

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

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CONSTITUTIONAL PETITION NO. 38 OF 2012

**HON. LT. (RTD) KAMBA SALEH :::::::::::::::::::::
PETITIONER MOSES WILSON.**

=VERSUS=

THE ATTORNEY GENERAL OF UGANDA::::::::::::::::::RESPONDENT

CORAM:-

Hon. Justice Remmy Kasule, JA

Hon. Justice Eldard Mwangusya, JA

Hon. Justice Rubby Aweri Opiyo, JA

Hon. Justice Solomy B. Bossa, JA

Hon. Justice Prof. Lillian Tibatemwa-Ekirikubinza, JA

JUDGMENT OF THE COURT

Introduction

On 27th May 2011, the President of the Republic of Uganda made numerous ministerial appointments. Amongst them was Hon. Kamba Saleh Moses Wilson (**herein after called the petitioner**), an elected member of Parliament for Kibuku County Constituency, Pallisa District, who was appointed Minister of State for Bunyoro Affairs. The said appointment was pursuant to **Article 114 (1)** of the Constitution to be with approval of parliament.

Pursuant to the above Article, on the 1st day of June 2011, the petitioner was duly informed by the Clerk to Parliament that he was scheduled to appear before the Appointments Committee of Parliament herein referred to as "the Committee". The petitioner appeared before the Committee for approval as a minister and was vetted. The Committee declined to approve the petitioner's appointment.

Aggrieved by the act of the Parliamentary Committee not to approve his appointment, the petitioner filed this Constitutional Petition **No. 38 of 2012** challenging the constitutionality of that act of the Parliamentary Committee on appointments.

The petition was filed Under **Article 137** of the Constitution of Uganda, 1995, as amended, the Constitutional Court (Petitions and References) Rule SI 91 of 2005 and all enabling laws.

The petitioner contends that he was aggrieved that the actions/inactions of the Committee did contravene and are inconsistent with the provisions of the Constitution due to the following reasons

- a) **Contrary to Articles 98 (1) (2); 99; 111 and 114 of the** Constitution, the Appointments Committee scheduled all ministerial appointment for vetting instead of approval.
- b) Contrary to **Article 114** of the Constitution, the Appointments Committee vetted the petitioner yet he was not subject to vetting but to approval, which approval is supposed to be always transitive.
- c) That the Constitution under **Article 114** does not give Parliament powers to veto or reject any ministerial appointment.
- d) That the Appointments Committee's debating of the petitioner's academic qualifications and declining to approve his appointment on that ground as the petitioner heard from corridors of Parliament and from the print and electronic media, amounted to voting out the petitioner from Parliament and was in contravention of **Article 1,2,3 (4) and (5), (26), 80 (1) 84,92 and 128** of the Constitution since:-
 - i) The question of the petitioner's academic qualifications was Adjudicated upon and courts declared the petitioner a fit and proper person to hold the elective office of Member of Parliament.
 - ii) Parliament has no power to impeach or challenge the academic qualifications of a Member of Parliament as that is the preserve of Court and recall by the electorate.

- e) **Contrary to Articles 20, 28 (1) and (6), 41 and 42 of the** Constitution, the Appointments Committee failed to observe rules of natural justice in so far as;
 - i) The humble petitioner was not given a chance to adduce evidence relating to his academic qualifications and in the absence of an iota of truth, the Committee's act was totally arbitrary, capricious and unacceptable to the rule of law.
 - ii) No reasons for the refusal of the petitioner's approval have been made known or accessible to the petitioner to date.
 - iii) The petitioner's right to be treated justly and fairly by the Appointments Committee of Parliament was compromised by the premises above.
- f) To the extent that a majority or all appointees for Minister of State posts who were rejected were Muslims the spirit of equality and freedom from discrimination was not given due consideration in contravention of **Articles 2, 21 (1) and (2)** of the Constitution.
- g) Contrary to **Articles 29, 79 (3) and 80** of the Constitution, the act of the Parliamentary Appointments Committee's refusal to approve or inaction as pertains the nomination of the petitioner amounted to an infringement on the petitioner's right to political participation and is thus unconstitutional.
- h) That the Committee's purported consideration of the petitioner's academic qualifications was ultra vires the powers of its mandate and an attempt by Parliament to usurp powers of the Judiciary contrary to the doctrine of separation of powers, independence of the Judiciary and finality of court judgments.

The petitioner's prayers:-

The petitioner prayed for the following declarations and orders

- (a) That the act of the Appointments Committee of vetting instead of approving all Ministerial appointments was contrary to **Articles 98 (1), (2), 111 and 113** of the Constitution ipso facto, unconstitutional, null and void.

(b) That the Appointments Committee's debate of the petitioner's academic qualifications and declining to approve his appointment on that ground as the petitioner heard from **corridors of parliament**, print and electronic media, amounted to voting out the petitioner from Parliament and was inconsistent with or in contravention of **Articles 1,2,3(4), and (5), 26, 80 (1), 84, 92 and 128** of the Constitution, ipso facto, null and void.

(c) That the Appointments Committee's failure to observe rules of natural justice by taking a decision against him without evidence was inconsistent with or in contravention of **Articles 20, 28 (1) and (6), 41 and 42** of the Constitution ipso facto null and void.

(d) That to the extent that a majority of all appointees for assistant ministerial posts (minister of state posts) who

were

rejected were Muslims, the spirit of equality and freedom from discrimination was not given due consideration in contravention of **Articles 2,21(1) and (2)** of the Constitution.

(e) That the Parliamentary Appointments Committee's refusal to approve or inaction as pertains the nomination of the petitioner amounted to an infringement of the petitioner's right to political participation and is thus inconsistent with or in contravention of **Articles 29, 79 (3) and 80** of the Constitution, **ipso facto** unconstitutional. That the Committee's purported consideration of the petitioner's academic qualifications was ultra vires their mandate and an attempt by Parliament to usurp the powers of the Judiciary and a violation of the doctrine of separation of powers, independence of the Judiciary and finality of a court judgment in contravention of **Articles 1, 2, 3 (4) and (5), 26, 80 (1), 84, 92 and 128** of the Constitution **ipso facto** null and void.

(1) An order for costs of this petition and certificate for two counsel.

The petition was supported by an affidavit affirmed to by Hon. Kamba Saleh Moses Wilson. Also in reply to the Respondent's affidavit in support of the answer to the petition the Hon. Kamba Saleh filed another affidavit affirmed by him.

The Respondent denied all the allegations contained in the petition and contended as follows:-

- (a) That the petition is misconceived, frivolous and vexatious and raises no issues for interpretation.
- (b) That the respondent has not by any act or omission violated or infringed any provision of the Constitution.
- (c) That the petition does not disclose any cause of action against the respondent.
- (d) That the Appointments Committee did not contravene or act and contrary to **Articles 98 (1) (2), 111 and 113 and 114** of the Constitution of Uganda.
- (e) That the Appointments Committee did not debate or decline approval of the petitioner's appointment on the basis of his academic qualifications and did not act contrary to **Article 1, 2, 3 (4), (5), 26, 80 (1), 84, 94 and 128** of the Constitution.
- (f) That the Respondent observed the rules of natural justice and did not act in contravention of **Articles 20, 28 (1) and (6), 41 and 42** of the Constitution.
- (g) That the respondent did not discriminate the petitioner on the basis of religion and did not act contrary to **Article 2, 21 (1) and (2)** of the Constitution.
- (h) That the respondent never infringed on the petitioner's right to political participation and did not act contrary to **Articles 29, 79 (3) and 80** of the Constitution.
- (i) That the Appointments Committee has never usurped the powers of the Judiciary and did not act contrary to **Articles 1, 2, 3 (4) (5), 26, 80 (1), 84, 92 and 128** of the Constitution.
- (j) That the petitioner is not entitled to any of the prayers, remedies or reliefs sought.

The respondent's answer to the petition was supported by the affidavit of Emelda Adong, a State Attorney in the Attorney General's Chambers and that of Jane L. Kibirige, the Clerk to Parliament of Uganda.

At scheduling the following facts were agreed upon:-

1. The petitioner is an adult male citizen of Uganda and the elected and seating member of the 9th Parliament for Kibuku County Constituency.
2. The petitioner was on the 27th day of May 2011 in an announcement made by His Excellency the President of the Republic of Uganda appointed a Minister of State for Bunyoro Affairs.
3. The said appointment was pursuant to **Article 114 (1)** of the Constitution, to be with the approval of Parliament.
4. On the 1st day of June 2011, the petitioner was informed by the Clerk to Parliament that he had been scheduled to appear before the Appointments Committee of Parliament for vetting.
5. The Petitioner did appear before the Parliamentary Committee on Appointments as required by law for approval as minister and he was vetted.
6. Parliament declined to approve the petitioner.
7. Aggrieved by the above act of Parliament, the petitioner filed **Constitutional Petition No. 38 of 2012** challenging the constitutionality of the act of parliament.

The following were agreed upon issues:-

1. Whether the petition raises a cause of action and whether the petitioner has locus standi.
2. Whether the Appointments Committee of Parliament flouted the rules of natural justice or was in contravention of the Constitution.
3. Whether the act of the Appointments Committee of Parliament of vetting instead of approval, of all ministerial appointments was inconsistent with or in contravention of the Constitution.
4. Whether the Appointments Committee of Parliament's act of considering the petitioner's academic qualifications and declining to approve his appointment on that ground was inconsistent with or in contravention of the Constitution.
5. Whether, to the extent that the majority of rejected appointees for ministerial appointments were Muslims was inconsistent with or in contravention of the Constitution.
6. Whether the Parliamentary Appointments Committee's refusal to approve the petitioner constituted an infringement on the petitioner's

right to political participation **ipso facto**, was inconsistent with or in contravention of the Constitution.

Representation:-

The petitioner was represented by John Mary Mugisha jointly with Mr. Twinobusingye Severino assisted by Mr. Hassan Kamba.

The Attorney General was represented by State Attorney Mr. Richard Adrole assisted by Kibirige Josephine also State Attorney and both from the Attorney General's Chambers.

At the commencement of hearing Mr. John Mary Mugisha, submitted to court the constitutional principles the court should consider in resolving the issues of the petition.

First in interpreting the Constitution the history of the country is very important and relevant. This principle is captured in the preamble to the 1995 Constitution. Counsel argued that some of the salient constitutional provisions are embedded to correct the historical mischiefs of the past which plunged this country into political and constitutional instability. Therefore, the history, language, and spirit of the Constitution must be understood as a cornerstone for interpretation of the Constitution.

Legal arguments.

Issue 1

Whether the petition raises a cause of action and the petitioner has locus standi.

Mr. Mugisha asserted that the petitioner's petition discloses a cause of action and the petitioner is clothed with the requisite locus standi to bring the matter before court. He contended that the various Supreme Court authorities and those of this Court state that as long as a petition raises issues for constitutional interpretation where it refers to the impugned act and the provision of the Constitution contravened, the petition is taken to have satisfied a requirement for disclosing a cause of action. He referred court to the cases of **Ismail Serugo vs KCC Supreme court**

Constitutional

Appeal No. 2 of 1998, Attorney General vs Tinyefunza Constitutional Appeal No. 001 of 1997 as well as Twinobusingye Severino vs Attorney General Constitutional Petition No. 008 of 2007.

*Counsel further stated that the current petition pleads that the acts complained of contravenes Articles **1,2,3(4), and (5), 20,21 (1),26,28 (1), 3 (c), (g) and 6,29,40,41,44 (c) 79(3), 81,84,92,91 (1) (8) and 111,113 and 128** of the Constitution. By simply pleading these averments, the petition shows a cause of action and that the petitioner led locus standi.*

*In the cases of **Baku Raphael Obudra vs Attorney General: Constitutional Petition No. 1 of 2003** and **Anifa Kawooya vs Attorney General and another Constitutional Petition No. 42 of 2010** it was held in both cases that, where a petition challenges the Constitutionality of an act of Parliament, it sufficiently discloses a cause of action if it specifies the act or its provision complained of and identifies the provision of the Constitution with which the act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and a broader interpretation should be given to the Constitutional Petition than a plaint in an ordinary Civil Suit when determining whether a cause of action has been disclosed.*

The learned counsel submitted further that the petitioner possesses the requisite locus standi pursuant to **Article 137 (3)** of the Constitution which provides that:-

“137 (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 Constitutional Court for a declaration to that effect and for redress where appropriate”.*

Counsel pointed out that in the cases of Twinobusingye Severino vs Attorney General (supra) and Serapio Rukundo vs Attorney General: Constitutional Petition No. 3 of 1997 the Constitutional Court has ruled as regards Article 137 (3) of the Constitution that the question of locus standi is made very clear by the said Article.

One only needs to allege any of the above and one will be entitled to petition the Constitutional Court. Such a one does not have to show

Mr. Mugisha concluded by stating that the petition discloses a reasonable cause of action and that the petitioner is clothed with the requisite locus standi.

Issue 2

Whether the Appointments Committee of Parliament flouted the rules of natural justice or was in contravention of the Constitution.

From the outset counsel submitted that the Appointments Committee flouted the rules of natural justice and acted in contravention of the Constitution. **Article 2** provides for the supremacy of the Constitution. Therefore, all agencies or authorities including Parliament are enjoined to respect and are bound by the Constitution. Counsel cited the cases of **Twinobusingye (supra) and Uganda Law Society and another vs Attorney General Constitutional Petition No.2 of 2002** to support his submission.

The Learned counsel contended that the Appointments Committee did not grant a fair hearing to the petitioner and did not grant him adequate time and facilities, did not avail the petitioner a copy of the decision, let alone, the reasons why it refused to approve him. The Committee thus contravened Articles **28 (1), (3) (c) (g) and (6)** by denying a fair hearing to the petitioner and this Article constitutes a non derogable right.

With reference to fair hearing, counsel referred to the case of **Caroline Turyatamba and others vs Attorney General: Constitutional Petition No. 15 of 2006** where the Constitutional Court held that the concept of a fair hearing involves a hearing by an impartial and disinterested tribunal. It involves giving parties a hearing before it condemns them. Fair hearing involves the right to present evidence and have findings supported by evidence. Mr. Mugisha argued that since the Appointments Committee was acting as a quasi judicial body, it was incumbent upon the Committee to exercise all tenets that were envisaged under **Article 28** by allowing the petitioner to cross-examine those alleging that the petitioner did not have the requisite qualifications and availing him with the decision of the Committee and the reasons why he was not approved. Mr. Mugisha made reference to the case of Bakaluba **Mukasa vs Nambooze Betty Bakileke: Election Petition Appeal No. 004 of 2009 (SC)**.

In the present case, Counsel submitted, the petitioner was not afforded a fair hearing by the Appointments Committee.

Counsel further submitted that Article 42 of the Constitution provides for the right to just and fair treatment in administrative decisions like that of the Appointments Committee in considering approval or non approval of the appointment of the petitioner. He referred to the case of **Ananias Tumukunde vs Attorney General: Constitutional Petition No. 004 of 2009** where it was stated by the Constitutional Court that *in determination of the civil rights and obligation or in respect of 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.*

Counsel strongly submitted that by delving into matters which Parliament was not mandated to do, it acted unconstitutionally for this is a preserve of the courts of law which had cleared the petitioner and the Committee ought not to have diverted into matters which were not of its mandate.

By failing to comply with the rules of natural justice and the provisions of the Constitution relating to fairness in administrative decisions and acting ultra vires, the Appointments Committee thus flouted the rules of natural justice and acted in contravention of the Constitution.

Counsel for the petitioner referred this court to the case of **Hon. Zachary Olum & another vs Attorney General: Constitutional Petition No. 6 of 1999** where a majority of 3:2 of the Court held that rule which restricted access to proceedings of Parliament was unconstitutional. Counsel referred court to the decision in **R. vs Secretary of State [1994] 1AC** where **Justice Muskley** emphasized that a party may not be able to demonstrate that it acted fairly unless it makes known and available the decision that affects that party.

Counsel argued that when an Act of Parliament confers administrative power, there is a presumption that it will be exercised in a manner which is fair in all circumstances and that the standards of fairness are not immutable. A person must have notice of a case against him/her and the reasons for the judgment or decision. Another requirement is that the judgment/decision

must be availed to a party affected because that party should have notice of a matter going against him/her at all material times.

Article **90(3) (c)** stipulates that in exercise of their functions under this Article Committees of Parliament shall have the powers of High Court. Article **42** on the other hand provides that any person appearing before an administrative official or body has a right to be treated justly and fairly and has a right to apply to a Court of law. Counsel submitted that **Articles 90 (3) (c) and 42** should be read together with **Article 28**.

This court was invited by counsel to accept and follow the decision of the European Court of Human Rights in the case of **Olay Sandaha vs Ukraine Application No. 21722 of 2011**, to the effect that the Parliamentary Committee like, any court of law, has to act fairly when making decisions. Where prejudice is occasioned to any party then it can be concluded that the Committee went against the rule of impartiality. Counsel thus concluded that the fact that the decision of the Appointments Committee was never availed to the petitioner amounts to prejudice and the Committee did not act impartially.

Relying on **Hypolito Cassiano De Souza vs Chairman and members of the Tanga Town Council, [1961 EA 377]**, where it was held that if the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in absence of the departure from the essential principles of justice, counsel invited this court to declare the decision of the Appointments Committee of Parliament concerning the petitioner to be null and void and thus unconstitutional.

Rule **156 (8)** of the Rules of Procedure of the Parliament of Uganda provides that a person whose name has been submitted to the Committee for approval shall be given the opportunity by the Committee to answer before it any adverse statements made against him/her.

Counsel submitted that in the affidavit in support of the petition it was stated that questions relating to the petitioner's education background were brought against him by Tom Mukama and given to Hon. Nandala Mafabi but the same were never communicated the petitioner rendering the whole process fraudulent.

Counsel prayed to this court to find that the petitioner did not get any fair hearing and as such the decision was void.

Issue 3

Whether the act of the Appointments Committee of vetting instead of approving all ministerial appointments was inconsistent with or in contravention of the Constitution.

For the petitioner, it was submitted that the act of the Appointments Committee of vetting instead of approving all ministerial appointments was inconsistent with the Constitution. It contravened **Articles 98 (1), (2), 99, 111 and 114** of the Constitution in so far as the Committee ought to have approved as opposed to vetting the appointments. This infringes the prerogatives of the President. By appointing, the President will have carried out vetting with the requisite bodies and the role of Parliament is simply to approve.

As to whether vetting and approval are one and the same thing, counsel argued that it is not the business of court to determine the supposed intention of the legislature when the meaning of the words used are precise and unambiguous. **Article 114 (1)** provides that the President may, with the approval of Parliament, appoint other ministers to assist cabinet ministers in the performance of their functions.

According to **Black's Law Dictionary, 6th Edition p.102** the "term" "approve" means to be satisfied with, to confirm, to ratify, to sanction, to consent to some act or thing done by another. The **Oxford Advanced Learners Dictionary, 5th edition, p. 1324** defines the term "to vet" as to make sure that a product is of good quality.

According to **Article 113** of the Constitution, Cabinet Ministers shall be appointed by the President with approval of Parliament from members of Parliament or persons qualified to be elected MPs. Counsel argued that there was no way **Article 114** could have meant that Parliament has the power to vet.

Issue 4

Whether the Appointments Committee's act of considering the petitioner's academic Qualifications and declining to approve his appointment on that ground was inconsistent with or in contravention with the provisions of the Constitution

had to be taken care of. The Constitutional Court held that the requirement had been flouted contrary to **Article 21** of the Constitution. For the above reason counsel contended that the petitioner was discriminated against for being a Muslim. He prayed

to court to find that the said constitutional provisions had been contravened to the prejudice of the petitioner.

Issue 6

Whether the Parliament's Appointment Committee's refusal to approve the petitioner constituted an infringement on the petitioner's right to political, ipso facto, was inconsistent with or in contravention of the Constitution.

It was argued for the petitioner that the Committee's refusal to approve the petitioner infringed his right to political participation and was unconstitutional in as far as he was refused to belong to any committee of Parliament and denied allocation of office on the pretext that he was due to be appointed a minister anytime. Because of the said unconstitutional acts of the Appointments Committee, the petitioner was aggrieved which entitled him to A grant of the remedies he had sought.

It was submitted for the appellant that rule **158** of the Rules of Procedure of Parliament of Uganda state that the chairperson of the Committee shall report to the House any appointment approved by the Committee and the report shall not be subject to debate. To this day that report has never been submitted to the Parliament to the prejudice of the petitioner. More so, there is no evidence under rule **159** of the Rules of Procedure that the Speaker had ever communicated in writing to the President as to the decision taken.

Respondent's submissions

State Attorney Adrole for the respondent handled issue **3,5 and 4** together and then issues **2,6,1 and 7** separately.

Issue 3

Counsel referred Article **90 (2), 94 (1),113 (1)** and **114 (1)** of the Constitution and paragraphs 3,4,5 and 7 of the affidavit of the Clerk to Parliament and submitted that no constitutional appointment to the position of cabinet minister or other ministers can ever be his appointment on that ground was inconsistent with or in contravention of the Constitution.

The learned counsel for petitioner argued that the purported act of the committee's refusal to approve the petitioner's appointment because of his lack of qualifications was inconsistent with the various Articles of the Constitution. It violated the supremacy of the people who voted the petitioner to Parliament. It contravened Article **76,81,84,98 and 118** of the Constitution. Counsel

submitted that the petitioner had already been subjected to a similar process before competent courts of law, which courts, and not Parliament are qualified to investigate whether Members of Parliament, possess relevant qualifications. This is the preserve of the Judiciary and there are processes for doing it.

In the case of Brigadier Henry Tumukunde VS Attorney General and Another, Constitutional Appeal No. 2 of 2006 (SC) it was held that under Article 84 (1) a member of Parliament loses his or her seat in accordance with the law but not due to forced resignation.

The Appointments Committee by challenging the academic qualifications of one of the members of Parliament was indirectly determining whether the petitioner was competent to be in Parliament or not and thus acted ultra vires. This ought not to have been one of the factors for considerations by the Committee.

Issue 5

Whether to the extent that the majority of the rejected appointees for ministerial appointments were Muslims was inconsistent with or in contravention of the Constitution.

The

learned counsel for petitioner contended that, to the extent that, the majority of the rejected appointees, inclusive of the petitioner, were Muslims,, the conduct of the Committee was inconsistent with the Constitution as much as it acted against the spirit of equality and freedom from discrimination in contravention of **Articles 2, and 21** (1) of the Constitution.

Counsel referred to the case of **Jacob Oulanyah vs Attorney General: Constitutional Petition No. 28 of 2006** where the petitioner,-an independent candidate, had not been catered for contrary to the constitutional provisions that all shades of opinion

complete unless Parliament steps in as enshrined in the Constitution and the Rules of Procedure of Parliament.

Parliament is not meant to rubber stamp such appointments but can either approve the nominees or withhold its approval upon which the President can either accept the recommendation or exercise the remedy provided to the President by Rules of Procedure of Parliament.

According to Rule **155 (1)** the Committee on Appointments shall be responsible for approving on behalf of Parliament the appointment of persons nominated for appointment by the President under the Constitution or any other appointment required to be approved by Parliament under any law.

Rule **158** stipulates that the chairperson of the Committee on Appointments shall report to the House and once an appointment has been approved, then the same is reported to the House.

Under Rule **159** the speaker shall communicate to the President in writing within three working days after the decision of the Appointments Committee on any person nominated. Therefore there is a requirement that the President should be informed of the decision of the committee within three days. In the case of the petitioner the President was actually made aware of the decision to reject the petitioner within three days of the taking of the decision.

Rule **160** provides for an appeal to the House by the Appointing Authority. Where the President's nominee is not approved by the Committee the President may appeal to the House to take a decision on the matter. It is only the President who is entitled to appeal.

Under Rule **160 (2)** the Committee on Appointments may by resolution of, at least one third of the members, refer a particular nomination decision to the full House. The decision of the House under the said rule is communicated to the President by the Speaker and not to any other person.

Learned State Attorney Adrole was emphatic that **Articles 113 and 114** are not merely to make Parliament rubber stamp the appointments made by the President. It was the intention of Parliament that once the President nominates persons,/for

Ministerial Appointments they should actually be approved, which also includes the power to disapprove, by Parliament.

According to counsel, relying on Darlington Sakwa and another VS Electoral Commission and 44 others: Constitutional Petition

No. 008 of 2006, the word “approval” should be given its widest possible meaning to also mean “disapproval”. He contended that the act of vetting instead of approval of all ministers was not inconsistent with the Constitution.

Issue 4 and 5

Counsel asserted that Parliament exercised its powers properly and fairly when considering to approve or not to approve the petitioner for ministerial appointment. The petitioner agrees that he appeared before the Committee and interacted with the members of that Committee. He was asked about his educational background, military background and the plans the petitioner had for the newly created ministry. Parliament then took a decision and the same was communicated to the full House and to H.E the President by the Speaker of Parliament in accordance with the relevant Rules.

The petitioner, according to counsel Adrole, is not supposed to take the court on a speculative journey or to hypothesize facts because this court has an obligation to adjudicate live disputes. In the case of **Legal Brains Trust (LBT) Ltd VS Attorney General of the Appellate Division at Arusha: Appeal No. 4 of 2012, of the East Africa Court of Justice**, the said Court held that it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions where no real live dispute exists. A court will not hear a case in abstract or one which is purely academic or speculative in nature.

It was speculative of the petitioner for him to assert without any evidence that Parliament did not approved him because of his academic qualifications being wanting or that failure to approve him was based on religious grounds. This is without evidence and only speculative and presumptuous.

Counsel reiterated that **Article 113 (1)** provides that cabinet ministers shall be appointed by the President with approval of parliament from among members of Parliament or persons qualified

Counsel concluded that Parliament had carried out its role in its wisdom and in accordance with the law with regard to the

petitioner's nomination.

Therefore in response to issues 4 and 5 counsel prayed court to hold that no provision of the Constitution had been violated.

Issues 1,2,6 and 7

In answer to the complaint that the petitioner had not been availed a report of the Committee containing the decision as regards approval of his appointment, counsel submitted that actually the petitioner appeared before the Committee and responded to questions put to him. Therefore, he was afforded a right to a fair hearing with other nominees on Wednesday 1/6/2011 and as earlier stated, the decision of the Committee is solely for the benefit of the President.

Counsel further submitted that while Article **41** provides for access to information, there are conventional ways of accessing information that is in possession of the State.

Section 10 of the **Access to Information Act (2005)** empowers, the Chief Executive to be responsible for ensuring that records of the public body are accessible under this Act, and under **section 37** of the same Act one may lodge a complaint with the Chief Magistrate against the decision of an information officer:-

a) To refuse a request for access; or

b) Taken under section 17 (1) or 20 (3) in relation to that person

It was therefore incumbent upon the petitioner to seek the necessary information from the Speaker or Clerk to Parliament and following the failure of the Clerk to Parliament or the Speaker to provide the necessary information, to lodge a complaint with a Chief Magistrate. Counsel submitted that the petitioner had the right to access information but he did not use it and cannot therefore say that the Speaker of Parliament refused to avail the information to him.

In reply learned counsel Mugisha submitted that the Parliamentary Committee was only mandated to approve. He contended that paragraphs 4,6 and 7 of the Clerk to Parliament's affidavit had been appropriately rebutted by paragraphs 7 and 8 of the petitioner's affidavit in reply. He submitted that the rules of the House do not override the constitutional mandate which entitles the petitioner to a right to a fair hearing within the rules of natural justice.

He contended that under Article **28** the petitioner was entitled to a decision. That the rules of the House do not provide what an aggrieved appointee should do, does not mean that the petitioner was not protected by the Constitution. If there is a lacuna in the rules, this does not take away the petitioner's Constitutional right to a fair hearing.

Further, it is not only the President who is entitled under the Constitution to a decision of the Parliamentary Committee but the appointee, in this case the petitioner, is also entitled to the decision and the reasons for the decision. He submitted that this is a non derogable right under Article **44 (c)**.

It was the contention of Counsel Mugisha that vetting and approval are distinct things. Whereas the vetting process is a preserve of the executive, approval is within the mandate of Parliament. Counsel reiterated his earlier submissions on cause of action and prayed that the petition be allowed with all the prayers prayed for.

[8] Determination of the issues by court.

Issue 1

Whether the petition raises a cause of action and the petitioner has locus standi.

Article **137 (3)** of the Constitution of the Republic of Uganda states as provides:-

“137 (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 Constitutional Court for a declaration to that effect, and for redress where appropriate”

This petition pleads that the act complained of contravenes Articles **1,2,3 (4) and (5), 20,21(1), 26, 28(1), (3) (C), 79 (3),81,84,92,91 (1)(2) and 111,113 and 128 of the Constitution.**

The law on whether a petition discloses a cause of action is now settled by various Supreme Court authorities which state that as long as a petition raises issues for Constitutional interpretation where it refers to the impugned act and provisions contravened, the petition is taken to have satisfied a requirement for disclosing a cause of action. This was stated in the cases of **Ismail Serugo VS KCC Supreme Court Constitutional Appeal No. 2 of 1998, and Attorney General VS Tinyefuza Constitutional Appeal No. 001 of 1997.**

In our considered opinion, this petition, prima facie, discloses a cause of action and vests the requisite locus standi in the petitioner. It identifies the provisions of the Constitution with which the act of the respondent is said to be inconsistent or in contravention, and seeks declarations to that effect. We therefore, answer issue 1 in the affirmative.

Issue 2

Whether the Appointments Committee of Parliament flouted the rules of natural justice or was in contravention of the Constitution.

Counsel for the petitioner argued that the Appointments Committee of Parliament did not grant a fair hearing to the petitioner; grant adequate time and facilities for presentation of his defence and that he was not availed a copy of the decision with any reasons as to why it refused to approve him and that this was in contravention of Articles **28(1), (3), (c), (g) and (6)**. Counsel submitted that the right to a fair hearing under the above Article is a non derogable right under Article **44 (c)** of the Constitution. He relied on the case of **Caroline Turyatema and Others VS Attorney General: Constitutional Petition No. 15 of 2006** where the Constitutional Court held that the concept of a fair hearing involves a hearing by an impartial and disinterested tribunal that affords to the parties

before it an opportunity to be heard. This involves giving parties a hearing before it condemns them, proceeds upon inquiry results in judgment.

The facts before this court are that the petitioner upon nomination for the position of Minister was, together with other nominees, afforded a hearing on Wednesday 1/6/2011 by the Appointment Committee of Parliament. The committee Members put questions to him and he explained to the members whatever he wanted to say and was relevant to the occasion.

**In the case of General Medical Council VS Spackman (1943)2
All**

ER 337 It was held that only when the decision is arrived at in absence or departure from the essential principles of natural justice must such proceedings be declared to be no decision.

We find that the petitioner's complaint that he was never informed of the decision of the Appointments Committee of Parliament and the reasons thereof not to have any validity. This is so because as a Member of Parliament the petitioner must have known the decision of the Committee and the reasons for the decision, when the Appointments Committee made its report to the full House of Parliament of which the petitioner is a member, and also when the Committee Communicated its decision to H.E. The President.

We note that **Article 41 of the Constitution** guarantees the right of access to information to every individual citizen. This is meant to ensure transparency and accountability of all government organs and departments.

It provides;

“Article 41. (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

Article 41. (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of the article and the procedure for obtaining access to that information.”

In accordance with this Article, Parliament has enacted the **Access to Information Act, 2005**. This Act details the information that is accessible.

Section 2 of the Access to information Act provides that;

- 1) ***This Act applies to all information and records of Government ministries, departments, local***

Governments, statutory corporations and bodies, commissions and other Government organs and agencies, unless specifically exempted by this Act.

2) **This Act does not apply to_**

- a) **Cabinet records and those of its committees;**
- b) **Record of court proceedings before the conclusion of the case.**

We observe that Parliament is one of the organs of government and that its records are not specifically excluded by **Section 2** of the **Access to information Act**.

We next turn to the procedure for obtaining information. This is laid down in the **Access to Information Regulations, 2011**.

Rule 3(1)

of the Regulations provides for a request for information to be in Form 1 set out in the **2nd schedule to the Regulations**. The form shall be obtained from public body which is in possession of the record.

Public body is defined under **Rule 2** as 'public body includes a government ministry, department, statutory corporation, authority or commission;' **Rule 3 (4)** provides that the request shall contain sufficient description of the record to which a person is requesting access.

Given that the above regulations were enacted in 2011 and the petition was filed in 2012, it is our considered view that the petitioner could have applied to obtain the information about why he was denied appointment from Parliament following this procedure. He chose not to do so. It would have been a different case if he asked and was denied such information. We have received no evidence to indicate that he tried to exercise his rights under the above provision.

Further, by virtue of the doctrine of separation of powers court must not be seen to interfere with the internal functioning of Parliament

(and the Executive) except where there is abuse of power and/or Parliament does not act within the confines of the law. See **Attorney General VS Major General David Tinyenfuza Constitutional**

Appeal No. 1 of 2007, (SC).

We therefore do not think this case falls in the scope which requires court to invoke its powers to check and balance the excess power of Parliament. We find the decision complained of was arrived at in compliance with the essential principles of natural justice and thus issue 2 fails.

Issue 3 & 6

Whether the act of the Appointments Committee of Parliament of vetting instead of approval of all ministerial appointments was inconsistent with or in contravention of the Constitution and whether Appointments Committee's refusal to approve the petitioner constituted an infringement on the petitioner's right to political participation, ipso facto, was inconsistent with or in contravention of the Constitution.

According to "Words and Phrases" legally defined, vol. 1: A-C 1998, 3rd edition, page 103, the term 'approved' means nothing more than that the legal form and expression of an instrument is approved. On the other hand, **Black's Law Dictionary, 1990, 6th edition, page 102** defines 'approval' as to be satisfied with, to confirm, ratify sanction or consent to some act or thing done by another. It also means to sanction officially, to ratify, to confirm, to pronounce good, think well of; admit the propriety or excellence of, to be pleased with.

The procedure of Parliament in approving appointments for Cabinet Ministers and other Ministers is provided for under Articles **113** and **114** of the Constitution and the Rules of Procedure of Parliament. These provisions vest in Parliament the mandate to approve nominations for appointment to positions of Cabinet Minister or other Ministers.

Under Article **94** of the Constitution, Parliament may, subject to the provisions of the Constitution, make rules to regulate its own procedure, including the procedure of committees appointed under Article **90** of the Constitution. Parliament under rules **146 (1) (f) and 155** of its Rules of Procedure delegates the function of approving persons nominated by the President for Appointment to be approved by parliament. The

Committee is required to report to the full House, through its chairperson, any appointments approved and such a report is not subject to debate.

Under Rule 159 the speaker shall communicate to the President in

writing within three working days after the decision of the Committee on any person nominated by the President for appointment. The President under Rule **160** may appeal to the House if the nominee is not approved by the Committee. The Committee on Appointments may by resolution of at least one third of its members refer a particular nomination to the decision of the House. The decision of the House shall be communicated to the President.

Therefore, under Rules **158 and 159** of the Rules of Procedure of Parliament the Committee of Parliament is answerable to Parliament and the President in the case of approval or non approval of any one appointed by the President but whose appointment has to be approved by Parliament.

The petitioner is a member of Parliament for Kibuku County Constituency, Pallisa District, and as such must have come to know the reasons for his appointment not being approved through the Committee's report to Parliament. Further the President went ahead and made a fresh appointment upon receipt of the Committee's report not approving the petitioner's appointment, thus filling the ministerial vacancy intended for the petitioner. The President never appealed to the full House of Parliament against the Committee's disapproval of the appointment of the petitioner under Rule 160 of the Rules of the Parliament.

Although the letter inviting the petitioner to meet the Committee talks of vetting, we do not find it anywhere in the law referring to vetting as one of the roles of Parliament. The law rather talks of approval. The Committee in exercising its powers under the Constitution and the rules can either approve or disapprove. This is an internal function of Parliament which this Court cannot interfere with as long as it is done within the confines of the Constitution and the Rules of Parliament. We therefore answer issue 3 and 6 in the negative.

Issue 4

Whether the Appointments Committee's act of considering the petitioner's academic qualifications and declining to approve his appointment on that ground was inconsistent with or in contravention of the Constitution.

Under paragraph 6 of the petition, the petitioner alleges that he did not know whether he was approved or not but has since learnt from the print and electronic media that his nomination hang in balance because his academic papers were cast in doubt.

This issue concerns the law on admissibility of news paper articles which is now settled by the Supreme Court of Uganda in **Attorney General VS Major General David Tinyenfuza Constitutional Appeal No. 1 of 2007**, Justice Kanyeihamba J.S.C. with respect to addressing electronic media evidence stated that:-

"...under the Evidence Act of Uganda, hearsay is inadmissible. Copies of newspaper reports are hearsay. I have had the benefit of reading the draft judgment of my brother Oder J.S.C, on this matter and I a.m. in agreement with his findings and opinion that the newspaper reports were inadmissible as being hearsay statements. The Constitutional Court erred, in ruling that the copies were admissible. I reject the submissions of counsel that in this age of technology and instant communication the court should ignore the hearsay rule of evidence...Mr. Lule belatedly introduced, the issue of res-gestae and submitted, to this court below, the res-gestae was admissible as an exception to the rule against hearsay..."

The newspaper articles are also not admissible under section 6, 9 and 10 of the Evidence Act, Cap 6. Therefore what the petitioner leant from the point and electronic media as regards his nomination, particulars of which point and electronic media are not disclosed by the petitioner is no evidence at all.

Therefore, we find no merit in the case of the petitioner as regards this issue. The same fails.

Issue No. 5

Whether to the extent that the majority of the rejected appointees for ministerial appointments were Muslims, was inconsistent with or in contravention of the Constitution.

before and under the law in all Sphere of political, economic, social and cultural life and in every other respect and enjoy equal protection of the law. Under Article **21 (2)** a person shall not be discriminated against on the grounds of sex, race, social or economic standing, political opinion or disability.

To “discriminate” for purposes of **Article 21** is to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic, origin, tribe, birth, or religion social or economic standing, political opinion or disability. **See: Caroline Turyatema and Others vs Attorney General and Another: (supra)**. In the petition before us, no evidence at all was adduced to prove that the petitioner was not approved because he was a Muslim.

We do not therefore agree with the petitioner’s submissions that the majority of the rejected appointees were Muslims. It is a baseless allegation because the petitioner did not prove it. Besides, this court takes it as a notorious fact worthy taking Judicial Notice of by this fact that the very appointment committee before which the petitioner appeared also considered other appointees of the Muslim faith, like it did with those of other religions, approving or disapproving them, regardless of the religion of such appointees.

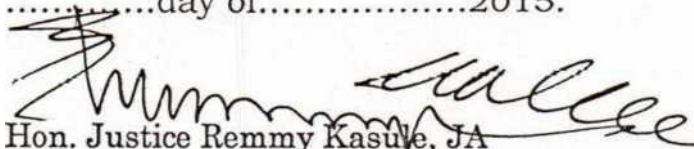
(9) Decision of the court.

The petitioner having been unsuccessful in all issues save on issue 1, this petition is hereby dismissed with costs to the respondent.

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Dated at Kampala thisday of.....2015.

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Hon. Justice Remmy Kasule, JA

Hon. Justice Eldard Mwangusya, JA

Hon. Justice Rubby Aweri Opio, JA

Hon. Justice Solomy B. Bossa, JA

Hon. Justice Prof. Lillian Tibatemwa-Ekirikubinza, JA

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