that Magistrate should also have power to hear a bail application by the remanded accused person appearing before him or her.

Alternatively, counsel for FHRI contended that if a Magistrate's Court could not hear bail applications for certain offences because they were a preserve of the High Court, then there was no reason why those suspects should be brought before a Magistrate's Court in the first place as opposed to being taken to the High Court, where they could apply for bail.

In light of the above submissions, FHRI's counsel prayed to this Court to declare that section 75(2) of the MCA contravenes Article 23(6) of the Constitution.

In reply, the Attorney General contended that the purpose and effect of section 75(2) of the MCA was to provide for offences which are triable by the High Court in respect of which Magistrates cannot grant bail. He also contended that the only act permitted by the law with respect to these offences as far as Magistrates were concerned was for them to commit such accused persons to the High Court.

The Attorney General also submitted that the Constitution and the laws enacted thereunder, like section 75 of the MCA provide for a clear procedure by which an accused person can apply for bail. He reiterated his submissions on grounds 1 and 2 and contended that this process was not ad hoc but rather was subject to rules of reason, justice and law, within the limits of the gravity of the offences committed. The Attorney General prayed that the decision of the Constitutional Court be upheld.

Consideration of Ground 3 of Appeal

Section 75(1) of the MCA gives a Magistrate's Court before which an accused person is charged with an offence, power to release such an accused person on bail. However, section 75(2) of the MCA curtails Magistrates' power to grant bail in respect of certain offences as follows:

"(2) The offences excluded from the grant of bail under subsection (1) are as follows:-

(a) an offence triable only by the High Court;

(b) the offence of terrorism and any other offence punishable by more than ten years imprisonment under the Anti-Terrorism Act, 2002;

(c) an offence under the Penal Code Act relating to cattle rustling

(d) offences under the Firearms Act punishable by more than ten years imprisonment;

(e) (repealed);

(f) rape, contrary to section 123 of the Penal Code Act and aggravated defilement under section 129 of that Act;

(g) embezzlement, contrary to section 268 of the Penal Code Act;

(h) causing financial loss, contrary to section 269 of the Penal Code Act;

(i) corruption, contrary to section 2 of the Prevention of Corruption Act;

(j) bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and

(k) any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

The above provision also captures amendments introduced by the Magistrates Courts (Amendment) Act, 2007.

In holding that section 75(2) of the MCA was not unconstitutional, the Constitutional Court held as follows:

"With regard to Section 75(2) of the MCA, it is not correct to say, on the evidence before Court, that it contravenes the provisions of Article 23(6). The accused's right to bail is not absolute. It

has to be enjoyed within the confines of the law. There has to be a constitutional balance of everybody's rights."

With due respect, the learned Justices of the Constitutional Court, in my view failed to address FHRI's contentions before them. The argument of FHRI was that the Magistrates had power to try some of the offences under section 75 (2) of the MCA and yet could not grant bail to persons charged before them with those offences.

My review of FHRI's submissions brings out a number of contentions which I must resolve under this ground of appeal. The first contention is that all Courts have power to grant bail under Article 23 (6) of the Constitution. Therefore a Court which has power to try an offence should also have power to grant bail in respect of that offence.

The second contention is that a Court which has power to remand an accused person appearing before it should also have power to grant bail to such an accused person. Therefore, according to FHRI, section 75(2) of the MCA is inconsistent with Article 23 (6) of the Constitution because it curtails Magistrates from granting bail in respect of offences that they have: (a) jurisdiction to try; and (b) power to remand an accused person.

The last contention is that if Magistrates do not have power to grant bail in respect to some offences, then such accused persons suspected of having committed those offences should be produced directly before the High Court rather than being produced before the Magistrates' Court first. I will now proceed to consider these contentions.

As I noted in my resolution of ground 2, Article 23(6) of the Constitution guarantees an accused person the right to apply for bail. The Article also vests in the Court power to grant bail on such conditions as it considers reasonable.

However, I note that Article 23(6) does not define what Court is being referred to. Nevertheless, Article 257 which is the interpretation Article

of our Constitution defines the term 'Court' under Article 257(1)(d) to mean a ***'Court of judicature established by or under the authority of this Constitution.'***

In the absence of a clear definition by the Constitution of which Court is referred to in Article 23(6), it is only logical for me to infer that the Court referred to under Article 23(6) of the Constitution is such a Court that has jurisdiction to try the offence for which an accused person is applying for bail. It therefore follows that if an offence is triable by a Magistrate's Court, then such a Court should also have powers to grant bail in respect of such an offence.

I also note that a bail hearing is part and parcel of a criminal trial process. This is because a bail application is usually made after an accused person has already been produced before Court and has been charged with an offence. If this Court has the jurisdiction to try the accused person, logically it should follow that such an accused person should be able to apply to this same Court to be released on bail and the Court should also have power to grant or decline to grant such an accused person bail.

Furthermore, I also note that the responsibility vested in a Magistrate's Court to hear and dispose of an offence is much heavier than the responsibility to hear and dispose of a bail application. Trying and disposing of an offence, among others, involves taking of evidence and reviewing it, applying the law to the facts/evidence to determine the guilt or innocence of the accused person and the appropriate sentence. Therefore, it does not make sense to me for a Court to have power to carry out this more complex task and only for it to be divested of power of carrying out a lesser task of hearing and determining a bail application. Essentially hearing a bail application involves determining, among others, whether the accused person: (a) has substantial sureties; (b) is likely to abscond from his or her trial owing to the gravity of the

offence; (c) has a fixed place of abode; (d) is likely to interfere with the trial process by either intimidating witnesses or frustrating investigations.

Bearing in mind the provisions of Article 23(6) and my analysis above, it is my finding that if a Court has jurisdiction to try an offence, then such a Court should have power to hear a bail application in respect of that offence.

I will now turn to review the excluded offences under section 75(2) vis-à-vis the parties' contentions. A review of the offences listed under section 75(2) of the MCA shows that they fall into three categories.

The first category covers offences which have been repealed. These are: (a) embezzlement contrary to section 268 of the Penal Code Act; (b) causing financial loss contrary to section 269 of the Penal Code Act; (c) corruption contrary to section 2 of the Prevention of Corruption Act; and (d) bribery contrary to section 5 of the Prevention of Corruption Act.

The provisions creating these four offences were repealed by sections 68 and 69 of the Anti Corruption Act, 2009 and re-enacted under the same Act. Despite their re-enactment, section 75(2) has never been amended to reflect these changes. I cannot therefore speculate on why the legislators in their wisdom repealed the provisions relating to these listed offences and failed to make an amendment under section 75 (2) of the MCA to reflect these changes. FHRI did not canvass these amendments in its submissions. Bearing in mind the repeal of the provisions relating to these four offences by the Anti Corruption Act, 2009 and the absence of any amendment to section 75(2), I have not found it necessary to discuss them.

The second category covers offences where the jurisdiction to try them is vested in the High Court. These are: (a) an offence triable only by the High Court covered under section 75(2)(a) of the MCA; (b) the offence of terrorism and any other offence punishable by more than ten years

imprisonment under the Anti-Terrorism Act covered under section 75(2)(b) of the MCA; and (c) the offences of rape contrary to section 123 of the PCA and aggravated defilement contrary to section 129 of the PCA both covered under section 75(2)(f) of the MCA.

With regard to these offences, I note that a Magistrate's Court does not have the jurisdiction to try them. It would therefore follow that since the jurisdiction to try these offences is vested in the High Court, then the power to grant bail in respect of these offences was also rightly vested in the High Court by section 75(2). Section 75 (2) of the MCA therefore rightly excluded these offences from those over which Magistrate Courts have power to grant bail.

I therefore find nothing unconstitutional about section 75(2)(a),(b)&(e) which excludes a Magistrate's Court from granting bail in respect of offences triable only by the High Court.

The third category of offences covered by section 75(2) of the MCA are the ones where a Chief Magistrate's Court has jurisdiction to try. These are: (a) the offence of cattle rustling covered under section 75(2)(c) of the MCA; and (b) the *'offences under the Firearms Act punishable by more than ten years imprisonment'* covered under section 75(2)(d) of the MCA.

These offences are triable by a Chief Magistrates' Courts by virtue of section 161 of the MCA which provides in the relevant part as follows:

> ***"(1) Subject to this section, a magistrate's court presided over by—***
>
> ***(a) a chief magistrate may try any offence other than an offence in respect of which the maximum penalty is death"***

Under section 266 of the Penal Code Act, cattle rustling is punishable by a sentence of imprisonment for life. This puts the offence of cattle rustling under the jurisdiction of a Chief Magistrates Court. However

section 75(2)(c) excludes Chief Magistrates from hearing a bail application with respect to an accused person charged with this offence.

Does this exclusion render section 75(2)(c) of the MCA inconsistent with Article 23(6) of the Constitution? In my analysis of Article 23(6) of the Constitution I found that the Court with jurisdiction to hear/try an offence has power to grant bail in respect of that offence. In this case, the Court referred to is a Chief Magistrate's Court which has the jurisdiction to try this offence. Bearing in mind my analysis of Article 23(6), I find that this exclusion renders section 75(2)(c) of the MCA inconsistent with Article 23(6) of the Constitution because: (a) it curtails an accused person's right to apply for bail before a Court that has jurisdiction to try the offence of cattle rustling; (b) it precludes a Court with jurisdiction to try the offence of cattle rustling from hearing an accused person's application for bail and from granting bail to him or her on such terms it considers reasonable.

I shall now proceed to consider whether section 75(2)(d)of the MCA which excludes Magistrates from granting bail in respect of *'offences under the Firearms Act punishable by more than 10 years imprisonment'* is inconsistent with Article 23(6) of the Constitution.

A review of the offences under the Firearms Act, Cap 299 Laws of Uganda (as amended by the Firearms (Amendment) Act, 2006) shows that only two offences fall within the jurisdiction of a Chief Magistrate. These are: (i) Manufacturing or assembling any firearm or ammunition contrary to section 11(1) & (3) of the Firearms Act; and (ii) Importation and Exportation of firearms and ammunition without a license contrary to section 23 (1), (2) & (3). The maximum sentence for these two offences is imprisonment for life.

Bearing in mind the provisions of section 161 of the MCA, this puts these two offences under the jurisdiction of Magistrates Courts. However section 75(2)(d) excludes Chief Magistrates from hearing a bail

application with respect to parties accused of committing either of these two offences.

Does this then make section 75(2)(d) inconsistent with Article 23(6) of the Constitution? As I noted earlier in my analysis of Article 23(6) of the Constitution, a Court with jurisdiction to hear/try an offence has power to grant bail in respect of that offence. Section 75(2)(d) goes against the letter and spirit of Article 23(6) of the Constitution because it curtails an accused person's right to apply for bail before a Court that has jurisdiction to try these two offences under the Firearms Act and precludes a Court with jurisdiction to try these two offences from hearing an accused person's application for bail.

I therefore agree with FHRI (as far as the listed offences under section 75 (2)(c) & (d) of the MCA) are concerned that the learned Justices of the Constitutional Court erred in law when they held that section 75(2) of the MCA was not unconstitutional.

I note that section 75(2) of the MCA also predates the 1995 Constitution. Article 274 of our Constitution saved these existing laws and requires that they be construed to bring them in conformity with the provisions of the Constitution. Given my findings in respect of section 75(2)(c)&(d) of the MCA and bearing mind Article 274 of the Constitution, it follows that since a Chief Magistrate has power to try the offence of cattle rustling; manufacturing or assembling any firearm or ammunition without a license and Importation and Exportation of firearms and ammunition without a license, he or she has power to consider bail applications in respect of these offences.

Before I take leave of this ground, I note that counsel for FHRI made additional submissions on the power of Magistrates Courts to remand accused persons suspected of having committed offences triable by the High Court only. Flowing from this, counsel for FHRI contended that if Magistrates Courts have power to remand such accused persons then

they should also have power to grant such accused persons bail. Alternatively counsel for FHRI contended that if they did not have the power to grant bail because of lack of jurisdiction to try such offences, then upon arrest of such accused persons they should be taken straight to the High Court where they would exercise their right to apply for bail.

I note that FHRI's submissions raise important legal questions on: (a) whether a remanding Court should have power to grant bail; and (b) whether we should do away with committal proceedings. However, I find that these issues fall outside the ambit of Ground 3 of appeal, which focused on the constitutionality of section 75(2) of the MCA. For that reason, I have not considered them.

Grounds 4 and 5 of Appeal.

Ground 4 of appeal was framed as follows:

"That the learned Justices of the Constitutional Court erred in law when they did not find that persons committed to trial at the High Court are still entitled to bail as provided for under Article 23 of the Constitution of the Republic of Uganda"

On the other hand, Ground 5 of appeal was framed as follows:

"That the learned Justices of the Constitutional Court erred in law when they did not find that automatic cancellation of bail upon committal of an accused person to the High Court for trial contravenes Article 28(3) (a) of the Constitution of the Republic of Uganda"

Arguing these grounds, FHRI contended that the issue of automatic lapse of bail was considered by the Constitutional Court in ***Hon. Sam Kuteesa & 2 others v. The Attorney General, Constitutional Petitions Nos 46 of 2011 & 54 of 2011.*** He argued that in that decision, the Constitutional Court found that the automatic cancellation of bail, without any right to be heard, based on the mere fact that one is being committed to the High Court for trial, was unconstitutional.

FHRI prayed to this Court to find that the learned Justices of the Constitutional Court erred in law when they did not find that persons committed to trial at the High Court are still entitled to remain on bail pending their trial before the High Court, as provided for under Article 23(6) of the Constitution.

FHRI's counsel further prayed to this Court to find that the learned Justices of the Constitutional Court erred in law when they did not find that automatic cancellation of bail upon committal, contravenes Article 28(3) (a) of the Constitution.

FHRI prayed that this Court confirms the position of the Constitutional Court in ***Hon. Sam Kuteesa & 2 others v. The Attorney General*** (supra) and puts these matters to rest.

The Attorney General associated himself with the decision of the Constitutional Court in ***Hon. Sam Kuteesa & 2 others v. The Attorney General***, (supra) and submitted that the Constitutional Court comprehensively resolved matters relating to the automatic lapse of bail in that case.

Consideration of Grounds 4 and 5 Appeal.

I have carefully considered the submissions of both parties on these two grounds. These grounds concerned the issue of automatic lapse of bail upon committal to the High Court.

A perusal of the record of appeal however shows that the Constitutional Court did not canvass any issue relating to automatic cancellation of bail upon committal to the High Court. The reason for this is not difficult to decipher. As the supplementary Record of Appeal shows, FHRI did not make any allegations to the Constitutional Court on the automatic lapse of bail.

Furthermore, it is evident from the Judgment of the Constitutional Court that no issue was ever framed by the parties on automatic lapse of bail upon committal for the Constitutional Court's determination.

I have further noted that the decision of the Constitutional Court in ***Constitutional Petitions Nos 46 of 2011 & 54 of 2011 Hon. Sam Kuteesa & 2 Others v. Attorney General***, which was cited by both parties, arose much later after this Petition had been decided in March 2008. There is therefore no way the learned Justices of the Constitutional Court could have referred to it.

In light of the above, it was wrong for FHRI to fault the learned Justices of the Constitutional Court for failing to pronounce themselves on matters that were never put before them. Ground 4 and 5 also fail.

Ground 6 of Appeal

Ground 6 of Appeal was framed as follows:

"That the learned Justices of the Constitutional Court erred in law when they did not find that the burden and onus of proof in a bail application lies with the State."

FHRI's counsel contended that under Article 23(6)(a) an accused person is entitled to apply for bail and that the State has a burden to prove why the accused should not be granted bail. FHRI further contended the accused person's role was to apply for bail and not to prove why he or she should be denied bail.

FHRI also contended that it was after the State has given reasons why the accused should be denied bail that the burden shifts to the accused person. Furthermore, FHRI contended that upon hearing the applicant's application, the Court might grant the accused bail on such conditions as it deems reasonable, since this was entirely an exercise of the Court's discretion. Counsel further argued that this should

however be distinguished from Article 23(6)(b) and (c) of the Constitution, which he contended was instructive and mandatory.

Regarding Article 23(6)(b), FHRI's counsel contended that where an accused person has been remanded in custody for an offence triable by the High Court, as well as a subordinate court, for sixty days before trial, the person was entitled to be released on bail on such conditions as the Court considers reasonable.

With regard to Article 23(6)(c), counsel contended that where an accused person has been remanded in custody for an offence triable only by the High Court for one hundred and eighty days before the case is committed to the High Court, the person was entitled to be released on bail on such conditions as the Court considers reasonable.

In FHRI's view, once an accused clocked the mandatory period on remand, the Court was under obligation to release the accused on bail, noting that there was no requirement on the accused person's part either to apply for bail or give reasons why the accused should be released on bail.

In the circumstances, FHRI contended that the burden and onus of proof fell squarely on the State to give reasons why the accused person should not be released on bail. Furthermore, that any attempt by the Court to deny the accused bail without valid reasons being given by the State was a clog on the right to bail, and therefore unconstitutional.

FHRI also argued that the Court's power in this regard only lies in setting conditions that will ensure the accused person's return to stand trial, but not to deter him or her from being released on bail. Counsel further submitted that in setting the conditions, the Court was expected to set conditions that did not contravene the Constitution.

In conclusion, counsel invited Court to find that under Article 23(6)(b) and (c) of the Constitution, the burden and onus of proof in a bail application lies with the State.

In response, the Attorney General submitted that this issue was never raised in the Petition filed in the Constitutional Court.

The Attorney General submitted that it was therefore improper and an abuse of the procedure of this Court for FHRI to smuggle into Court a matter that was never canvassed in the Constitutional Court. The Attorney General prayed that this Court decline to consider this ground. He reiterated his prayer that this Court upholds the decision of the Constitutional Court on the matter of bail and dismiss this Appeal.

Court's Consideration of Ground 6 of Appeal

I have perused the submissions of both parties to the Constitutional Court. A perusal of the declarations sought by FHRI in its Petition confirms that no such declaration was ever sought from the Constitutional Court. I agree with the Attorney General that no issue on the burden and onus of proof in bail applications was ever framed for the Constitutional Court to determine. The Constitutional Court therefore did not pronounce itself on this issue and cannot be faulted for not doing so. Ground 6 of Appeal therefore fails.

Costs

In its Petition before the Constitutional Court, FHRI prayed for costs. However, the records of proceedings of three members of Coram show that FHRI withdrew its prayer for costs. The records of proceedings of the other two members are silent on this issue. Be that as it may, in the lead judgment of Kikonyogo, DCJ which the rest of the members on Coram entirely agreed with, she made no order as to costs since the petition was brought in public interest.

FHRI prayed for costs in its Memorandum of Appeal to this Court. However, counsel for FHRI did not submit on this prayer in their submissions. In the same regard, the Attorney General did not make any submissions on costs.

The issue of award of costs in public interest litigation matters and what such costs should cover was considered in two recent decisions of this Court, namely ***Kwizera Eddie v. Attorney General, Constitutional Appeal No. 01 of 2008*** and ***Muwanga Kivumbi v. Attorney General, Constitutional Appeal No. 06 of 2011.*** The position of the Court in these two decisions is that costs, even in constitutional matters, ordinarily follow the event, as provided for under section 27 of the Civil Procedure Act (hereinafter referred to as the CPA). Despite my reservations on the applicability of section 27 of the CPA to constitutional appeals and applications which I elaborated in my Judgments in the above two appeals, I am still bound by the majority decision of the Court in ***Muwanga Kivumbi*** (supra) on the applicability of section 27 of the CPA in constitutional matters.

The Constitutional Court declined to award costs to FHRI on grounds that this was a public interest matter. There is no dispute that the Petition from which this appeal arose was a public interest petition. In Constitutional Petition No. 20 of 2006, FHRI described itself as a Non Governmental Organization whose objectives include, among others, the protection and promotion of human rights, provision of legal aid, advocating for legal reform, and ensuring observance of human rights. I therefore agree with the Constitutional Court that FHRI filed this Petition in public interest and that it would not be proper to award costs to them. Accordingly, because this was a public interest matter and no submission was made on the prayer for costs by FHRI, I would not award costs to FHRI.

Conclusion

In conclusion, I make the following findings:

(a) On ground 1, I find that the learned Justices of Appeal did not err when they held that section 14(2) of the TIA did not contravene Article 28(1) of the Constitution. Ground 1 should fail.

(b) On ground 2, I find that the learned Justices of Appeal did not err when they held that section 15 of the TIA did not contravene Article 23(6) of the Constitution. Ground 2 should fail.

(c) On ground 3, I find that the learned Justices of Appeal partly erred when they held that section 75(2)(c)&(d) of the MCA did not contravene Article 23(6) of the Constitution. Ground 3 should partly succeed.

(d) On ground 4, I find that the issues raised in this ground were never canvassed at the Constitutional Court. Ground 4 should fail.

(e) On ground 5, I find that the issues raised in this ground were never canvassed by FHRI at the Constitutional Court. Ground 5 should fail.

(e) On ground 6, I also find that the issue raised therein was never canvassed at the Constitutional Court. Ground 6 should fail.

In light of these findings, I would partially allow the appeal and make the following declarations and orders:

(1) That section 14 (2) of the Trial on Indictments Act construed with Article 274 of the Constitution is not inconsistent with Article 28(1) of the Constitution as an accused person should always be accorded a hearing before his or her terms of bail are revised.

(2) That section 15 of the Trial on Indictments Act construed with Article 274 of the Constitution is not inconsistent with Article 23(6) of the Constitution because it does not take away the right of an accused person to apply for bail.

(3) Construed with Article 274 of Constitution, section 15 of the Trial on Indictments Act which requires a person accused of a capital offence to prove exceptional circumstances before he or she is granted bail is not inconsistent with Article 23(6) of the Constitution.

(4) That section 15 of the Trial on Indictments Act construed with Article 274 of the Constitution does not fetter the Court's discretion to grant bail to a person accused of a capital offence and is therefore not inconsistent with Article 23(6) of the Constitution.

5) That section 75(2)(c) of the Magistrates Courts Act which: (a) denies an accused person the right to apply for bail before a Chief Magistrate in respect of the offence of cattle rustling and (b) excludes a Chief Magistrate from considering such a bail application and yet he/she has jurisdiction to try this offence, is inconsistent with Article 23(6) of the Constitution.

(6) That section 75(2)(d) of the Magistrates Courts Act which: (a) denies an accused person the right to apply for bail before a Chief Magistrate in respect of the offences of Manufacturing or assembling any firearm or ammunition without a license and Importation and Exportation of firearms and ammunition without a license and (b) excludes a Chief Magistrate from considering bail applications with respect to these offences and yet he/she has jurisdiction to try them, is inconsistent with Article 23(6) of the Constitution.

The following orders of the Constitutional Court which were not challenged in this Appeal are upheld:

(1) Section 16 of Trial on Indictments Act contravenes Articles 20, 23(6) and 28 of Constitution and is null and void to the extent of the inconsistency.

(2) Section 76 of Magistrates Courts Act is null and void to the extent of inconsistency with Articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution in so far as it infringes on the constitutional rights to liberty and speedy trial.

(3) Sections 219, 231 and 248 of UPDF Act, which subject accused persons to lengthy periods of detention are inconsistent with Articles 20, 23(6), 28(1) and 28(3) of the Constitution.

(4) Section 25 (2) of the Police Act is inconsistent with Articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void to the extent of inconsistency.

Lastly, each party will bear their own costs of this appeal.

Dated at Kampala this 26th day of October 2018.

Kisaakye

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JUSTICE DR.ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT