

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

CONSTITUTIONAL PETITION NO. 44 of 2011

CAPTAIN BENJAMIN AHIMBISIBWE.....PETITIONER

VERSUS

ATTORNEY GENERALRESPONDENTS

CORAM : **Hon. Mr. Justice Kenneth Kakuru, JA/JCC**
 Hon. Lady Justice Elizabeth Musoke, JA/JCC
 Hon. Mr. Justice Cheborion Barishaki, JA/JCC
 Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC
 Hon. Mr. Justice Stephen Musota, JA/JCC

JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Mr. Justice Ezekiel Muhanguzi, JCC, I agree with him that the petition has no merit and ought to be dismissed.

Looking at the petition as a whole I would add that, it raises no issues for constitutional interpretation. It has indeed been resolved by re-evaluating the evidence before us. I am inclined to think that the petitioner ought to have raised the issue of double jeopardy at his trial at the General Court Martial. He is still at liberty to do so. In the event that the objection is dismissed he would then appeal the decision to the Court Martial Appeals Court either after the full trial or after the decision on a preliminary matter.

As Musoke, Barishaki and Musota, JJCC also agree, this petition stands dismissed with no order as to costs.

Dated at Kampala this 16th day of Jan 2020.



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Kenneth Kakuru
JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 0044 OF 2011
(Coram: Kakuru, Musoke, Cheborion, Muhanguzi, Musota JJA/JJCC)

CAPTAIN BENJAMIN AHIMBISIBWE :::::::::::::::::::: PETITIONER

VERSUS

ATTORNEY GENERAL :::::::::::::::::::: RESPONDENT

JUDGMENT OF ELIZABETH MUSOKE, JA/JCC

I have had the benefit of reading in draft the lead judgment of my learned brother Muhanguzi, JA/JCC, and I concur with the reasoning and conclusions reached therein, that the petition has no merit and should be dismissed with no order as to costs. I have nothing useful to add.

Dated at Kampala this 16th day of Jan.....2020



Elizabeth Musoke
Justice of Appeal/Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Kenneth Kakuru, Elizabeth Musoke, Cheborion Barishaki,
Ezekiel Muhanguzi & Stephen Musota, JJA/ JJCC)

Constitutional Petition No.44 of 2011

BETWEEN

Captain Benjamin Ahimbisibwe.....Petitioner

AND

The Attorney General.....Respondent

JUDGMENT OF BARISHAKI CHEBORION, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Ezekiel Muhanguzi, JA/JCC and I agree with the analysis and conclusion that this Petition lacks merit and should be dismissed.

I also agree that all the declarations and orders sought should be denied.

Dated at Kampala this16th..... day ofJan..... 2020


Cheborion Barishaki

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 44 OF 2011

5 **CAPTAIN BENJAMIN AHIMBISIBWEPETITIONER**
VERSUS
ATTORNEY GENERAL.....RESPONDENT

Coram: Hon. Mr. Justice Kenneth Kakuru, JA/JCC
10 Hon. Lady Justice Elizabeth Musoke, JA/JCC
Hon. Mr. Justice Cheborion Barishaki, JA/JCC
Hon. Mr. Justice Ezekiel Muhanguzi, JA/JCC
Hon. Mr. Justice Stephen Musota, JA/JCC

15 **JUDGMENT OF EZEKIEL MUHANGUZI, JA/JCC**

The Petitioner Capt. Benjamin Ahimbisibwe, filed this Petition under Article 137 of the constitution seeking various declarations from this court on the following grounds:-

20 “a) *That the trial of the Petitioner in the General Court Martial under Case No. UPDF/GCM/102/2009 for the offence of conduct prejudicial to good order and discipline of the Defence Forces contrary to S.178 (1) (2) and (5) of the UPDF Act No. 7/2005 when he had previously been tried for the same offence by the Unit Disciplinary Committee (UDC) of the Military Police at Makindye*
25 *and convicted and sentenced contravenes the provisions of Article*

28 (9) which prohibits the trial of any person twice for the same offence.

- 30
- b) *That the detention of the Petitioner at Luzira Prison on remand by the General Court Martial in Case No. UPDF/GCM/102/2009 for the offence that he had been tried and convicted by the Unit Disciplinary Committee contravenes the provisions of Article 28 (9) of the Constitution of Uganda.*
- 35
- c) *That the trial of the Petitioner by the General Court Martial on the defective amended charge sheet that had offences for which the Court had no jurisdiction to entertain offended the principles of a fair trial and was in contravention of Articles 28, 44 (c) and 45 of the Constitution of Uganda.*
- 40
- d) *That the trial of the Petitioner by the General Court Martial and the UDC for the offence of the conduct prejudicial to good order and discipline C/S 178 of the UPDF Act, 2005 contravened the provisions of Article 28, 44 (c) and 45 of the constitution in as far as the definition of the offence excludes the matters which the charge incorporated as constituting the offence.”*

Therefore the Petitioner prays that the court may grant:-

- 45
- i. *A declaration that the Petitioner’s trial in Case No. UPDF/GCM/102/2009 contravenes the provisions of Article 28 (9) because he had been previously tried in UDC under Criminal case No. 57 of 2009 and convicted for the same offence.*
- 50
- ii. *A declaration that, by reason of the above the Petitioner is entitled to a plea of autrefois convict and that his trial in the General Court Martial be halted and charges withdrawn against him and he be discharged.*
- 55
- iii. *A declaration that the conviction and sentencing the Petitioner by the UDC for the offence of conduct prejudicial to good order and discipline C/S 178 of UPDF Act was illegal and unconstitutional.*

- iv. *A declaration that the detention of the Petitioner at Luzira prison is illegal and unconstitutional.*
- v. *An order for a monetary compensation for the suffering and injustice caused to him as a result of the illegal trial and detention.*
- 60 vi. *The Respondent pays costs of this Petition to your Petitioner.”*

The Petition is supported by the affidavit of the Petitioner sworn at Luzira on the 18th day of October, 2011.

65 The Attorney General filed an answer to the Petition denying all the allegations and contending that the Petition is misconceived and should be dismissed.

On the 18th June, 2012, the parties in a scheduling conference, agreed on the following facts:-

70 That the Petitioner, an army officer was tried by the Unit Disciplinary Committee of Military Police at Makindye for the offence of conduct prejudicial to good order and discipline contrary to section 178 of the UPDF Act, 2005. He was convicted and sentenced to 3 years imprisonment.

75 Being dissatisfied with the decision, he appealed to the General Court Martial. The appeal was dismissed and further the petitioner appealed to the Court Martial Appeals Court. The conviction was quashed and sentence set a side. Before the appeal could be disposed of, the Petitioner was further charged with the same offence in the General Court Martial and plea of autrefois convict was only halted by this court.

80 The parties agreed on the following issues to be resolved by the court.

1. *Whether the trial of Petitioner in the General Court Martial for the same offence he had been tried before and convicted contravened the provisions of Article 28 (a) of the Constitution.*

2. Whether there are remedies available to the parties.

85 At the hearing of this Petition, on 17th June 2019, Mr. Lawrence Tumwesigye, learned counsel, represented the Petitioner while Kudoli Wanyama, Principal State Attorney, appeared for the respondent.

Submissions for the Petitioner

90 Issue No. 1. ***Whether the trial of Petitioner in the General Court Martial for the same offence he had been tried before and convicted contravened the provisions of Article 28 (9) of the Constitution.***

Mr. Tumwesigye submitted that the Petitioner was charged and convicted in the Unit Disciplinary Committee (UDC) with the offence of conduct prejudicial to good order and discipline of the Defence Forces contrary to Section 178 (1) (2) and (5) of the UPDF Act No. 1 of 2005.

Further, that the Petitioner was being tried in the General Court Martial Vide Case No. UPDF/GCM/102/2009 for the same offence of conduct prejudicial to good order and discipline of the Defence Forces contrary to Articles 28 (9) of the Constitution. In support of his argument, 100 counsel relied on ***Connelly V DPP (1964) AC 1254***, for the proposition that the doctrine of res judicata occupies the same place in the civil law as the doctrine of autrefois does in criminal law which is to the effect that a man ought not to be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or 105 a previous acquittal.

Submissions for the respondent

In reply, Mr. Wanyama learned Principal State Attorney, submitted that the Unit Disciplinary Committee is mandated to regulate the conduct of UPDF officers under Section 77 of the UPDF Act and that it is not a 110 competent court under Article 28 (9) of the Constitution but a disciplinary Committee. He pointed out that the role of Unit

Disciplinary Committee is to hold an inquiry to find out or ascertain whether or not the Petitioner should be disciplined. Further, that the proceedings before General Court Martial determine criminal or civil liability and impose appropriate sentences or remedies for or against and thus not inconsistent with Article 28 (9) of the Constitution. Counsel prayed court to dismiss the Petition with costs to the respondent.

Consideration of the petition.

I have carefully considered the Petitioner's Petition, the submissions of counsel, the laws cited and the authorities relied on.

There are two issues that were raised for determination by this court. Firstly, whether the trial of the Petitioner in the General Court Martial for the same offence he had been tried for before and convicted of contravened the provisions of Article 28 (9) of the Constitution. Secondly, whether there are remedies available to the parties, however, counsel on both sides did not submit on this issue.

This Petition was filed under Article 137 of the Constitution which expressly provides as follows:-

"137. Questions as to the interpretation of the Constitution.

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that—

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

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the

140 *constitutional court for a declaration to that effect, and for redress where appropriate.*

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

145 *(a) grant an order of redress; or*

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

150 *(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—*

(a) may, if it is of the opinion that the question involves a substantial question of law; and

155 *(b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.*

(6) Where any question is referred to the constitutional court under clause (5) of this article, the constitutional court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision.

160 *(7) Upon a petition being made or a question being referred under this article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it.”*

165 The Petitioner petitioned this court alleging that the acts of the respondent to wit; trying him with the offence he had been tried for by the Unit Disciplinary Committee are contrary to Article 28(9) of the Constitution. In my opinion this petition falls under Article 137 (3) (b) of the Constitution as reproduced above.

170 In answer to issue number one, it is not in dispute that the petitioner
was charged on 17th July, 2009 and tried by the Unit Disciplinary
Committee of Military Police at Makindye for the offence of conduct
prejudicial to good order and discipline contrary to section 178 of the
UPDF Act, 2005. The record of the petition at page 76 shows that he
was convicted as charged and sentenced to 3 years imprisonment. He
175 was also dismissed from the defence forces with disgrace.

Further, it is not in contention that the petitioner was charged on 10th
November, 2009 with the offence of conduct prejudicial to good order
and discipline of the defence forces contrary to section 178 (1) (2) and
(5) of the UPDF Act no. 7 of 2005. He was being tried for the offence by
180 the General Court Martial hence this petition, alleging that his trial was
against the principle of double jeopardy as provided for under Article
28 (9) of the Constitution, which provides as follows:-

“28. Right to a fair hearing.

185 ***(9) A person who shows that he or she has been tried by a competent
court for a criminal offence and convicted or acquitted of that offence
shall not again be tried for the offence or for any other criminal offence of
which he or she could have been convicted at the trial for that offence,
except upon the order of a superior court in the course of appeal or review
proceedings relating to the conviction or acquittal.”***

190 My understanding of the above provision of the Constitution is that a
person should not be tried or punished more than once for the same
act. In this petition, Capt. Benjamin Ahimbisibwe alleges that his trial in
the General Court Martial amounts to double jeopardy since he had
been tried and sentenced by the Unit Disciplinary Committee.

195 In ***Attorney General V Uganda Law Society, Supreme Court
Constitutional Appeal No. 1 of 2006***, Mulenga, J had this to say:-

200 “.....Article 28(9) of the Constitution, which prohibits the trial of a person for an offence of which he or she has been convicted or acquitted. In effect that provision is an aspect of the protection of the right to fair hearing, namely the right not to be tried more than once on the same facts or for the same actus reus. The principle behind that right originates from an old English common law maxim that “no man is to be brought in jeopardy of life or limb more than once for the same offence”. I agree with the proposition invoked by Okello J.A. (as he then was) that a constitutional provision which relates to a fundamental right
205 must be given an interpretation that realises the full benefit of the guaranteed right. Article 28(9) is such a provision that must be given such interpretation, and not the narrow interpretation urged by the appellant.

210 Subject to the rule against misjoinder, the prosecution has the liberty to join in the same charge sheet or indictment against an accused person all possible offences arising from the same facts in order that the offences are tried together. The law also empowers the court in appropriate circumstances to convict an accused person of an offence established by the adduced evidence instead of the offence stated in the charge sheet or indictment. All this is in recognition of the principle that an accused person should be subjected to trial
215 on the same facts only once.”

The minimum requirements under which *res judicata* can be determined were stated by the Supreme Court in ***Karia and Another v Attorney General and others [2005] 1 EA 83*** to be that; (a) there has to be a former suit or issue decided by a competent court (b) the matter in
220 dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar and (c) the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.

225 Therefore to determine double jeopardy/doctrine of autrefois in this case; (i) the previous offence must have been determined by a

competent court; (ii) the previous offence against the petitioner must have been directly or substantially the same as the present offence where double jeopardy is being pleaded; and (iii) the parties in the
230 previous and present cases must be the same.

Firstly, the petitioner was tried by the Unit Disciplinary Committee. The Committee found him guilty, convicted him and sentenced him to 3 years imprisonment. That Committee is provided for under section 195 of the UPDF Act and under subsection 3 the committee has powers to
235 try any person for any non-capital offence under the Act and impose any sentence authorized by law.

The respondent argued that the UDC is not a competent court within the meaning of Article 28(9) of the Constitution. A competent court in this context means a court with jurisdiction to try a matter/case. As
240 earlier noted above, the Unit Disciplinary Committee has powers to try any person for any non-capital offence and thus has jurisdiction to hear and determine such offences. It is therefore a competent court within the meaning of Article 28(9) of the Constitution.

Secondly, the petitioner was charged with the offence of conduct prejudicial to good order and discipline contrary to section 178 of the
245 UPDF Act in the Unit Disciplinary Committee and in the General Court Martial.

The particulars of the offence of conduct prejudicial to good order and discipline before the Unit Disciplinary Committee are that; *“On or
250 around October 2007, the accused while in Kampala District assisted one Hope Balikajja to change her names to Namara Mebel who died in the process of processing the death benefit of her husband one Kidega who died in Kitgum and obtained court order to re-open the account no. 0140030557700. He retained ATM card and withdrew 40 million
255 shillings.”*

The particulars of the offence of conduct prejudicial to good order and discipline before the general court martial are that; *“RO/6254 CAPT. RICHARD NANA, RO/8219 CAPT. B KALENZI, RO/8272 CAPT. BENJAMIN AHIMBISIBWE and others still at large while at Land Forces HQS Bombo and diverse places in Kampala used one Hope Mukabarikaje as Namara Mable in order to obtain pension/survivors benefits for the family of Capt. Edward Musoke and put the money worth Shs 61,000,000/=(sixty one million Uganda shillings) to personal use.”*

Although the wording in the above particulars of the offence is different, the two offences arose in the same transaction, however the offences were committed against different people. The offence against the petitioner before the Unit Disciplinary Committee involved the benefits for the late Kidega amounting to 40 million shillings and the offence before the General Court Martial involved the benefits for the family of the late Capt. Edward Musoke amounting to 61 million shillings.

It is therefore clear that although the two offences arose in the same transaction, they were committed against different people. I would therefore find that the two offences are not directly or substantially the same.

Further, I find that even if the evidence/witnesses are the same, it would not mean that the result of the trial would be the same per se. A conviction or acquittal in the previous offence before the Unit Disciplinary Committee would not necessarily involve a conviction or acquittal in the present offence before the General Court Martial.

Conclusion

In the result, I find that the petitioner’s trial in the General Court Martial for the offence of conduct prejudicial to good order and

discipline contrary to section 178 of the UPDF Act, 2005 did not amount
285 to double jeopardy. The parties involved are different and the amount
of money stolen is different.

I find that this petition lacks merit, and would deny all the declarations
and orders sought and the petition be hereby dismissed.

Dated at Kampala this.....16th.....day of.....Jan.....2020.

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Ezekiel Muhanguzi
Justice of Appeal/ Constitutional Court

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 44 OF 2011
CAPTAIN BENJAMIN AHIMBISIBWE :::::::::::::::::::: PETITIONER
VERSUS
ATTORNEY GENERAL :::::::::::::::::::: RESPONDENT

CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JA/JCC
HON. JUSTICE CHEBORION BARISHAKI, JA/JCC
HON. JUSTICE EZEKIEL MUHANGUZI, JA/JCC
HON. JUSTICE STEPHEN MUSOTA, JA/JCC

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft the judgment by my brother Justice Ezekiel Muhanguzi, JA/JCC. I am in agreement with his reasoning and orders he has proposed.

The petitioner's trial in the General Court Martial for the offence of conduct prejudicial to good order and discipline contrary to section 178 of the UPDF Act, 2005 did not amount to double jeopardy.

The facts constituting the offences were different and the amount of money stolen is different. The offence against the petitioner before the Unit Disciplinary Committee involved the benefits of the Late Kidega amounting to 40 million shillings and the offence before the General Court Martial involved the benefits for the family of the late Capt. Edward Musoke amounting to 61 million shillings.

This petition lacks merit and the petitioner is not entitled to the declarations and orders sought. The petition stands dismissed.

Dated this 16th day of Jan 2020



Stephen Musota
Justice of Appeal/Constitutional Court