

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke, Barishaki Cheborion, Mutangula Kibeedi & Mulyagonja, JJA / JJCC)

Constitutional Petition No. 02 of 2014

BETWEEN

Dr. Kamba Samuel Baleke=====Petitioner

AND

Attorney General=====Respondent No.1

Director of Public Prosecution=====Respondent No.2

Judgment of Fredrick Egonda-Ntende, JA / JCC

- [1] I have the benefit of reading in draft the judgment of my brother, Barishaki Cheborion, JA / JCC. I agree with him that this petition has no merit. It presents no question for constitutional interpretation.
- [2] As Musoke, Mutangula Kibeedi and Mulyagonja, JJA / JJCC, agree, this petition is struck out with no order as to costs.

Signed, dated, and delivered at Kampala this 27th day of April 2021



Fredrick Egonda-Ntende
Justice of Appeal / Justice of the Constitutional Court

**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 02 OF 2014**

DR. SAMUEL BALEKE:.....PETITIONER

VERSUS

1. ATTORNEY GENERAL

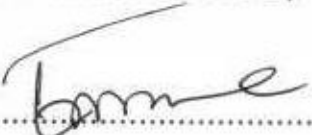
2. DIRECTOR OF PUBLIC PROSECUTIONS:.....RESPONDENT

**CORAM: HON. MR. JUSTICE FREDRICK EGONDA NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHEBORION BARISHAKI, JCC
HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC
HON. LADY JUSTICE IRENE MULYAGONJA, JCC**

JUDGMENT OF ELIZABETH MUSOKE, JCC

I have had the advantage of reading in draft the Judgment of my learned brother Cheborion, JCC in this matter. I agree with it. For the reasons he has given, I too would find that the Petition is not suitable as matter for constitutional interpretation. Therefore, I would strike out the Petition and make no order as to costs.

Dated at Kampala this 27th day of April 2021.

.....


Elizabeth Musoke

Justice of the Constitutional Court.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 02 OF 2014

***Coram: F.M.S Egonda Ntende, Elizabeth Musoke, Barishaki Cheborion,
Muzamiru Kibeedi, Irene Mulyagonja, JJA/JJCC***

10 **1. DR. KAMBA SAMUEL BALEKE.....PETITIONER**

VERSUS

1. ATTORNEY GENERAL

2. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGMENT OF CHEBORION BARISHAKI, JCC

15 **Background**

In January 2010, the petitioner was charged in the Chief Magistrates Court at Buganda Road in Criminal Case No. 80/2010 with two counts, namely; embezzlement contrary to section 19 a (iii) and causing financial loss contrary to section 20 of the Anti- Corruption Act, 2009. It was alleged that in September 2009, at the Ministry of Health Headquarters, Kampala, he being an employee of the Ministry of Health as a Senior Health Planner, stole Shs. 37,074,400/=, the property of the Ministry of health to which he had access by virtue of his office. The indictment contained an alternative count of causing financial loss contrary to section 20 (1) of the Anti- Corruption Act. Further that in September 2009 at

5 the Ministry of health, as a Senior Health Planner, the petitioner in the performance of his duties omitted to remit Shs. 37,074,400/= to the team assigned to collect qualitative data for the Annual Health Sector Performance Report for the financial year 2008/2009 knowing or having reason to believe that such omission would cause financial loss to the Ministry of Health.

10 The petitioner alleges that the particulars of the two offences were identical and failed to disclose the offence of causing financial loss but despite this anomaly the Director of Public Prosecutions went ahead and endorsed the charge sheet. That he was later committed to the Anti- Corruption Division of the High Court for trial and two trials were conducted. That an indictment was prepared under
15 criminal Case no.80/2010 of the Anti-Corruption Division which contained embezzlement as the main count and causing financial loss as an alternative count and the particulars of the offence of causing financial loss were different from the particulars in the charge sheet in the Chief Magistrates' Court.

The petitioner alleges that the aforementioned acts and omissions were
20 inconsistent with and in contravention of the Constitution. He thus petitioned this court seeking the following declarations:

- (i) That the endorsement of the charge sheet by the DPP in criminal case No. 80/2010 Chief Magistrates' Court Buganda Road contravened Articles 28 (9) and 120 (5) of the Constitution of the Republic of Uganda
25 and is null and void.

- 5 (ii) The trial of the petitioner in the Anti -Corruption Division of the High Court contravened section 47 of the Anti- Corruption Act 2009 as well as Articles 28 (9) and 120 (5) of the Constitution of the Republic of Uganda and was null and void.
- (iii) That court grants orders terminating proceedings arising from criminal
10 case No. 80/2010 of the Chief Magistrates' Court Buganda Road and Criminal Case No. 41/2010 of the Anti- Corruption Division of the High Court in favor of the petitioner and set the petitioner free.
- (iv) That court refers the matter to the High Court to investigate and determine appropriate redress.

15 The petition was accompanied by an Affidavit sworn by the petitioner the relevant parts of which are as follows;

3. *That the particulars of the offence of embezzlement were stated as follows;*

Dr. Kamba Samuel Baleke on 23rd September, 2009 at the Ministry of Health, Headquarters Kampala stole UGX 48,990,000/= the property of the
20 *Ministry of health of the government of Uganda which he had access to by virtue of his office.*

4. *That the particulars of the offence for causing financial loss were stated as*

follows; Dr. Kamba Samuel Baleke on 23rd September, 2009 at the Ministry of health, headquarters Kampala caused financial loss of UGX
25 *48,990,000/= the property of the Ministry of Health of the Government of Uganda which came into his possession by virtue of his office.*

5 7. That during my trial under criminal Case No. 41/2010 of the Anti-Corruption Division of the High Court I was tried, convicted and sentenced without an indictment by the High Court.

8. That during my trial under criminal case No.80/2010 of the Anti-Corruption Division of the High Court I was indicted and committed to
10 prison without trial.

9. That the trials in criminal cases No. 80/2010 and 41/2010 took place concurrently and were based on the same facts

10. That the indictment under criminal Case No. 80/2010 carried a main charge of embezzlement and an alternative count of causing financial
15 loss and was not endorsed by the DPP as required by law.

11. That I had exceptional difficulties in putting together a single defence that would serve as defence for both the main and alternative count.

The 1st Respondent filed an answer to the petition accompanied by an affidavit sworn by Mr. Batanda Gerald a state Attorney in the 1st respondent's Chambers
20 in which he denied all allegations in the petition and stated that it does not raise any questions for constitutional interpretation.

The 2nd respondent filed an answer to the petition accompanied by the affidavit of Baine Stanley Moses, a Chief State Attorney in the Office of the Director of Public Prosecutions in which he stated that the petition disclosed no questions
25 for constitutional interpretation and raised a preliminary objection that the

5 petition was misconceived against the 2nd respondent since she was by law legally represented by the 1st respondent.

Representations

At the hearing of this petition, the petitioner appeared for himself. The 1st respondent was represented by Mr. Geoffrey Atwine, Senior State Attorney and
10 the 2nd respondent was represented by Mr. Ariong Stephen State Attorney both from the Attorney General's Chambers and holding brief for Mr. Adrole a Principal State Attorney in the same chambers.

Issues

The agreed issues between the parties as set out in the Petitioner's conferencing
15 notes were:

1. Whether the petition raised any questions for constitutional interpretation.
2. Whether the inclusion in the indictment in criminal case No.80/2010 of the Anti- Corruption division of the alternative charge which was neither a lesser offence nor minor and cognate to the main offence violated article
20 28 of the constitution.
3. Whether the act of the DPP in endorsing a charge sheet in criminal case 80/2010 of the chief magistrate's Court Buganda road, where the particulars of the offence were a duplicate to the particulars for embezzlement amounted to an abuse of the legal process and contravened
25 Article 120(5) of the constitution.

- 5 4. Whether the conduct of two criminal trials in the High Court namely criminal case No. 80/2010 and criminal case No. 41/2010 in which the petitioner was the defendant and the particulars were identical contravened articles 28(1) and 120 (5) of the constitution and was therefore unconstitutional
- 10 5. Whether the conduct of criminal case No.41/2010 of the Anti-Corruption division without an indictment violated Article 28 of the constitution.
6. Whether indicting and committing the petitioner to prison under criminal case No. 80/2010 of the High Court Anti- corruption division without a trial being held contravened Article 28 of the Constitution.
- 15 7. Whether the conduct of criminal trials No.80/2010 and No. 41/2010 by the Anti-Corruption division without a substantive endorsement by the DPP as required by the Anti- Corruption Act contravened Article 125(5) of the constitution.

Submissions

- 20 On the first issue, it was submitted by the petitioner that for a petition to raise issues for constitutional interpretation, the acts or omissions complained of must have taken place, must be related to the constitutional provisions allegedly violated and adequate remedies should not be available in the regular courts or the law or custom should be contrary to provisions of the constitution. He cited
- 25 **Intoil & Another v The Permanent Secretary Ministry of Energy & others [2009]1 EA 157** for the proposition that the merits of the petition are not relevant

5 at the stage of determining whether a petition raises issues for constitutional interpretation as the petitioner is entitled to his day in court.

The petitioner contended that the regular courts by endorsing the charge sheet in the Magistrate's Court and presiding over trials in criminal cases No. 41 & 80 of 2010 was sitting in judgment of their own case and the constitutional court
10 was the only body clothed with authority to exercise independence and impartiality to resolve the complaints.

He submitted that the inclusion of alternative charges in an indictment is a long standing practice of the DPP and the judiciary whose constitutionality can be challenged and articles 28 and 120(5) of the Constitution clearly set out the
15 standards of a fair trial and the limits within which the DPP must exercise her powers.

On issue 2, the petitioner submitted that the Magistrates' Courts Act, the Trial on Indictment Act and the Criminal Procedure Act prescribed in detail the procedure to be followed when prosecuting individuals. That these laws did not
20 provide for the inclusion of alternative counts in a charge sheet. He contended that the DPP had no authority to prefer alternative charges and the regular courts ought not to have accepted charge sheets which included alternative counts because doing so violated article 28 (9) of the constitution. In his view, the law provides for the conviction of individuals on lesser offenses even when
25 such offenses have not been included in the indictment which made it unnecessary for the DPP to prefer alternative charges.

5 The petitioner further submitted that he was convicted on an alternative charge of causing financial loss which was based on the same evidence and facts relied on in the main count of embezzlement which in his view, amounted to double jeopardy. He contended that the alternative charge was not minor and cognate and that the defence he gave for embezzlement could not serve as a defence for
10 causing financial loss as there was no provision in law for an accused to provide an alternative defence.

On issue 3, the petitioner submitted that the charge sheet in criminal case No. 80/2010 endorsed by the DPP did not disclose the charge of causing financial loss. That the DPP preferred charges before ascertaining whether he had
15 evidence to support the charge. He contended that in so doing, the DPP acted dishonestly, in bad faith, and not in public interest or in the interest of administration of justice and failed to prevent abuse of legal process thereby violating article 120(5) of the constitution.

The petitioner further submitted that the DPP initiated prosecution before
20 30/7/2010 which was the deadline for public officers to account for funds as per Regulation 65 of SI NO.72 of 2003, Public Finance and Accounting Regulations. That at the time the DPP initiated the investigation and prosecution, the actions of the petitioner had not constituted a crime thus violating articles 28(7), article 163 (3), (4), 166(4) and 174 of the constitution. He cited **Kazinda**
25 **Geoffrey v Attorney General Constitutional Petition No. 30/2014** to support his proposition that when the DPP investigates public officers without giving

5 them a chance to handover and appear for audit, her actions are unconstitutional.

On issue 4, the petitioner submitted that sections 23(1) of the Trial on indictment Act and 86 (1) of Magistrates Court Act provide for preferring of several counts based on the same facts in a single charge sheet which contradicts article 28(9)
10 and article 44(c) of the Constitution. That the DPP in preferring several counts based on the same facts in a single indictment, amounted to derogation from article 28(9) of the constitution which is prohibited by article 44 (c).

The petitioner further submitted that the state in running two concurrent trials, made it impossible for him to plead that he had already been tried on the same
15 facts in another trial.

On issue 6, the petitioner submitted that by indicting and committing him to prison to serve a sentence without trial under High Court criminal case No.80 of 2020 denied him his basic right to a fair trial which violated articles 28 and 44(c) of the constitution. He did not submit on issues 5 and 7 of his petition.

20 The respondents in reply submitted that the 2nd respondent's failure to sanction the charge sheet or the indictment and the committal proceedings did not raise questions for constitutional interpretation. In their view, these matters should have been drawn to the attention of the trial Court for appropriate redress. They referred court to the case of **Ismail Serugo, Constitutional petition No. 14 of**
25 **1997** for the proposition that this court should normally be involved only in matters requiring interpretation of the constitution under Article 137.

5 On issue two, the respondents submitted that the petitioner's contention that the law does not provide for alternative charges in either a charge sheet or an indictment was untenable. That the provisions of the law embedded in sections 86(1) of the Magistrates Court's Act cap 16 and sections 23 (1) and 25 of the Trial on indictment Act permit alternative counts and doing so did not
10 contravene article 28 of the Constitution.

Counsel for the respondents further submitted that court can either convict or acquit an accused based on an indictment whether the counts are substantive or alternate even if the offences are founded on the same facts. That the offences were tried in the same criminal proceedings and not different proceedings that
15 would make them fall foul of article 28(9) of the Constitution.

On issue 3, Counsel for the respondents submitted that the allegation that the offence of causing financial loss had the same particulars as the main offence of embezzlement did not merit constitutional interpretation. That the charge sheet was sanctioned by the DPP albeit having the same particulars and although this
20 was cured by the indictment it did not violate article 120 (5) of the constitution.

Counsel argued issues 4, 5,6 & 7 together and submitted that the petitioner's allegation of having been subjected to two criminal trials was misconceived and was without merit because the petitioner was arraigned before the Chief Magistrates' Court in criminal case No. 80/2010 where charges were read out to
25 him. That he was later committed to the High Court for trial vide criminal case No.41/2010. Counsel cited section 168(1) of the Magistrates' court's Act and

5 section 1 of the Trial on indictment Act for the principle that committal proceedings are part of the criminal process and that the petitioner was only tried in the High Court with two offences and convicted on the 2nd count of causing financial loss.

He further submitted that the petitioner was tried and convicted in criminal case
10 41/2010 on an indictment. That the charge sheet in criminal case No. 80/2010 was sanctioned by the DPP and the indictment in criminal case no. 41/2010 was endorsed by Alice Komuhangi Khauka, principal state Attorney for the DPP. He cited sections 26 and 135 of the Trial on indictment Act which allows the DPP to delegate powers of sanctioning and endorsing charge sheets and indictments to
15 officers below him. That the 2nd respondent's act did not in any way contravene article 28(9) and 120(5) of the constitution.

Regarding the legal capacity of the 2nd respondent, Counsel submitted that the office of the DPP was created under article 120 of the Constitution which does not give the office corporate status to sue or be sued in courts of law. That the
20 right person to have been sued was the 1st respondent as prescribed by article 250 (2) of the constitution.

He prayed that the petition be dismissed for not raising questions for constitutional interpretation.

The petitioner rejoined that section 86(1) of the Magistrates Court Act and
25 Section 26(1) of the Trial on Indictment Act only authorize charging of several counts based on the same facts but not charging with alternative counts. That

5 prosecuting persons in the alternative, amounts to double jeopardy which is forbidden by section 18 of the Penal Code Act. That indicting people in the alternative is used by the state to derogate citizens from the rights guaranteed under article 28(9) which derogation is prohibited by article 44(c).

On issues 3,4,5,6 and 7, the petitioner rejoined that the trial involved 3 criminal
10 cases to wit; No.80/2010 of the chief Magistrates court Buganda Road, No. 80/2010 of the Anti- corruption division and No. 41/2010 of the Ant- Corruption Court. He contended that he still has a warrant to serve a sentence under criminal case No. 80/2010 of the Anti-Corruption Division. He however, conceded that there is no evidence of a trial or judgment under case No.80/2010
15 and 80/2020 in the chief Magistrates Court and High Court respectively and prayed that this court stays those proceedings.

That the DPP being an independent authority under article 120(6) and article 137 (3) (b) of the Constitution, it was prudent that he be in the know when the constitutionality of his actions were being challenged and added that nothing in
20 the Constitution or any other law precludes the DPP from being joined to the Attorney General as a respondent.

I have considered the written submissions and oral highlights of both parties on the constitutionality of the impugned laws. I have also perused the affidavits as well as the relative provisions of the law and authorities cited by the parties.

5 In **Trop Vs Dulles 356 US 86 [1958]**, Chief Justice Earl Warren, writing for the majority Justices of the United States Supreme Court on the role of courts in constitutional interpretation opined that;

"We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the constitution...

10 *If we do not, the words of the Constitution become little more than good advice.*

When it appears that an Act of congress conflicts with one of those provisions, we have no choice but to enforce the paramount demands of the Constitution. We are sworn to do no less. We cannot push back the limits of
15 *the Constitution merely to accommodate a challenged legislation We must apply these limits as the constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."*

The first issue is whether the petition raises any questions for constitutional
20 interpretation.

The jurisdiction of this court is provided for under Article 137 of the Constitution and as far as is relevant it provides that:

"137. Questions as to interpretation of the Constitution

1. Any question as to the interpretation of this Constitution shall be
25 ***determined by the Court of Appeal sitting as the Constitutional 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 Constitutional Court for a declaration to that effect, and for redress where appropriate.

In **Attorney General vs. Major General David Tinyefuza Supreme Court Constitutional Appeal No. 1 of 1997** Kanyeihamba JSC while deciding on whether the question as to whether a constitutional petition disclosed a cause of action held that a cause of action is the act or acts committed by the defendant, in this case the state, which gives the plaintiff a cause and a reason to complain. The learned Justice referred to Stroud's Judicial Dictionary which defines a cause of action as the entire set of circumstances giving rise to an enforceable claim. This is the principle which justified judicial pronouncements in such cases as *Hernaman v. Smith* (1885)6 Exch 659, *Cook v. Gill* (1873) LR8 CP 107 and *Abdulla v. Esmail* (1969) EALR 111. That in *Read v. Brown* (1888(22) QBD, 128(CA), where it was held that a cause of action is every fact that would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court.

5 In determining whether the pleadings disclose a cause of action, court must be satisfied by glancing at the plaint or petition, the affidavits and their annexures, if any, and statement of defence or reply to the petition, without first going into the merits of the arguments for either side.

Commenting on the import of Article 137 of the Constitution, Justice Mulenga
10 JSC in **Ismail Serugo vs. Kampala City Council & Anor, SCCA No.2 of 1998** held that a petition brought under this provision in his opinion, sufficiently disclosed a cause of action, if it described the act or omission complained of and showed the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the
15 act or omission and prayed for a declaration to that effect.

In **Attorney General vs Maj General David Tinyefuza Supreme Court Constitutional Appeal No.1 Of 1997, (unreported)** Wambuzi CJ was clear that the jurisdiction of the Constitutional Court was limited in Article 137 (1) of the Constitution to interpretation of the Constitution and no other jurisdiction apart
20 from interpretation of the Constitution was given to that court. That unless the question before the court depended in its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court had no jurisdiction.

The petition must show on the face of it that interpretation of a provision of the
25 Constitution was required and it was not enough to merely allege that a Constitutional provision had been violated.

5 If the rights alleged to have been violated are enforceable under Article 50 of the Constitution by a competent Court, then the Constitutional Court cannot be called to interpret the Constitution.

A petition therefore discloses a cause of action as long as it has pleaded certain allegations that, if true, would entitle the Petitioner to relief from this court. This
10 means that there must be a question or controversy that needs to be answered by this court with regard to interpretation of any provision of the Constitution in relation to an impugned law, act or omission by any person or authority.

Justice Egonda Ntende JCC; in **Ssekikubo and 10 others versus the National Resistance Movement (NRM) Constitutional Petition No. 9 of 2019** while
15 commenting on the jurisdiction and role of this court had this to say;

*"The ordinary application of the law including the constitution is a duty that is performed by all courts, persons, and or organs of the state as directed by the constitution and will not ordinarily result into an action in the constitutional court unless a question arises as to the interpretation of the
20 constitution. When such a question arises, this court is seized with jurisdiction to answer that question as to the correct interpretation of the constitution.*

*It is possible in my view that a particular set of facts, may give rise to multiple causes of action, for instance either in tort or contract. A party will
25 choose what action to pursue, whether in tort or contract, as the law may prescribe. A party could similarly bring an action for judicial review, if he is*

5 *challenging a decision by a person and an authority that is not in accord with the law or bring a constitutional petition before the constitutional court if on the same facts, a question for constitutional interpretation arises."*

The Petitioner here makes several allegations against the DPP. First that the inclusion in the indictment in criminal case No.80/2010 of the Anti- Corruption
10 division of the alternative charge which was neither a lesser offence nor minor and cognate to the main offence was unconstitutional. Second that the endorsement of a charge sheet in criminal case 80/2010 of the chief magistrate's Court Buganda road, where the particulars of the offence were a duplicate of the particulars for embezzlement amounted to an abuse of the legal process. That
15 the conduct of two criminal trials in the High Court with identical particulars, the conduct of criminal case No.41/2010 of the Anti-Corruption division without an indictment, indicting and committing the petitioner to prison under criminal case No. 80/2010 of the High Court Anti- Corruption Division without a trial being held and the conduct of criminal trials without a substantive endorsement
20 by the DPP as required by the Anti- Corruption Act all contravened Articles 28, 120(5) and 125(5) of the constitution.

The record shows that the acts and omissions complained of arose during the investigation and prosecution in the chief magistrate's court which carried out the committal proceedings and in the High Court where the trial took place.

25 It was argued for the petitioner that it is illegal for the indictment to contain 2 charges and alternative charges.

5 **Section 86 (1) of the Magistrate`s Court Act** provide that;

(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.

10 **Section 23(1) of the Trial on Indictment Act Cap 23** provides that;

(1) Any offences, whether felonies or misdemeanours, may be charged together in the same indictment if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.

15 These two provisions of the law show that it is legal for an indictment to have 2 charges and an alternative charge can be preferred in the same charge sheet.

The petitioner was charged with embezzlement and causing financial loss. These offences require the consent of the Director of Public Prosecution (DPP) before any officer authorised by the DPP could endorse the charge sheet and
20 indictment. Section 49 of the Anti-Corruption Act 2009 provides that;

1. ***Prosecution of offences.***

A prosecution under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions or the Inspector General of Government; but a person charged with such an offence may be arrested, or a warrant for his or her arrest may be issued and executed, and the
25 ***person may be detained or released on police bond, notwithstanding that***

5 *the consent of the Director of Public Prosecutions or the Inspector General of Government, to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.*

Be that as it may, if the consent of the DPP was not obtained or any errors existed
10 in the charge sheet, indictment or any other inconsistencies, they should have been brought up and argued in the High Court because that court was clothed with authority to properly investigate and determine these issues. That Court would have exercised its mandate under Section 36 (1) of the Judicature Act which allows the High Court to make an order, as the case may be, of—
15 mandamus, requiring any act to be done; prohibition, prohibiting any proceedings or matter; or certiorari, removing any proceedings or matter to the High Court. The appellant also had the option of appealing the decision of the High Court.

The appellant sought for an order terminating his prosecution in the High Court.
20 Criminal trials cannot be stopped on the wish of the parties because crime affects society generally. In **Dr. Tiberius Muhebwa vs Uganda Constitutional Petition No. 09 of 2012 and Constitutional Petition No. 10 of 2008 Jim Muhwezi & 3 Others vs Attorney General and Inspector General of Government**, court cautioned against the stopping of criminal trials on allegation that the trial would
25 not be free and fair. I am persuaded to follow the reasoning in the latter case where Court had this to say about requests by the accused to stop prosecutions;

5 *"The trial court is capable of fairly and accurately pronouncing itself on the matter without prejudice to the accused. Where any prejudice occurs the appeal system of this country is capable of providing a remedy. Was it to be otherwise, a situation would arise whereby anyone charged with an offence would rush to the Constitutional court with a request to stop the prosecution pending hearing his*
10 *challenge against the prosecution. In due course, this court would find itself engaged in petitions to stop criminal prosecutions and nothing else. This could result into a breakdown of the administration of the criminal justice system and affect the smooth operation of the Constitutional Court"*

The DPP is accountable for his actions and ought to operate within the confines
15 of the Constitution and other laws. If the DPP performs his functions in a manner that is parallel and opposite to constitutional parameters, or he unreasonably exercises those powers, then his decision can be challenged by way of judicial review for purposes of promoting and protecting constitutional safeguards under article 21, 22 and 120(5) of the constitution.

20 This was clearly put by court in **Matalulu v DPP (2003) 4 LRC 712** when it held that;

"It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric
25 *character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is*

5 *within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."*

I find that the questions raised in this petition are matters for enforcement which fall within the jurisdiction of the High Court. The petition discloses no question
10 for constitutional interpretation which leaves this court with no jurisdiction to intervene. Even if the matters had come by way of Constitutional reference as the petitioner alluded, still no question would exist to trigger this court's jurisdiction to interpret the Constitution.

Issue No.1 fails.

15 The 1st respondent raised a pertinent legal issue concerning the lack of capacity of the 2nd respondent, to sue or be sued.

The petitioner alleges that it was not illegal for him to sue the 2nd respondent given the fact that it's an authority whose acts and omissions can be declared unconstitutional. He contended that the 2nd respondent ought to be made aware
20 that the constitutionality of his actions and omissions were being challenged.

Article 120 of the Constitution which provides for office and functions of the DPP does not establish it as a body Corporate.

In **Charles Harry Twagira Vs Attorney General & Anor SCCA 4 of 2007** where the DPP had been made a party to a suit, it was held that the appellant should
25 have proceeded only against the Attorney General and the 3rd respondent

5 since the Director of Public Prosecutions though a government department was not a body corporate with powers to sue or be sued.

The capacity to sue and/or be sued is conferred by the Constitution or statute. There being no constitutional or statutory provision conferring any such power on the DPP, he cannot be made a party to a suit. Article 250 (2) of the constitution
10 requires that all legal proceedings by or against the government to be instituted by or against the Attorney General. There are however, decisions to the effect that in cases of judicial review the impugned institution can be cited.

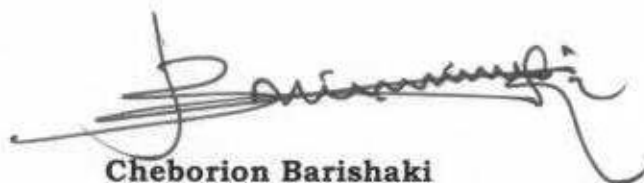
Having found that the petition presents nothing for the interpretation of the Constitution, I do not find it necessary to delve into other issues raised therein.

15 I would therefore strike out the petition with no order as to Costs.

I so order.

Dated this.....27th.....day of April.....2021.

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Cheborion Barishaki

Justice of Appeal/ Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Elizabeth Musoke, Cheborion Barishaki, Muzamiru M. Kibeedi, & Irene Mulyagonja, JJA/JJCC*]

CONSTITUTIONAL PETITION NO. 02 OF 2014

1. DR. KAMBA SAMUEL BALEKE.....PETITIONER

VERSUS

1. ATTORNEY GENERAL

2. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGMENT OF MUZAMIRU M. KIBEEDI, JCC

I have had the advantage of reading in draft the Judgment prepared by My Lord, Cheborion Barishaki, JCC. I agree with the reasoning and the Orders he has proposed.

Dated at Kampala this 27th day of April 20 21



Muzamiru Mutangula Kibeedi

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
(Egonda Ntende, Musoke, Barishaki, Mutangula Kibeedi and
Mulyagonja, JJCC)
CONSTITUTIONAL PETITION NO. 002 OF 2014

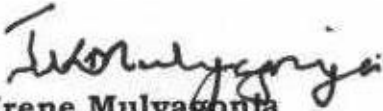
DR KAMBA SAMUEL BALEKE ::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

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

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my brother **Barishaki Cheborion, JCC**. I agree with the reasoning and the conclusion that the petition did not disclose any question as to the interpretation of the Constitution. It should therefore be struck out and with no order as to costs.


Irene Mulyagonja

JUSTICE OF APPEAL/CONSTITUTIONAL COURT