

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

CONSTITUTIONAL REFERENCE NO. 31 OF 2010

5 *(Arising out of Criminal Case No. HCT-ACD-00-CSC-37/2010)*

Under Constitutional Court (Petitions and References) Rules 2005

BETWEEN

UGANDA:.....PROSECUTOR

AND

10 **ATUGONZA FRANCIS:.....ACCUSED**

CORAM: HON. JUSTICE A.E.N.MPAGI-BAHIGEINE, DCJ

HON. JUSTICE C.K.BYAMUGISHA,JA

HON. JUSTICE S.B.K.KAVUMA,JA

15 **HON. JUSTICE A.S.NSHIMYE,JA**

HON. JUSTICE M.S.ARACH AMOK,JA

COURT RULING

20 This Reference arises out of High Court (Anti- Corruption Division) Criminal Case
No. HCT- ACD-OO-CSC-37/2010.

The applicant herein, Francis Atugonza, was charged with committing an offence of abuse of office contrary to section 11(1) of the Anti-corruption Act, No 6 of

2009. The acts complained of are alleged to have been committed between December 2007 and December 2008.

Mr. Mohamed Mbabazi, learned counsel for the applicant, objected to the charge in that the Anti-Corruption Act came into force on 25th August 2009, much later than
5 the alleged acts. This therefore offended and or violated article 28(7) and (12) of the Constitution.

The trial judge therefore framed the question for constitutional interpretation by this court in the following terms.

10 *“Whether the charging of the accused under the Anti- corruption Act, 2009 which commenced on the 25th August 2009, for the offence committed between December 2007 and December 2008 is consistent with articles 28(7) and (12) of the Constitution”*

15 Mr. Mbabazi pointed out that when the Anti-Corruption Act 2009 came into force, Section 69 thereof repealed various sections of the Penal Code i.e. 85-89. For this purpose it was section 87 providing for the offence of Abuse of Office.

However, at the commencement of the 2009 Act, the offence under Section 87 was decriminalised therefore the applicant was charged with a non existent offence, he
20 argued. The new Section 11(1) of the Anti- Corruption Act makes the sentence heavier which renders the entire charge inconsistent with article 28(7) and (12).

Learned counsel complained about the lack of a grandfather Clause under the new Act to cover the transitional period, as is the case in other statutes like the UPDF Act No 7/2005, and Labour Dispute Arbitration Act 8/2006.

He asserted that the applicant could not have had the mens rea to commit an offence not in existence at the time. This therefore was retrospective legislation.

He prayed Court to find that charging the applicant under the Anti-Corruption Act for an offence committed before the Act came into existence is inconsistent with
5 article 28(7) and (12). He asked for appropriate directions to the Lower Court.

In reply, Mr. Richard Adrole, learned State Attorney, opposed the reference contending that the charge under the Anti- Corruption Act was valid. The offence
10 under Section 11 of the Anti-Corruption Act is the same offence of Abuse of Office as in the old section. There was no requirement that persons must be charged under existing laws. The article only requires that criminal charges be brought in respect of offences which are founded on an act or omission, that at the time it took place, constituted a criminal offence. The law allows for criminal
15 charges to be brought against a person in respect of acts or omissions which at the time they were committed constituted an offence, but where the law establishing those offences has since been repealed.

He sought to rely on Section 13(1) of the Interpretation Act to save situation, probably oblivious of provisions of section 1 (3) thereof which states:

20 *“This act shall not apply for the construction or interpretation of the constitutional instrument or an applied law”*

He argued that it was thus lawful to charge the applicant under the re-enacted section 11 of the Anti-Corruption Act with modifications. As such any reference to the offence of Abuse of Office (as it was stated in section 87 of the Penal Code
25 Act) is construed as a reference to the re- enacted section 11 of the Anti Corruption

Act for acts that constituted offences under the repealed Section 87 of the Penal Code Act. The fact that a heavier penalty was added is a question to be considered by the Court at the time of sentencing, under Article 28(8). If the Judge imposed a harsher sentence under the new Act, there would be inconsistency with the
5 Constitution. It would however be the duty of counsel present to point that out to Court.

Learned counsel prayed Court to find that the charging of the applicant under the Anti-Corruption Act, 2009 which came into force on 25th August 2009, for offences committed between December 2007 and December 2009 is consistent
10 with Article 28(7) and (12) of the Constitution.

In rejoinder Mr. Mbabazi strenuously argued that a remedy would only be in the grand father Clause and in its absence, the charge is inconsistent with Article 28(7) and (12).

15

Section 87 of the Penal Code provides:

Abuse of office

87 (1)

20

“A person who being employed in a public body or a Company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or any other person, in abuse of the authority of his or her office, commits an

offence and is liable on conviction to imprisonment for a period not exceeding seven years.

5 (2) *Where a person is convicted of an offence under subsection (1) and the act constituting the offence was done for the purpose of gain, the Court shall in addition to any other penalty it may impose, order that anything received is a consequence of the act be fortified to the Government”*

Section 11 of the Anti-Corruption Act similarly reads;

11 Abuse of office.

10 (1) *A person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary prejudicial to the interests of his or her employer or any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding*
15 *one hundred and sixty currency points or both.*

(2) *Where a person is convicted of an offence under subsection (1) and the Act constituting the offence was done for the purposes of gain, the court shall in addition to any other penalty it may impose, order that anything received as a consequence of the act, be fortified to the government.*

20 The Court is called upon to test the validity of the charge preferred against the appellant as against Article 28(7) and (12) of the Constitution. These constitutional provisions state:

28(7)

“No person should be charged of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a Criminal offence”

(12)

5 *“Except for contempt of Court, no person shall be convicted of a Criminal offence unless the offence is defined and the penalty for it prescribed by law”*

The constitutional provisions prohibit the retrospective charging of a person especially with an undefined offence.

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When an action is challenged to be unconstitutional, it is the duty of this court as guardian of the Constitution to interpret the Constitution and determine the validity of that action.

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The language of section 87 of the Penal Code vis-a- vis section 11(1) of the Anti Corruption Act is so plain and unambiguous that the words are to be given in their natural literal meaning. That being the case it is also plain that Section 11 is a reproduction of section 87 of the Penal Code Act with only the modification
20 regarding the fine.

For this purpose it is important to determine the object of the Anti-Corruption Act .The preamble is a vital aid to its interpretation. It determines its objective. The preamble normally is a preliminary statement of the reasons which have made the Act desirable. It may also be used to introduce a particular section or group of
25 sections.

The preamble to the Anti Corruption Act, 2009 states:

“ *An Act to provide for the effectual prevention of corruption in both the public and private sector, to repeal and replace the Prevention of Corruption Act, to consequentially amend the Penal Code Act, the Leadership Code Act and to provide for other related matters*”

With the foregoing in mind, it is a general rule that when a statute is repealed and all or some of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmation of the old law, and a neutralisation of the repeal, so that the provisions of the repealed Act which are thus re-enacted continue in force without interruption. **(Emphasis added)** and all rights and liabilities thereunder are preserved and may be enforced. **See Halsbury’s Laws 3rd Edition Vol. 36 paragraph 719.** Thus the vital function of the grandfather clause alluded to by Mr. Mbabazi would be superfluous in this case, where there is no interruption in the operation of the law.

Similarly apart from section 87 of the Penal Code, the repealed and replaced Prevention of corruption Act, the amended Penal Code Act, the Leadership code Act and other matters specifically mentioned therein which are in the same or substantially the same terms as in the new Act shall be taken to be a continuation of the former Acts, although the former may be expressly repealed

We are therefore satisfied that in view of what we have stated above the applicant is properly charged under section 11 of the Anti Corruption Act, which is a reaffirmation of section 87 of the Penal Code Act. This section cannot be treated as though it never existed because of repeal. The principle that a repeal treat such provisions as past and closed does not apply for reasons aforementioned.

We thus consider that this reference was not brought in good faith, but only to delay justice.

Article 137 (5) should be read in the proper spirit of the Constitution. As was put
5 succinctly by Wambuzi C.J (retired) in **Ismail Serugo V Kampala City Council
And Attorney General** (Constitutional Appeal No. 2 of 1998).

“ ... The petition (read reference) must show on the face of it, that interpretation of a provision of the constitution is required. It is not enough to allege merely that a constitutional provision has been violated”

10 The applicant must go further to show prima facie the violation alleged and its effect before, a question could be referred to the Constitutional Court.

Most references tend to provide an escape from justice by indefinitely staying and delaying the proceedings, thus clogging the system.

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This reference thus stands dismissed with costs.

The trial judge is directed to proceed with the hearing of the case, without any further delay.

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Dated at Kampala this...01stday of.....March2011.

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A.E.N.MPAGI-BAHIGEINE,
DEPUTY CHIEF JUSTICE.

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C.K.BYAMUGISHA
JUSTICE OF APPEAL.

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S.B.K.KAVUMA,
JUSTICE OF APPEAL.

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A.S.NSHIMYE,
JUSTICE OF APPEAL.

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