

**THE REPUBLIC OF UGANDA**

**CONSTITUTIONAL COURT**

**CONSTITUTIONAL REFERENCE NO. 20 OF 2005**

**(CORAM: MUKASA-KIKONYOGO; DC.J, OKELLO, MPAGI- BAHIGEINE,  
KITUMBA AND BYAMUGISHA, JJ.A)**

**UGANDA;,,;PROSECUTOR**

**VERSES**

**COL. (R I D) DR KIZZA BESIGYE;,,;ACCUSED**

*Criminal Law—Treason—Treason contrary to Section 23 (1) (c) of Penal Code Act*

*Criminal Law—Rape—Rape contrary to Section 123 of Penal Code Act*

*Constitutional Law—Bail—Applicant not to be deprived of his/her freedom unreasonably*

*Constitutional Law—Bail—Refusal to grant bail—Bail not to be refused merely as punishment as this would conflict with presumption of innocence*

*Constitutional Law—Bail—Refusal to grant bail—Refusal to grant bail not to be based on mere allegations*

*Constitutional Law—Bail—Discretion to set bail conditions—Both High Court and subordinate Courts have discretionary powers to set bail conditions which they deem reasonable, though this must be done with caution*

This matter was placed before the Constitutional Court by way of reference under Article 137 (5) of the Constitution of the Republic of Uganda, 1995. The main thrust of this reference was “whether under Article 23 (6) of the Constitution, Courts have the discretion to grant or not to grant bail.

The respondent (a presidential candidate) and 22 others had been arrested and jointly

charged with treason contrary to Section 23 (1) (c) of the Penal Code Act. The respondent was also charged with rape contrary to Section 123 of the Penal Code Act.

He applied for bail which was opposed by the Director of Public Prosecutions (DPP). The principle Judge granted the respondent interim bail and referred the matter to the Constitutional Court for determination in regard to grant of bail.

The DPP opposed the bail application on two grounds, namely: that the Court has discretion to grant or not to grant bail, pointing out that, however, in the case of the applicant, there were no exceptional circumstances as stipulated under Section 15 of the Trial on Indictment Act, Cap 23 which would warrant the exercise of Court's discretion in the applicant's favour. Secondly, that the High Court had given conflicting interpretation of Article 23 (6) (a) of the Constitution thus leading to serious confusion in the lower Courts which are bound by the High Court decisions.

**HELD:**

The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The refusal to grant bail should not be based on mere allegations. The grounds must be substantiated. Both High Court and the subordinate Courts have discretionary powers to set bail conditions which they deem reasonable, though this must be done with caution

*Bail granted.*

*Dated on 25<sup>th</sup> day of September 2006 at Kampala*

*MUKASA KIKONYOGO, DC.J*

*OKELLO, J.A*

*MPAGI BAHIGEINE, J.A*

*KITUMBA, J.A*

*BYAMUGISHA, J.A*

**Legislation considered:**

Penal Code Act, Cap 106, Sections 23 (1) (c)

The Constitution of the Republic of Uganda, 1995, Articles 23 (6), (a), 137 (5)

Trial on Indictment Act, Cap 23, Section 15

**Case cited:**

Layan Yahaya Vs Uganda, High Court Miscellaneous Criminal Application No.  
96 of 2005

**Other legal materials referred to:**

Black's Law Dictionary, Sixth Edition