THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

HOLDEN AT KAMPALA

CONSTITUTIONAL PETITION NO. 26 OF 2021

CORAM:

Hon: Lady Justice Catherine Bamugemereire, JCC
Hon: Mr. Justice Stephen Musota, JCC
Hon: Mr. Justice Christopher Madrama, JCC
Hon: Mr. Justice Muzamiru Kibeedi, JCC
Hon: Lady Justice Irene Mulyagonja, JCC

DAVID CHANDI JAMWA:: PETITIONER

VERSUS

THE ATTORNEY GENERAL:: RESPONDENT

JUDGMENT OF CATHERINE BAMUGEMEREIRE JCC

This constitutional petition was brought under Article 137 (1), (3) (a), (4) and (7) of the Constitution of the Republic of Uganda 1995 and also under rule 3 of the Constitutional Court (Petitions and Reference) Rules 2005.

The Petitioner alleged that:

1. The Judgment of the Court of Appeal, in Criminal Appeal No. 77 of 2011 from which the Judgment of the Supreme Court in Criminal Appeal No. 2 of 2018 arose was inconsistent with and / or in contravention of Articles 2 (2), 135 (1), 126 (2) (b), 28 (1), 28 (3) (d) and 44 (c) of the Constitution.
2. The Judgments of the High Court, the Court of Appeal and Supreme Court in relation to the conviction of the accused for

Causing Financial Loss contrary to Section 20 of the Anti-Corruption Act, 2009 were made in contravention of Articles 2 (2), 28 (1), 28 (7), 28 (12), 44 (c), 79 (1) and 79 (2) of the Constitution.

3. Section5(3) of the Judicature Act, to the extent that it limits the right of convicted persons to appeal to the supreme Court on matters relating to their sentences contravenes Articles 2(2), 28 (1), 44 (c), 129 (2), 129 (3) and 139 (1) of the Constitution.

Before I delve into resolving the matters raised in the grounds of the petition, I will endeavour to provide context to it by laying out the background that forms the bone of contention.

Background

The facts as ascertained from the record are that the petitioner was appointed as Managing Director of the National Social Security Fund (NSSF) by the Minister of Finance on 2nd February 2007. On 4th December 2008, the Minister of Finance interdicted the petitioner. He was arrested by the Inspector General of Government (IGG), arraigned before the courts, and charged with several offences including; Causing Financial Loss contrary to section 20 of the Anti-Corruption Act and Abuse of Office contrary to s.11 of the Anti-Corruption Act (ACA). At the High Court, the petitioner was acquitted of the offence of Abuse of Office contrary to section 11 of the ACA. He was however, found guilty of the offence of Causing Financial Loss contrary to section 20 of the ACA. The petitioner was sentenced to 12 years' imprisonment, and he was also barred from holding any public office for 10 years after completing his custodial sentence.

The petitioner appealed the conviction and sentence to the Court of Appeal in respect of the offence of Causing Financial Loss c/s 20 of the ACA. At the same time, the Inspector General of Government cross-appealed the petitioner's acquittal in respect of the offence of Abuse of office c/s 11 of the ACA. In 2018, the Court of Appeal upheld the petitioner's conviction and sentence in respect of Causing Financial Loss and entered a conviction against him in respect to the offence of Abuse of Office c/s 11 of the ACA and sentenced him to 4 years' imprisonment to be served concurrently with the 12 years sentence of Causing Financial Loss.

The petitioner further appealed his convictions and sentences to the Supreme Court which Court upheld all convictions and sentences against him.

The petitioner has now petitioned this court (Constitutional Court), alleging various inconsistencies and contraventions of articles of the Constitution of Uganda arising from the Judgments of the High Court, the Court of Appeal and the Supreme Court.

Representations

At the hearing of the petition, Mr. Peter Kabatsi (SC) together with Mr. Bruce Musinguzi of Messrs Kampala Associated Advocates appeared for the petitioner while Mr. Bichachi Ojambo a State Attorney from the Attorney General's Chambers appeared for the respondent.

The Petitioner's Submissions

At the hearing of the Petition, Senior Counsel Mr. Peter Kabatsi informed court that they were no longer pursuing the issue regarding

the coram involving the single Justice sitting to read the Judgment. This issue is therefore struck out.

Senior Counsel contended that the Judgments of the Court of Appeal in C.A No. 77 of 2011 and the Supreme Court in SCCA No. 2 of 2018, in relation to denial of the Petitioner's right to be heard, acceptance of unsworn statements, averring a falsehood and unexplained inordinate delay in case disposal, were inconsistent with and/or in contravention of Articles 2(2), 135(1), 126(2)(b), 128(1), 129(2), 28(1) 28(3)(d) and 44(c) of the Constitution.

It was counsel's submission that while the Court of Appeal received the petitioner's appeal (CACA No. 77 of 2011) on 27th March 2011, it heard the same 3 years and 7 months later on 14th October 2014 and worse still delivered the judgment much later on 15th January 2018, precisely 3 years and 3 months later, making the total appeal period almost 7 years. Counsel's submission was that no explanation or plausible excuse, whatsoever, was given to explain the severe violation of Article 126 (2) (b) of the Constitution. Senior counsel contended that the conduct of the court amounted to denying the petitioner justice. Counsel invited this court to be persuaded by the decision of a court in India in Abdul Rehman Antulay & Ors v R.S Nayak & Anor Supreme Court of India, No. 833 of 1990 in support of his submission.

Counsel prayed that this court deems it necessary to correct the indisputable violation of Article 126(2)(b) of the Constitution that denied the petitioner justice.

Senior counsel submitted that the process of delivering the judgment abrogated the constitution. He drew the attention of this court to the fact that only a single justice sat to read the judgment. And that during the delivery of the judgment in CACA No. 77 of 2011 the single Justice proceeded to make an extensive statement, not on oath, in which he attempted to rationalise the integrity, validity and authenticity of the judgment he was to deliver. It was counsel's argument that the Justice in effect was adducing evidence from the bench and further inexplicably and contemptuously denied the petitioner's counsel the right to address the court thereby denying the petitioner a right to be heard. Counsel contended that such acts constituted a severe violation of Article 129 (2) of the Constitution and thus a serious abuse of authority on his part, rendering the judgment he delivered suspect, questionable, and fallible. Counsel concluded that such acts rendered the proceedings of the Court of Appeal nugatory and the judgment a nullity.

Counsel referred to the Supreme Court decision in David Chandi Jamwa v Uganda S.C. Criminal Appeal No. 2 of 2017 where the Supreme Court had this to say:

> "Where the date of signature and delivery of the judgment are different, it does not affect the validity of the signed judgment. The only conditionality is that the judgment in question was written and signed by a judge who took part in the hearing and deciding the matter. The reasons that prevent the judge who wrote and signed the judgment to deliver it in person is irrelevant. It is immaterial that such a judge was prevented by death or retirement provided that at the time of the writing and signing the judge was a member of the court. That the inordinate delay in the delivery of the judgment and failure to date the judgment on

the day it's delivered is a technicality curable under Article 126 (2) (c) of the Constitution."

It was counsel's contention that section 20 of the ACA stipulates three interdependent, inseparable, and inextricably linked ingredients/elements of the offence of Causing Financial Loss, that is; designated employer entities, premeditation and designated loss incurring entities. Counsel submitted that these three ingredients/elements must all hold for the definition of Causing Financial Loss to be met.

He further submitted that the element which stipulates designated employer entities is not contested since the petitioner was employed by NSSF, a designated public body. However, the second element of premeditation continues to be a bone of contention. More importantly, the definition regarding the entity which incurs loss from the predicate act is narrow in definition and does not include bodies such as the NSSF. The submission for the petitioner is that the law limits the loss to Government, banks, and credit institutions, which NSSF is not.

Counsel added that the ostensible omission of 'insurance company' and 'public body' from the third element is technically a lacuna or a hiatus in written law that cripples the legal potency of section 20 of the ACA 2009.

Counsel's next submission on this issue was about the retroactive effect of a law. He contended that the High Court and Court of Appeal retrospectively applied the Anti-corruption Act, 2009. The petitioner's circumstances were that all the alleged offences occurred before the Anti-Corruption Act of 2009 came into force. Counsel argued that the appellant's convictions for Causing Financial Loss and Abuse of Office were misadvised. He was critical of the trial court and the appellate court for inaction when this issue

had been raised as a point of law during the petitioner's trial. Counsel submitted that whereas the offences with which the petitioner was indicted were created on 25th August 2009, the facts occurred in 2007. Counsel cited various authorities to the effect that laws should never have retrospective enforcement. (See: TSS Grain Millers Ltd v Attorney General (2003)

The Respondent's Submissions

Counsel for the respondent raised a preliminary objection regarding the jurisdiction of this court as a Constitutional Court. He submitted that it is not enough to merely allege that a constitutional provision had been violated. The petitioner had the obligation to prove the alleged violation and its effect before a question could be referred to the Constitutional Court. Counsel contended that the questions the petitioner was seeking the Constitutional Court to interpret were matters that had already been determined by this court before and their legal fate and stand established.

Counsel for the Respondent submitted that no questions that call for this honourable court to pronounce itself on their constitutionality were raised, the same having been fully and ably determined and resolved by the Supreme Court.

Counsel referred to the Supreme Court decision in David Chandi Jamwa v Uganda S.C. Criminal Appeal No. 2 of 2017 where it reinforced the view that where the date of signature and delivery of the judgment are different, it does not affect the validity of the signed judgment.

"The only conditionality that Chandi Jamwa (supra)added was that once the judgment was written and signed by a justice who took part in the hearing and deciding the matter, it was irrelevant whether he/she sat alone to deliver such judgment. The reasons that prevent the justice who wrote and signed the judgment to deliver it in person is irrelevant. It is immaterial that such a judge was prevented by death or retirement provided that at the time of the writing and signing the judge was a member of the court. The inordinate delay in the delivery of the judgment and failure to date the judgment on the day it's delivered has been found to be a technicality curable under Article 126 (2) (c) of the Constitution."

Regarding the 2nd ground, counsel for the petitioner submitted that the petitioner was convicted of the offence of causing Financial Loss under section 20 of the Anti-Corruption Act, 2009. He added that the Court of Appeal and Supreme Court upheld the petitioner's conviction and sentence based on the same section. It was counsel's contention that the petitioner throughout his hearings and trials unsuccessfully contested the legality of his conviction since the impugned acts or omissions did not constitute or meet the definition of the offence of Causing Financial Loss under section 20 of the ACA.

It was counsel's argument that section 20 of the ACA clearly stipulates three interdependent, inseparable and inextricably linked elements of the offence of Causing Financial Loss: that a designated employee of a prescribed entity, in a premediated way did or omitted to do an act thus

incurring loss to the entity. Counsel reasoned that the three elements must all hold for the definition of Causing Financial Loss to be met.

Counsel for the petitioner submitted that the first element of designated employer entities holds since the petitioner was employed by NSSF, a public body, further that the second element of premeditation continues to be debatable and a bone of contention, but the third definition element of designated loss incurring entities does not hold as NSSF the entity to which the petitioner allegedly caused a loss, is neither the Government, bank nor credit institution.

Counsel added that the ostensible omission of 'insurance company' and 'public body' from the third element's set is technically a lacuna or a hiatus in written law that cripples the legal potency of section 20 of the ACA 2009.

Counsel further argued that the High Court and Court of Appeal retrospectively applied the Anti-Corruption Act, 2009 to find the Petitioner guilty of Causing Financial Loss and Abuse of Office, respectively. His argument on legality of sections 11 and 20 of the ACA was that it was raised as a preliminary point of law during the petitioner's trial, but it was not considered. Counsel submitted that the offences with which the petitioner was charged were created on 25th August 2009, yet the facts on which the petitioner was tried occurred in 2007. Counsel cited various authorities to the effect that laws should never have retrospective enforcement. (See: TSS Grain Millers Ltd v Attorney General (2003) 2 EA 685 and National Westminster Bank PLC v Spectrum Plus Ltd & Ors, HLS (2005).

It was counsel's averment that the Petitioner's High Court conviction, and the subsequent upholding of the same by the Court of Appeal and Supreme Court, for Causing Financial Loss under section 20 of the Anti-Corruption Act, 2009 was illegal since the petitioner's impugned acts or omissions did not constitute the offence of causing Financial Loss under section 20 of the ACA, thereby constituting serious violations of Articles 28 (1), 28 (7), 28 (12) and 44 (c) of the Constitution, thereby eroding the petitioner's non-derogable right to a fair hearing and violating the principle of legality.

The Respondent's Case

In reply, counsel for the respondent submitted that the contention whether the Supreme Court retrospectively defined section 20 of the ACA and thereby violated Articles 79 (1) and (2), 28 (7), 28 (12) and 44 of the Constitution, has already been addressed, determined, and resolved by this Court in Damian Akankwasa v Uganda Constitutional Reference No. 4/2011, where it was held that;

> "The requirement of Article 28 (7) as we understand it is that for a person to be charged with a criminal offence under any legislation the facts or omissions allegedly committed must have constituted a criminal offence which is defined under the law and there has to be a sentence prescribed for it. The test to be applied is whether the acts or omissions allegedly committed by an accused person constituted a criminal offence at the time they were committed. The acts, which the applicant is alleged to have committed and which it is alleged caused financial loss to National Forest Authority, occurred between 13th August 2007 and 29th February 2008. During this period there was a criminal offence of Causing Financial Loss defined under section 269 of the Penal Code Act which had been repealed by the Anti-Corruption

> Act. There was also a punishment prescribed for it. Section 20 of the Anti-Corruption Act in our view is a re-enactment of section 269 of the Penal Code Act. The only difference between the two sections as counsel for the applicant submitted, the sentence in the latter Act was enhanced. We do not consider the difference in the sentence material. The facts constituting the offence meet the criteria of Article 28 (7). Causing Financial Loss was a criminal offence between 13th August 2007 and 29th February 2008. The applicant/petitioner was properly charged in our view."

Counsel further submitted that section 20 of the Anti-Corruption Act, 2009 as the law in place became applicable and it spells out the offence and penalty for the offence which is lawful and is consistent with Articles 28(7), 8(12), 79(1)(2), 126(1) of the Constitution, contrary to what the petitioner stated in paragraph 3(ii), 4 (vii) (ix) and (xii) of the petition.

Regarding Issue No. 3: Whether section 5 (3) of the Judicature Act, Cap 13 to the extent that it limits the right of the applicant to appeal to the Supreme Court on matters relating to the severity of his sentence, is inconsistent with and/or in contravention of Articles 2(2), 28(1), 44(c), 129(2), 129(3), 132(1) and 132(2) of the Constitution:

Counsel for the petitioner submitted that in invoking section 5(3) of the Judicature Act Cap 13 which limits the right of the petitioner to appeal to the Supreme Court on matters relating to the severity of his sentence was unlawful and illegal and violated the petitioner's non-derogable right to a fair hearing, the Supreme Court acted in contravention of the Constitution of Uganda. He submitted that the Supreme Court acted unconstitutionally when it declined to investigate the severity of the petitioner's sentence. Counsel further submitted that the Court should

not have denied his rights on grounds that they were not allowed under section 5(3) of the Judicature Act.

Counsel for the petitioner reiterated his earlier prayers to allow the petition.

In reply, counsel for the respondent submitted that section 5(3) of the Judicature Act does not violate the above-mentioned articles of the Constitution as alleged by the petitioner. It was counsel's contention that an appeal is a creature of statute thus one either has a right to appeal or not. Counsel further stated that it's a cardinal principle of Constitutional interpretation that the entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other.

Counsel averred that section 5 (3) of the Judicature Act re-states the correct position of the law that is followed in Criminal Appeals in the Supreme Court and its application was in conformity with Articles 2 (2), 126 (1), 128 (1) (2) (4) and 274 of the Constitution, the Judicature Act and there was nothing calling for constitutional interpretation in the premises.

It was counsel's contention that the petitioner was at all times represented by counsel of his choice in all courts and his counsel ably submitted on mitigating factors before sentencing and there is no contradictory evidence that he was not heard by court as he was fully represented.

Counsel concluded that the petition is incompetent, frivolous, and vexatious and filed in abuse of court process and raises no questions for determination under Article 137.

He prayed that the petition be dismissed with costs.

Determination of the Grounds of the Petition

I have carefully considered the petition together with the affidavit in support as well as the answer to the petition. I have also considered the submissions and authorities provided to this court by both Learned Counsel. I have keenly observed that Counsel for the Petitioner hinged his argument on three major issues to-wit:

i) Whether the judgments of the Court of Appeal in Court of Appeal Criminal Appeal No. 77 of 2011 and Supreme Court Criminal Appeal No. 02 of 2018 denied the petitioner the right to be heard, contrary to Articles 2(2), 135 (1), 126 (2) (b), 128 (1), 129 (2), 28 (1), 28 (3) (d), and 44 (c) of the Constitution:

ii) Whether the conviction and sentencing of the petitioner for Causing Financial Loss in High Court Session Case No. 87 of 2011 and the subsequent confirmation of the sentence for the offence by the Court of Appeal and the Supreme Court were contrary to and non-compliant with section 20 of the Anti-Corruption Act, 2009; and if so, whether the courts' application of section 20 Anti-Corruption Act was retrospective and therefore inconsistent with or in contravention of Articles 2 (2), 28 (1), 28 (7), 28 (12), 44 (c), 79 (1) and 79 (2) of the Constitution;

iii) Whether section 5 (3) of the Judicature Act, Cap 13, to the extent that it limits the right of an appellant to appeal to the Supreme Court on matters relating to the severity of his/her

sentence, is inconsistent with and/or in contravention of Articles 2 (2), 28 (1), 44 (c), 129 (3), 132 (1) and 132 (2) of the Constitution.

In addressing the preliminary objection raised by the respondent as to whether the petition raises any question regarding the interpretation of the Constitution, I make a finding that indeed the grounds of this petition do not raise any matter for constitutional interpretation. I will return to give reasons for this finding later in the discourse.

The petitioner asserts that the provisions of section 5 (3) of the Judicature Act is in contravention of Articles 2 (2), 28 (1), 44 (c), 129 (3), 132 (1) and 132 (2) of the Constitution.

In paragraph 9 of his Affidavit in support of the Petition dated 15th September 2021, the petitioner states that the facts upon which he was charged and convicted for Causing Financial Loss occurred in the year 2007 and yet he was charged with an offence which was proscribed by section 20 of the Anti-Corruption Act which came into force on 25th August 2009. The Petitioner states that in 2007 when he was charged with the offence, section 20 of the impugned Act was not yet in force or in existence.

The Petitioner avers that he should not have been charged under section 20 of the Anti-Corruption Act 2009 because doing so was contrary to Article 28(7) (12) of the Constitution. He asserts that the Supreme Court purported to retrospectively define section 20 of the Anti-

Corruption Act in violation of the principles of legality established under Articles 28 (7), 28 (12) and 44 (c) of the Constitution.

In the answer, the Respondent contended that when the Anti-Corruption Act came into force, it amended, repealed and replaced sections of the Penal Code and that therefore the petitioner was lawfully charged under it. Further, that the preamble to the Anti-Corruption Act states that it is *"An Act to provide for the effectual prevention of corruption in both the public and the 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."*

It was argued for the Respondent that, contrary to what was raised by the Petitioner, section 20 of the Anti-Corruption Act as the law in place became applicable and clearly spelt out the offences and the penalties under the Act. Counsel for the Respondent submitted that the Act is lawful and consistent with Articles 28 (7), (8), (12), 79 (1) and (2), and 126 (1) of the Constitution. The respondent further contended that in accordance with section 13 (2) of the Interpretation Act, Cap 3, a repealed enactment does not affect liability or any penalty in respect of any offence committed against any enactment so repealed.

He further contended that the issue of the constitutionality and the application of section 20 of the Anti-Corruption Act was already addressed and determined by this court in Constitutional Reference No 4 of 2011, Damian Akankwasa v Uganda and Francis Atugonza v Uganda Constitutional Reference No.31/2010. Counsel invited this court to find that section 20 of the Anti-Corruption Act of 2009 had been properly

interpreted and applied by the courts of judicature. He further submitted that the courts did not offend the Constitution when they found that the petitioner was employed by NSSF, a body established by an Act of Parliament and was properly charged under the law. Counsel for the Responded urged this court to find that therefore that the question was *res judicata* and that there was nothing inconsistent with the Constitution. He invited this court to dismiss the Petition.

As part of the determination whether there is a question for constitutional interpretation it is essential to establish the following i) whether this court conclusively considered the retrospective application of section 20 of the Anti-Corruption Act in the decisions cited by the respondent, making the issue about it in this petition *res judicata.* ii) whether the retrospective application of section 20 of the ACA by the High Court against the petitioner, and its confirmation by the Court of Appeal and the Supreme Court, is in contravention of Articles 28 (7), (8), (12), 79 (1) and (2), and 126 (1). The first sub issue I will attempt to resolve is the question of *res judicata.*

Sub-Issue No.1: Res judicata and Issue No. 2 Retroactive Reach

The question then becomes whether this court has in its past decisions disposed of the issue regarding the constitutionality of section 20 of the ACA. The Respondent did submit that indeed this court has done so in the past. We shall take a granular look at some of the decisions referred to by the Respondent and others we have taken the liberty to include.

While distinguishing Damian Akankwasa with the current petition, Counsel for the Petitioner reasoned that this court did not assign a correct interpretation to Article 28 (7) and (12) of the Constitution in the case of Francis Atugonza v Uganda. Counsel invited this court to depart from the reasoning in the above two cases. He argued that the provisions of Article 28 (7) and (12) are absolute and non-derogable. He found fault in the charging of the petitioner under section 20 (1) for acts allegedly committed between August 2007 and February 2009, before the enactment of the ACA and before the creation of the offence, reasoning that it contravened the stated provisions of the Constitution.

Counsel opined that sections 11 and 20 (1) of the Anti-Corruption Act were not a re-enactment of sections 87 and 269 of the Penal Code Act, respectively. He pointed out that the difference between the former and the latter offence of Causing Financial Loss created by the ACA was mainly the enhancement of the sentence. It was counsel's submission therefore that the enactment of the new offence could not be a continuation of the former offence.

In reply, counsel for the respondent contended that the offence of Causing Financial Loss under the Anti-Corruption Act, 2009 was *impari materia* and a replica of section 269 the Penal Code Act CAP 109 before it was repealed. It was his submission that the only requirement under Article 28 (7) of the Constitution is that criminal charges be brought in respect of offences which are founded on acts or omissions which at the time they took place constituted a criminal offence. He justified his views with the words used in the two sections which he argued, are similar. He further drew the attention of the court to the identical lay

out of the titles and captions in the drafting of the laws. Counsel conceded that the sentence had been enhanced. He, however, maintained that it was lawful to charge the petitioner under section 20 (1) of the Anti-Corruption Act.

I will look closely at Damian Akankwasa and Atugonza (supra) to ascertain if the two decisions settled the questions the current petition seeks answers to.

In Damian Akankwasa v Uganda Constitutional Petition No. 004 of 2011, the petitioner was charged with the offence of Causing Financial Loss contrary to section 20 of the Anti-Corruption Act. It was alleged that he committed the offence between 13th August 2007 and 29th February 2008. When Akankwasa appeared in court to take a plea, his advocate applied to have the trial court state a constitutional reference to this court. The question that was framed as follows:

> *Whether the charging and the prosecution of the accused under section 20 (1) of the Anti-Corruption Act No. 6 of 2009 for offences allegedly committed between August 2007 and February 2008 is inconsistent with Articles 28 (7) and (12) of the Constitution.*

In support of the constitutional reference, Counsel for the Damian Akankwasa submitted that this court wrongly interpreted Article 28(7) and (12) of the Constitution in Francis Atugonza v Uganda and urged the court to depart from it. He stated that the provisions of the said article are absolute and derogating from them is prohibited under Article 44(c) of the Constitution. Learned counsel further

submitted that charging the applicant/ petitioner under section 20(1) for offences allegedly committed between August 2007 and February 2009 before the enactment of the Anti-Corruption Act and before the creation of the offence contravened Articles 28(7) and (12) of the Constitution. He further stated that sections 11 and 20(1) of the Anti-Corruption Act were not a re-enactment of Sections 87 and 269 of the Penal Code Act. He cited no authority to support his assertion. He conceded that there was a difference between the former and the new offences with regard to the enhancement of sentence. He claimed that, as a result of the difference, the re-enactment of the new offences cannot be a continuation of the former offence. He invited court to allow the reference.

The ruling in Damian Akankwasa was as follows:

> "20 of the Anti- Corruption Act in our view is a re-enactment of section 269 of the Penal Code Act. The only difference between the two sections as counsel for the applicant submitted, the sentence in the latter Act was enhanced. We do not consider the difference in the sentence material. The facts constituting the offence meet the criteria of Article 28(7). Causing financial loss was a criminal offence between 13th August 2007 and 29th February 2008. The applicant/petitioner was properly charged in our view.
>
> This reference raises similar issues as those that were raised in Constitutional Reference No.31/2010- Uganda v Atugonza Francis in which this court ruled that section 11(1) of the Anti-Corruption Act was not inconsistent with Article 28(7) and (12) of the Constitution. The ruling in that reference applies to the instant reference with the result that we dismiss it with costs.

The record of the lower court is returned with the direction that the trial magistrate should proceed with the trial of the applicant/petitioner forthwith."

The decision in Damian Akankwasa borrows heavily on the decision in Atugonza. I will therefore reproduce the decision in Atugonza as well and thereafter will discuss the two decisions together.

Francis Atugonza was charged with committing the offence of Abuse of Office contrary to section 11(1) of the Anti-corruption Act, No 6 of 2009. The acts complained of were alleged to have been committed between December 2007 and December 2008. 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 the alleged acts. This therefore offended and or violated Article 28(7) and (12) of the Constitution.

As a result, the trial judge framed a question for constitutional interpretation... in the following terms.

> "*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*"

Counsel pointed out that when the Anti-Corruption Act 2009 came into force, section 69 of the ACA repealed various sections of the Penal Code including sections 85-89. Section 87 provided for the offence of Abuse of Office. He further argued that at the commencement of the ACA, the offence of Abuse of Office under section 87 was

decriminalised. He contended that in effect the applicant was charged with a non-existent offence. Counsel emphasized that the new section 11(1) of the Anti- Corruption Act creates a stiffer sentence which renders the entire charge inconsistent with Article 28(7) and (12). Counsel found fault with the ACA for lack of a grandfather clause which would ordinarily have covered 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. He argued that this therefore was retrospective legislation which was inconsistent with article 28(7) and 12 of the Constitution.

In reply, Mr. Richard Adrole, learned State Attorney, opposed the reference contending that the charge under the Anti- Corruption Act was valid. He argued that the offence under Section 11 of the Anti-Corruption Act is the same offence of Abuse of Office as in the old section. He asserted that there was no requirement that persons must be charged under existing laws. His argument was that the article only required that criminal charges be brought in respect of offences which were founded on an act or omission, that at the time it took place, constituted a criminal offence. The law allowed for criminal 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. Counsel for the respondent further argued that any reference to the offence of Abuse of Office, stipulated under section 87 of the Penal Code Act, is construed as a reference to the re-enacted section 11 of the Anti-Corruption Act.

He invited this court to find that acts which constituted offences under the repealed section 87 of the Penal Code Act were still offences under the new section 11 of the ACA. The fact that a heavier penalty was added was a question to be considered by the Court at the time of sentencing, under Article 28(8).

The decision of the court was that the constitutional reference was unsuccessful. The court noted that for this purpose, it was important to determine the object of the Anti-Corruption Act. It explained the law in its decision as follows:

> "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 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 <u>without</u>

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(s) 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."

The starting point for statutory interpretation is that legislation is presumptively prospective. There is a presumption that a statute should not be given retroactive effect. In the petition before us the question was whether the sections had retroactive reach.

The two cases of Damian Akankwasa and Francis Atugonza draw on the understanding that a legislation will only be permissible if it remains fair. Where it leads to unjustifiable outcomes, the prospective legislation then becomes untenable. The main judicial test to determine permissibility or impermissibility of retrospective statutes is to measure their degree of fairness or unfairness. This criterion was expressed by Stoughton LJ., in Secretary of State for Services v Tunnicliffe [1991] 1 All ER 712, 724, when he observed:

> "The true principle is that Parliament is presumed not to have intended to alter law applicable to past events and transactions in a manner which is unfair to those who are concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a manner of degree. The greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

I find that without calling it so, the constitutional court in Akankwasa and Kugonza, applied the permissibility test. Where counsel had condemned the Anti-Corruption Act for introducing new and stiffer sentences, the court declared that the elements of the law and the prison terms were fair and just and simply a continuance of what had been applied under the Penal Code Act. We agree with this interpretation of the law and would not change this view.

I would hasten to add that in our particular circumstances, the petitioner was convicted for Causing Financial Loss under section 20 of the Anti-Corruption Act in the High Court, the Court of Appeal and Supreme Court. The submission of the petitioner was that the ACA was not in force at the time he committed the offence. He argued that his conviction was contrary to the principle of legality in criminal law was in contravention of Articles 28 (7), (8), (12) and Article 44 (c) of the Constitution. Counsel argued that the act of the Supreme Court in purporting to retroactively define section 20 of the ACA violated the principles of legality established under Articles 28 (7), 28 (12) and 44 (c) of the Constitution of Uganda. It was also the case for the petitioner that the Supreme Court in expanding and elaborating on the definition of section 20 of the Anti-corruption Act, thus violating the constitutional doctrine of separation of powers which was contrary to Articles 79 (1), (2), Articles 28 (7), 28 (12) and 44(c) of the Constitution, making the definition unconstitutional, null and void. He argued that the retroactive application of section 20 of the Anti-Corruption Act on the petitioner and his subsequent conviction on a redefined section 20 of the Anti-Corruption Act were unconstitutional and ought to be set aside.

In the above two Constitutional References, Akankwasa and Atugonza, the court was called upon to carry out a validity test in which the impugned sections of the law had to be assessed to check whether they met the constitutional standard under Article 28(7). As earlier noted, the sections of the law traversed in the two cases include section 11 and section 20 of the Anti-Corruption Act. Both constitutional references

found that section 11 and 20, were applicable to the facts of the respective offences in Akankwasa and in Atugonza.

This leads me to the conclusion that assertions made by the petitioner are inaccurate as they do not reflect the true position of the law. The above assertions misrepresent the law and the spirit of the law. When the Anti Corruption Act was promulgated, it repealed but also replaced the sections of the Penal Code which were affected by the law.

Further, in the two decisions the court considered the effect of the law on what would have otherwise been the grandfather clause. A grandfather clause, grandfathering, or grandfathered in a provision or section of a law, regulation, or other legal document, allows people or entities to follow old laws instead of new ones or limits how changes will be applied to legal relations and activities. Counsel distinguished the Anti-Corruption Act (the ACA) from the UPDF and Labour Unions Act submitting that the ACA lacked a grandfather clause.

In the UPDF Act, section 106 provides a continuum under which former armies are absorbed under the current law. It provides that "the Armed Forces of Uganda in existence immediately before the date of the commencement of this Act shall be deemed, on and after that date, to be included in the Uganda Peoples' Defence Forces raised and maintained under this Act." The Labour Unions Act 2006 equally has a savings clause under section 62. It provides for transitional arrangements in the following manner, notwithstanding the repeal of the Trade Unions Act, the National Organisation of Trade Unions shall continue to be in existence and shall be deemed to be a registered federation of labour

unions. While the above UPDF and the Labour Unions Acts have a section embedded in them sections which specifically provide a continuum for the actions which took place before the enactment, the ACA law provides the continuum in the preamble. The declaration in Atungonza is instructive.

> "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."

Without a doubt, although section 87 and section 267,268 and 269 of the Penal Code were repealed by the Anti-Corruption Act, the same law at the same time replaced and amended the Penal Code. This is demonstrated in the text and the wording of the new and old law. Save for the sentencing including a fine which did not exist in the earlier Act, the wording of the offences and the prison sentences are one and the same. It leaves no doubt that the acts and omissions said to have occurred always constituted a criminal offence.

As I conclude the question whether this matter is res judicata I will refer to Uganda v Godfrey Onegi Obel, Constitutional Petition/Reference No 24 of 2011, the Constitutional Court pronounced itself on the question of *res judicata* in the following manner:

> "the interpretation by this Court of any legal provision *vis-à-vis* the Constitution and its legal effect is not limited to the parties concerned in the case in which the interpretation is made. The above interpretation by the Constitutional Court has a binding

pronouncement of the law, subject to appeal to the Supreme Court. This court, therefore, cannot or should not hear and determine the same substantive and legal questions about the interpretation of the Constitution more than once because they become *res judicata*."

Issue No. 2

Questions were also raised regarding the retroactive reach of the sections 11 and 20 of the Anti-Corruption Act in as far as they contravened Articles 28(7), (8) and (12) of the Constitution. Article 28(7) is to the effect that "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". The import of Article 28 is that criminal law should be sufficiently precise to enable persons to know in advance whether their conduct would be criminal. Here is how the repealed and the amended sections of the law read:

87. Abuse of office of the Penal Code Act

(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 act prejudicial to the interests of his or her employer or of 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 term not exceeding seven years.

The impugned provision in section 11 (1) of the Anti-Corruption Act, 2009 provides as follows:

11. Abuse of office

(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 act prejudicial to the interests of his or her employer or of 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 one hundred and sixty-eight currency points or both.

The repealed section 269 of the Penal Code Act provided as follows:

"Causing Financial Loss"

1. Any person employed by the Government, a bank, a credit institution, an insurance company or public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution, insurance company, public body or customer of a bank or credit institution is liable on conviction to a term of imprisonment of not less than three years and not more than fourteen years.
2. In this section-
    a. "bank" and "credit institution" have the meanings assigned to them by the Financial Institutions Act;
    b. "insurance company" means an insurance company within the meaning of section 4 of the Insurance Act; and
    c. 'public body" has the meaning assigned to it by section 1 of the Prevention of Corruption Act."

The current section 20 under the Anti-Corruption Act provides that:

"Causing Financial Loss."

(1)Any person employed by the Government, bank, a credit institution, an insurance company or a public body, who in the performance of his or duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or to a fine not exceeding three hundred and thirty six currency points or to both.

(2)In this section-

a. "bank" or "credit institution" have the meanings assigned to them by the Financial Institutions Act; and
b. "insurance company" means an insurance company within the meaning of section 4 of the Insurance Act."

If an act was criminalised at the time it was committed 'according to the general principles of law recognised' it should not be declared null and void, simply because the law has a new name. In Polyukhovich v The Commonwealth [1991] HCA 32 (the Polyukhovich case) the Australian High Court upheld the power of the Parliament in 1988 to legislate for the trial in Australian Courts of war crimes committed during the Second World War. History would bear us out that there was a time when the minimum sentence to offences of Abuse of Office and Embezzlement was three years imprisonment. Under the current legal regime, the prison sentence is tempered and has the option of paying a fine,

an option that did not exist under the Penal Code. Rather than have a likelihood of only going to jail, a person accused of a crime under section 11 and section 20 of the ACA now has the option of paying his way out of prison. One could postulate that the sentence could be stiffer if the court exercised its right to impose both a fine and the option of imprisonment. In the case of the petitioner, however, the courts employed only the old law in sentencing him. That way the courts acted in conformity with the law under which he might have been charged had it not been repealed.

We must not lose the historical context within which conduct in public office has been regulated by creating offences of abuse of office, causing financial loss and embezzlement. The current crisis many nations face is not war crimes, as the situation in Nazi Germany. The current crisis is the problem of corruption which manifests as abuse of office, corruption, embezzlement, causing financial loss and a plethora of other high crimes and misdemeanours as enumerated in the Anti-Corruption Act and related laws. Offences of Abuse of Office and Causing Financial Loss have always been criminalised. In the new law the elements have remained the same. The interpretation has not changed. A person who commits such a crime cannot claim that it was not a crime because at the time he is prosecuted it is now found in the **Anti-Corruption Act**. **"What's in a name? That which we call a rose, by any other word would smell as sweet."** Once the wrong was clearly proscribed, it meets the criteria under Article 28(7,8,12) and therefore does not contravene the Constitution only for reason that it was clothed in a separate law. **Akankwasa and Atugonza** are still good law.

Before I sum up this issue, I will take a thirty-thousand-feet-view of the question of sentence. Without regurgitating what has already been

discussed above, I wish to address the question of the legality of the sentence which was meted out on the petitioner. The case for the petitioner was that the sentencing of the petitioner under section 20 of the Anti-Corruption Act by the High Court to imprisonment for a period of 14 years and his disqualification from holding public office for a period of 10 years after conviction under section 46 of the Anti-Corruption Act, was illegal and inconsistent with and/or in contravention of Article 28 (8) and 44 (c) of the Constitution. And further that the confirmation of the sentences imposed on the petitioner by the High Court, by the Court of Appeal and the Supreme Court was illegal and inconsistent with and/or in contravention of Article 28 (8) and 44 (c) of the Constitution. It was further argued that the sentencing of the petitioner under section 20 ACA, which provided for a severer penalty than the former provision for the offence of Causing Financial Loss in section 269 of the Penal Code, was in contravention of the imperatives in Articles 28 (7), (8) and (12) and 44(c) of the Constitution and occasioned an injustice that was contrary to the provisions of the Constitution that should not be left without a remedy from this court.

For the respondent supported the position that the Anti Corruption Act No. 6 of 2009 was made pursuant to the powers of Parliament under Article 79 for good governance and consonant with the National Objectives and Directive Principles of State Policy No. XXVI on accountability enshrined in the 1995 Constitution from which the impugned judgments emanate, and the judgments ought to be defended.

Counsel argued that it would set a wrong precedent for convicts to use the Constitutional Court under the guise of constitutional interpretation, to challenge and try to overturn concluded cases that have been exhausted by

appeal and confirmed by the Supreme Court, so that criminals can be set free, and conviction set aside.

I quoted in full what the impugned sections 11 and 20 of the ACA provide. I also repeated what the repealed sections 87 and 269 of the Penal Code Act provide. What I did not mention was what guided sentencing in the old Act. In a by-the way manner section 274 and section 275 of the PCA guided how consequential orders were made. They provide as follows:

> 274. **Application of Director of Public Prosecution's powers under certain sections of the Prevention of Corruption Act.**
>
> The powers of the Director of Public Prosecutions under sections 16 to 20 of the Prevention of Corruption Act shall, with the necessary modifications, apply to offences under sections 261, 268, 269 and 271 as they apply to offences under that Act, and the penalties prescribed in the applied sections shall apply accordingly.
>
> 270. Compensation.
>
> Where a person is convicted under section 268 or 269 or where a convicted person is sentenced under section 271, the court shall, in addition to the punishment provided there, order such person to pay by way of compensation to the aggrieved party, such sum as in the opinion of the court is just, having regard to the loss suffered by the aggrieved party; and such order shall be deemed to be a decree under section 25 of the Civil Procedure Act, and shall be executed in the manner provided under section 38 of that Act.
>
> THE PREVENTION OF CORRUPTION ACT.
>
> Arrangement of Sections.
>
> **25. Disqualification.**

Every person who is convicted of any offence under section 2, 3, 4 or 5 shall become disqualified for ten years from the date of his or her conviction from holding any office in or under a public body.

The reason I bring up the above repealed sections of the PCA is to convey the ***status quo*** before the ACA was promulgated. When a person was found guilty of offences under sections 26, 268 and 269 of the Penal Code Act the State, the court had to refer to several laws such as the Civil Procedure Act and the Prevention of Corruption Act in order to make sentencing and other consequential orders. In this regard the heading of **section 274,** apart from spelling out the powers of the DPP, hence the heading, sought to provide that the **Prevention of Corruption Act 1970** would with the necessary modifications, apply to offences under **sections 261, 268, 269 and 271** as they apply to offences under that Act, meaning the **Prevention of Corruption Act**, and most importantly that the penalties prescribed would apply accordingly.

I find that the preamble to the Anti-Corruption Act 2009, saves the repealed sections of the Penal Code in a clear and unambiguous way. Therefore sections 11 and 20 of the Anti-Corruption Act, 2009 are the law applicable and they stipulated the offence and the penalty for the offences and are lawful and is consistent with Articles 28(7), (8), (12) 79(1)(2), 126(1) contrary to what is stated in paragraph 3(ii) and 4(vii) (ix) and (xii) of the petition.

Given the wider contexts and implications of this petition, I find that the petition before us raises questions which were answered **in Atungonza and Akankwasa** (supra).

I shall now consider whether this petition raises questions for Constitutional interpretation by this Court. Article 137 (1) of the Constitution is to the effect that any question as to the interpretation of this Constitution shall be decided by the Court of Appeal sitting as the Constitutional Court.

Under Article 137 (3), A person who alleges that-

> (a) an Act of Parliament or any other law or anything 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 Court is bestowed with authority to determine any questions of the interpretation of the Constitution. Article 137 (3) deals with the cause of action to be pleaded in a petition before this Court.

In Raphael Baku Obudra & Anor v Attorney General, Supreme Court Constitutional Appeal No. 1 of 2005 and Ismail Serugo v Kampala City Council & Attorney General, Constitutional Appeal No. 2 of 1998 it was propounded that:

> "For the Constitutional Court to have jurisdiction the petition must show on the face of it that the interpretation of a provision of the Constitution is required. It is not enough to allege merely that a constitutional provision has been violated. The applicant must go further to show a prima facie case, the violation as alleged and its effect before a question could be referred to the Constitutional Court."

This court is tasked with the duty to prove whether the issues raised in this petition involve a question as to the interpretation of the Constitution.

It's a well-settled position of law that for any petition to be successful it must show on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to merely allege that a Constitutional provision has been violated but the petitioner must go ahead to show the violation alleged and its effect before a question could be referred to the Constitutional Court.

The jurisdiction conferred upon the Constitutional Court by Article 137 is to ascertain whether the subject of the Constitutional litigation, be it an act of parliament, or other law or act or omission done under the authority of any law, or by any person or authority, is or is not in violation of the Constitution.

In the instant case, the petitioner is challenging the delay in delivering the Court of Appeal Judgment in CACA No. 77 of 2011, the Judgments of the High Court, the Court of Appeal and Supreme Court in relation to the conviction of the accused for Causing Financial Loss contrary to Section 20 of the Anti-Corruption Act, 2009 alleging that they were passed in contravention of Articles 2 (2), 28 (1), 28 (7), 28 (12), 44 (c), 79 (1) and 79 (2) of the Constitution.

The petitioner challenged section 5(3) of the Judicature Act, to the extent that it limits the right of convicted persons to appeal to the Supreme Court in violation of Articles 2(2), 28 (1), 44 (c), 129 (2), 129 (3) and 139 (1) of the Constitution.

Having dealt with issues 1 and 2, I will now deal with the issues that remain outstanding. Regarding the issue of delay in passing the Judgment in CACA

No. 77 of 2011: briefly, the appeal was heard on 23rd October 2014 by a panel of three judges; (Hon. Justice Steven Kavuma DCJ (as he then was), Justice Ruby Aweri Opio JSC and Justice Kenneth Kakuru JA). Judgment was signed by two Justices and delivered on 15th January 2018. The two justices were: Hon. Justice Ruby Aweri Opio and Hon. Justice Kenneth Kakuru. By the date of delivery of the Judgment, Justice Ruby Opio Awere had been elevated to the Supreme Court and Justice Steven Kavuma the DCJ then had retired.

The Petitioner raised this same issue in **David Chandi Jamwa v Uganda Supreme Court Criminal Appeal No. 2 of 2017.** The Petitioner (then appellant) argued that the delay in delivering the judgment contravened his right to a fair hearing. I wish to draw the attention to the decision of **David Chandi Jamwa v Uganda Supreme Court Criminal Appeal No. 2 of 2018** where their Lordships by a majority Judgment held thus:

> "We acknowledge that there was inordinate delay in the delivery of the judgment to which we take exception. We also acknowledge there was non-compliance with rule 33 (11) of the Court of Appeal rules which provides that a judgment be dated as of the day when it is delivered. In our view none of the two errors is so fatal as to render invalid the authentic signature of a judge who had jurisdiction in the matter at the time, he appended his signature. The two errors are the sort of technicalities that should not be allowed to prevail at the expense of substantive justice as envisaged by Article 126 (2)(e) of the constitution..."

I join issue with the concern over inordinate delay in delivery of judgments and add my voice to the need for finding remedies to cutting down the lead time in the delivery of justice. However, basing on the above deliberations, I

already find that the Supreme Court clearly pronounced itself on the issue raised by the petitioner. I note that I approached this part of the Petition from two angles. I approached it from the angle that petitions should not be filed in pretext. The attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted. A petition should not be one that is disguised and clothed in language of a petition but seeks to give redress in a matter that has been already decided upon by courts of competent jurisdiction. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution see **McCulloch v Maryland 17 US 316**. In this case the petitioner had filed a criminal appeal in the supreme court. In my humble view, this petition comes as an affront to the powers of the Supreme Court in the hope that this court can find justiciability in a matter that is res judicata. I find this approach disturbing if not vexatious. It tests judicial neutrality.

I find that none of the issues raised in the petition call for constitutional interpretation of the many articles cited by the petitioner which this court has not already pronounced itself upon. Judicial neutrality inescapably involves taking sides. The judgment of the court, though it may elude an issue, in effect settles a substance of the issue. Judicial authorities to figure out when to defer to others in a constitutional matter is a form of substantive power. Judicial restraint is but another form of judicial activism. When a law is found to abrogate or contravene the constitution, that law is said to be null and void to the extent of its inconsistency. We have not found that here. We would therefore need to be circumspect in delving into

matters that on the face of the record do not call for constitutional interpretation.

The last leg of this petition is section 5(3) of the Judicature Act which creates limitation on appeals states as follows:

> **5. Appeals to the Supreme Court in criminal matters**
>
> **(3) In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence.**

According to the submission of the petitioner, section 5(3) creates a constitutional conundrum. He suggests that issues of severity of sentence are questions of law.

I find the above thinking problematic. There is a contradiction in thinking that every issue that leads to great dissatisfaction must have an answer in the Constitution. In this case there is sometimes tension between interpretation of the Constitution and judicial enforcement of its commands. The effect of this tension was experienced in the United States supreme court in Norton v Shelby County 118 U.S. 425 (1886) where Justice Field in describing the result and effect if what happens when a law is declared unconstitutional stated thus:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed."

It is important to think of law in terms of cause and effect. In approaching section 5(3) of the Judicature Act in this manner, I see this law as one of the most litigated parts of judge-made law. There is so much-repeated litigation

on the question of the severity of sentence that it forms by necessary implication, one of the normative and value-laden areas in the internal structure of judicial review. By review in this case, I mean the number of times the question of severity of sentence has had recourse to first instance and appellate review. The supreme court has on a plethora of occasions had to consider the issue of severity of sentence. In Nzabaikukize Jamada the Supreme Court held as follows:

> "This court has previously held that in spite of the provisions of section 5(3), it may consider an appeal against a sentence.

In Kiwalabye Bernard v Uganda, SCCA No. 143 of 2001 the Court thus:

> "The appellate court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion exercised in sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."

Busiku Thomas v Uganda, Criminal Appeal No. 33 of 2011 (SC), and in Mpagi Godfrey v. Uganda, SCCA No. 63 of 2001; see also Sewanyana Livingstone v Uganda SCCA No. 19 of 2006, Bonyo Abdul v Uganda, SCCA No. 07 of 2011. The above listed cases have all seen the Supreme Court consider the issue of severity of sentence. I note that the supreme court has to choose what cases it wishes to take up as mandated under Article 132(2) of the Constitution. Matters of sentence have often been seen as matters of discretion. The Supreme Court seems so far to have been

unwilling to entertain appeals in which discretionary matters of fact on sentencing are what they have to deal with. This has not always been the case. This is partly because of the jealously guarded notion of judicial discretion.

5

What is Judicial Discretion?

Bouvier, quoted in Nevada Supreme Court case in Nevada in **Goodman v Goodman 68 Nev. 484,** described judicial discretion as:

> "That part of the judicial function which decides questions arising in
10 the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law. The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the
15 personal judgment of the court."

The whole area of sentencing is so discretionary that courts seem to be unwilling to fetter the discretion of judges lest they get bridled, hemmed in, unable to act without control and also courts look to avoid self-censorship. And yet discretion should and must let the judge act out of one's own
20 judgment and free will. A discretionary issue cannot become a question of law. The Supreme Court has no reason to entitle such a question. **In Norris v Clinkscales, 47 S.C. 488**

> "the courts and text writers all concur that by `judicial discretion' is meant sound discretion guided by fixed legal principles. It must not
25 be arbitrary nor capricious, but must be regulated upon legal grounds, grounds that will make it judicial. It must be compelled by conscience, and not by humour. So that when a judge properly

exercises his judicial discretion he will decide and act according to the rules of equity, and so as to advance the ends of justice."

Discretion as a concept is almost difficult to converse. This is what makes the question of sentencing a matter of fact. Sentencing is undeniably the most complex task; among the many difficult tasks a judge assumes. Perhaps it is by far the most onerous task any judge is faced with. This is due to the variety of matters that must be factored in and considered in order for a judge to arrive at a sentence such as the antecedents of the offender, the manner in which the crime was committed, the effect of the act, the age of the offender and in heinous crime, whether it forms the rarest of the rare. When a judge of 1st instance, a trial judge, arrives at a sentence, first it should be respected and if it is to be disturbed there must be good reason.

In our jurisdiction, appellate courts have recommended that a sentence should not be manifestly excessive or so low as to cause a miscarriage of justice and should be in line with and not contrary to principles of law. A sentencing regime which is so low as to encourage gender-based violence or other crimes would be injurious to a society and would be seen as one which keeps a certain group of people, like young men capable of reform, in prison for extended periods of time, causing despondency and hopelessness in society. Sentences ought to reflect the seriousness of the offence and protect the public and yet at the same time provide the accused with the needed education, training, medical care, and correctional treatment. Sentences are meant to be rehabilitative and should bring harmony in the community. There can never be a perfect or correct sentence. A sentencing decision will more often than not deprive a human being of his liberty for a period. This

deprivation of another human of his liberty has profound and long-lasting impact not only on the individual but often on his loved ones such as family, friends, and community. At the same time, the law envisages that discretionary roles have to be respected and not over litigated. This is why in our jurisdiction courts will not usually interfere with a sentence passed by a trial judge except for reasons some of which are articulated above.

This brings us back to the question whether such a discretionary matter as sentencing is one which invites a constitutional question demanding an answer. I would answer this question in the negative.

This petition is *res judicata*. Since the majority of the panel agree as much, we find that there is no merit in this petition and therefore it dismissed.

We make no order as to costs.

Dated at Kampala this 27th day of April 2023

Catherine Bamugemereire
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 26 OF 2021

DAVID CHANDI JAMWA:::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

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

CORAM: HON. JUSTICE CATHERINE BAMUGEMEREIRE, JCC
HON. JUSTICE STEPHEN MUSOTA, JCC
HON. JUSTICE CHRISTOPHER MADRAMA, JCC
HON. JUSTICE IRENE MULYAGONJA, JCC
HON. JUSTICE MUZAMIRU KIBEEDI, JCC

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA

I have had the benefit of reading in draft the judgment by my sister Hon. Justice Catherine Bamugemereire, JA.

I agree with the judgment and the orders she has proposed.

Dated this 27th day of June 2023

Hon. Stephen Musota

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(CORAM: BAMUGEMEREIRE, MUSOTA, MADRAMA, MULYAGONJA AND KIBEEDI, JJCC)

CONSTITUTIONAL PETITION NO 26 OF 2016

DAVID CHANDI JAMWA} ..... PETITIONER

VERSUS

THE ATTORNEY GENERAL} .....RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have had the benefit of reading in draft the judgment of my learned sister Hon. Lady Justice Catherine K. Bamugemereire, JCC.

I concur with her judgment that the petition raises no controversy as to the interpretation of the Constitution in terms of article 137 (1) of the Constitution and all the controversies raised having been determined before.

I would however like to add my voice to some of the issues relating to interpretation. In their decision, the Constitutional Court in **Damian Akankwasa vs Uganda; Constitutional Reference No 4 of 2011** considered whether charging somebody under section 20 of the Anti - Corruption Act when the offence was committed before the promulgation of the Anti - Corruption Act 2009 was unconstitutional. They found that the financial loss which was alleged occurred between 13th August 2007 and 29th February 2008 before the promulgation of the Anti - Corruption Act 2009. In resolving the controversy, they compared section 269 of the Penal Code Act and section 20 of the Anti - Corruption Act and found that section 20 was a re-enactment of section 269 of the Penal Code Act. My understanding of the decision of the constitutional court is that it was their implicit finding that it was erroneous to charge their petitioner under section 20 of the Anti -

Corruption Act and that is why they went into the effort of establishing whether section 20 of the Anti - Corruption Act was the same or similar to section 269 of the Penal Code Act. If this was not the case, it would have been sufficient for the Constitutional Court to find that it was enough to charge the petitioner under section 20 of the Anti - Corruption Act because it was lawful. Instead, the constitutional court went through the pain of establishing whether section 269 of the Penal Code Act had the same ingredients as section 20 of the Anti - Corruption Act with regard to the offence of causing financial loss. They did this precisely because, it was erroneous to charge the petitioner under section 20 of the Anti - Corruption Act and the only question for consideration was whether this was prejudicial to the accused.

I have further considered section 34(1) of the Criminal Procedure Code Act which provides as follows:

> 34. Powers of appellate court on appeals from convictions.
>
> (1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

Under section 34 (1) of the Criminal Procedure Code Act, a wrong decision on a question of law will not lead on appeal, to the decision being set aside, if no substantial miscarriage of justice has occurred. By comparing sections 269 of the Penal Code Act with section 20 of the Anti - Corruption Act, the court was trying to establish whether any substantial miscarriage of justice had actually occurred by virtue of charging the petitioner under section 20 (supra). They found that section 269 of the Penal Code Act was re-enacted

in section 20 of the Anti - Corruption Act and the petitioner was not prejudiced because the ingredients of the offence are the same.

In this petition, the petitioner's contention is that charging him under section 20 of the Anti-Corruption Act, and sentencing him under the provision violated his right to a fair hearing enshrined under article 28 (8) of the Constitution insofar as the penalty under section 20 of the Anti-Corruption Act was heavier than that under section 269 of the Penal Code Act. I have carefully considered these sections. I will start by considering the maximum penalty under section 20 of the Anti-Corruption Act. Section 20 provides for a maximum of 14 years' imprisonment for a convict of causing financial loss under the section. Similarly, section 269 of the Penal Code Act provides for a maximum penalty of 14 years' imprisonment and a minimum penalty of three years' imprisonment for the offence of causing financial loss. As far as the sentence of imprisonment is concerned, the two provisions have the same maximum penalty. Moreover, as a question of fact, the petitioner was sentenced to 12 years' imprisonment and therefore was not prejudiced by charged under section 20 of the Anti-Corruption Act. I note that section 20 of the Anti - Corruption Act also includes the penalty of a fine which was not there under section 269 Penal Code Act. However, the petitioner in this petition had not been sentenced to pay a fine. That aside, sections 269 of the Penal Code and section 20 of the Anti - Corruption Act are the same. The petitioner could not have been prejudiced by the evidence led to prove the ingredients of the offence under section 20 of the Anti - Corruption Act because the ingredients of the offence remained the same as under section 269 of the Penal Code Act.

Article 28 (7) of the Constitution provides that:

> No person shall be charged with or convicted of a criminal offence which is founded on act or omission that did not at the time it took place constitute a criminal offence.

Clearly the offence of causing financial loss was a criminal offence under section 269 of the Penal Code Act and therefore article 28 (7) of the

Constitution does not apply to the petitioner's petition. He should have been charged under article 269 of the Penal Code Act. I have further considered article 28 (8) of the Constitution which is the appropriate provision for consideration in the circumstances and it provides that:

> (8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

The maximum penalty that could have been imposed at the time the petitioner is stated to have committed the offence of causing financial loss was 14 years' imprisonment. This was under section 269 of the Penal Code Act. Further section 20 of the Anti - Corruption Act 2009 impose a maximum penalty of 14 years' imprisonment. As I noted above, the petitioner was not sentenced to a fine which is the additional penalty under section 20 of the Anti - Corruption Act. In that sense, the petitioner was not prejudiced by the sentence of 12 years' imprisonment which remains a lawful sentence deemed to be under section 269 of the Penal Code Act.

Further, the charging of the petitioner under section 20 of the Anti-Corruption Act, may be taken as a wrong citation of the law. It has the technical consequence of imposing on the petitioner a disqualification from holding public office for a period of 10 years without a court order. The disqualification is by operation of section 46 of the Anti - Corruption Act. Section 46 of the Anti - Corruption Act provides that:

> 46. Disqualification.
>
> A person who is convicted of an offence under section 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 shall be disqualified from holding a public office for a period of ten years from his or her conviction.

Where a person is convicted of an offence under section 20 of the Anti - Corruption Act, he or she shall automatically be disqualified from holding public office for a period of 10 years from the date of his or her conviction. In other words, it would be prejudicial to apply section 20 in sentencing the petitioner because of the automatic disqualification from holding public

office. This however depends on whether the previous law also provided for disqualification of a person from holding a public officer under the provisions of the Prevention of Corruption Act. Section 270 of the Penal Code Act provides that:

> 270. Compensation.
>
> Where a person is convicted under section 268 or 269 or where a convicted person is sentenced under section 271, the court shall, in addition to the punishment provided there, order such person to pay by way of compensation to the aggrieved party, such sum as in the opinion of the court is just, having regard to the loss suffered by the aggrieved party; and such order shall be deemed to be a decree under section 25 of the Civil Procedure Act, and shall be executed in the manner provided under section 38 of that Act.

The petitioner is deemed to have been charged under section 269 of the Penal Code Act and therefore the provisions of section 270 of the Penal Code Act, applies to him. However, section 46 of the Anti - Corruption Act does not apply to him.

The question of whether imposition of the sentence of disqualification by virtue of a conviction under section 20 of the Anti - Corruption Act, contravenes article 28 (8) of the Constitution is not a question as to interpretation of the Constitution but a question for enforcement of the cited provisions of the Constitution. There is no controversy about the fact that the Constitution provides that no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for the offence at the time when it was committed. It is as plain as can be and there can be no dispute as to the meaning, scope or application of section 28 (8) of the Constitution. Specifically, it should be noted that section 46 of the Anti - Corruption Act, applies automatically by operation of law and not by the order of court. Any person convicted of an offence of causing financial loss under section 20 of the Anti - Corruption Act, shall be disqualified for a period of 10 years from holding public office. It is therefore the erroneous act of charging the petitioner under section 20 of the Anti - Corruption Act and being convicted

thereunder which leads to the disqualification. The problem with the analysis of the petitioner is that there was no sentence required for application of section 46 of the Anti - Corruption Act. For it to be applied, all the evidence needed is a conviction under section 20 of the Anti - Corruption Act.

As can be seen from the decision of this court **Damian Akankwasa v Uganda; Constitutional Reference No 4 of 2011**, the court laboured on the premises that the charging of the petitioner under section 20 of the Anti - Corruption Act, though erroneous did not prejudice him because the elements of the offence of causing financial loss under section 269 of the Penal Code Act, were the same as those under section 20 of the Anti - Corruption Act. The judgement in **Damian Akankwasa v Uganda** (supra) can only be applied to say that; though it was erroneous to charge somebody under section 20, the charging of a person per se under section 20 of the Anti - Corruption Act, did not prejudice him because it had the same elements or ingredients of the offence and therefore it could be a mere technicality. In my judgment this is a technicality that did not prejudice the petitioner and the court ought to find that section 46 of the Anti - Corruption Act, does not apply to the Petitioner because the Anti - Corruption Act did not operate retrospectively.

The date of commencement of the Anti - Corruption Act, is 25th August 2009. It could therefore not apply to facts and circumstances before 25th August 2009. Further section 69 thereof repealed section 269 of the Penal Code Act. It provides that:

> 69. Consequential amendment of Cap. 120.
>
> The Penal Code Act is amended by repealing sections 85, 86, 87, 88, 89 90, 91, 92, 93, 268, 269, 322, 325 and 326.

This repeal became effective on the 25th of August 2009. Further section 14 of the Acts of Parliament Act, Cap 2 laws of Uganda provides for commencement of Acts of Parliament as at the date specified in the Act and where the Act is intended to have retrospective effect, the Act shall state

so expressly. Section 14 of the Acts of Parliament Act codifies the common law and provides that:

> 14. Commencement of Acts.
>
> (1) Subject to this section, the commencement of an Act shall be such date as is provided in or under the Act, or where no date is provided, the date of its publication as notified in the Gazette.
>
> (2) Every Act shall be deemed to come into force at the first moment of the day of commencement.
>
> (3) A provision in an Act regulating the coming into force of the Act or any part of the Act shall have effect notwithstanding that the part of the Act containing the provision has not come into operation.
>
> (4) Where an Act is made with retrospective effect, the commencement of the Act shall be the date from which it is given or deemed to be given that effect.
>
> (5) Subsection (4) shall not apply to an Act until there is notification in the Gazette as to the date of its publication; and until that date is specified, the Act shall be without effect.

As I have stated above, section 14 of the Acts of Parliament Act codifies the common law which is succinctly stated by Lopes LJ in **Re School Board Election for the Parish of Pulborough (1894) 1 QB 725**, at 737 that:

> It is a well-established principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended. This principle of construction is especially applicable when the enactment to which retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions. It need not be penal in the sense of punishment. Every statute it has been said, which takes away or impairs vested rights acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transaction already past, must be presumed to be intended not to have retrospective effect.

Section 20 of the Anti - Corruption Act, does not have retrospective effect as the is no statutory provision which expressly states so. Secondly the date of its commencement is a specified. Further, it's provisions cannot

apply to a state of facts before it came into force which is after 25 August 2009. Having said that, this does not disclose any question as to interpretation of article 28 (8) Constitution, which as I stated above is clear and unambiguous. All that the petitioner raised is a question for enforcement of his rights under article 28 (8) to the extent of getting an order that section 46 of the Anti - Corruption Act, does not apply to him.

Further matters of enforcement of fundamental rights and freedoms under article 50 of the Constitution are litigated before competent courts which include, the High Court and appellate courts. I further agree with reference to enforcement matters, that the applicant exhausted his remedies before the competent courts already and entertaining afresh any alleged violation of his fundamental rights and freedoms in this Petition would be entertaining a disguised appeal relating to the enforcement of his fundamental rights and freedoms as enshrined under article 28 (8) of the Constitution. In the very least, the petitioner ought to apply to the Supreme Court for review of its decision.

In addition, I have considered the second aspect of the petitioner's case which is whether section 5 (3) of the Judicature Act, to the extent that it limits the right of convicted persons to appeal to the Supreme Court, thereby violates article 28 (1), 44 (c), 129 (2), 129 (3) and 139 (1) of the Constitution.

I find that this aspect of the petition has no merit because section 5 (3) of the Judicature Act, does not bar a convict sentenced to a term of imprisonment from appealing against the decision of the Court of Appeal against sentence on a point of law. For instance, if the period the appellant had spent in lawful custody before his conviction had not been taken into account in terms of article 23 (8) of the Constitution, there is a right of appeal on a point of law. Any sentence can be challenged for illegality. What is restricted are appeals against the severity of sentence. Appeals are creatures of statute as clearly provided for under section 132 (2) the Constitution which provides that:

132.Jurisdiction of the Supreme Court.

(1) The Supreme Court shall be the final court of appeal.

(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.

Section 5 (3) of the Judicature Act, cap 13 laws of Uganda provides that:

(3) In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including severity of the sentence.

The question of whether section 46 of the Anti - Corruption Act, was erroneously applied to the petitioner, is a question of law. As I noted above, section 46 of the Anti - Corruption Act, applies automatically to any person who has been sentenced under section 20 of the Anti - Corruption Act. It does not require a sentence of the court since the law operates automatically. Secondly, to make an order sentencing a person to disqualification is a mere surplusage because the law does not require such an order to be made. It follows that, there is not right of appeal against a sentence which is not enabled by any law. It is a question for enforcement of the petitioner's rights and therefore this aspect of the petition that his right to appeal is infringed by section 5 (3) of the Judicature Act, has no merit and is not a question as to interpretation of the Constitution. Further it is based on erroneous premises that the section bars the petitioner from appealing against illegality of sentence whereas not.

In the premises, I therefore agree that the petition does not raise any question as to interpretation of the constitution. I concur with the judgment of my learned sister Hon. Lady Justice Catherine K. Bamugemereire, JCC dismissing the petition with the orders she has proposed.

Dated at Kampala the 22nd day of April 20

Christopher Madrama Izama

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

{Coram: Bamugemereire, Musota, Madrama, Kibeedi & Mulyagonja, JJCC}

CONSTITUTIONAL PETITION NO. 26 OF 2021

DAVID CHANDI JAMWA::PETITIONER

VERSUS

ATTORNEY GENERAL:::RESPONDENT

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading the judgment of my sister Bamugemereire, JCC and the supporting judgment of my brother Madrama, JCC in which they both found that this petition did not raise any questions for constitutional interpretation within the meaning of Article 137 of the Constitution. And that therefore the petition ought to be dismissed with no order as to costs, and I agree with the final decision proposed. However, there is one particular aspect of the petition that I would like to address in this judgment.

In the petition now before us, the petitioner basically raised three issues as follows:

i. Whether the judgments of the Court of Appeal in CACA No. 77 of 2011 and the Supreme Court in SCCA No. 02 of 2018 denied the petitioner the right to be heard, contrary to Articles 2(2), 135 (1), 126 (2) (b), 128 (1), 129 (2), 28 (1), 28 (3) (d), 44 (c) and 144 (1) of the constitution;

ii. Whether the courts' application of section 20 of the Anti-Corruption Act was retrospective and therefore inconsistent with or in contravention of Articles 2 (2), 28 (1), 28 (7), 28 (12), 44 (c), 79 (1) and 79 (2) of the Constitution;

iii. Whether section 5 (3) of the Judicature Act, Cap 13, to the extent that it limits the right of an appellant to appeal to the Supreme Court on matters relating to the severity of his/her sentence, is inconsistent with and/or in contravention of Articles 2 (2), 28 (1), 44 (c), 129 (3), 132 (1) and 132 (2) of the Constitution.

All of the issues above were addressed in the lead judgment by my learned sister, Bamugemereire, JCC, in which she correctly set out the facts and the law with regard to the retrospective application of the impugned provisions in this petition, with which I agree.

However, I do not *entirely* agree with the finding, at page 31 of my learned sister's opinion, that the interpretation that was given to the provisions of sections 11 and 20 of the Anti-Corruption Act *vis-à-vis* the various provisions of the Constitution in **Damian Akankwasa v Uganda Constitutional Reference No 4 of 2011** and **Francis Atugonza v Uganda Constitutional Reference No. 31/2010** are good law. Neither do I *wholly* agree with the statement at page 34, lines 25-26, that the petition raised questions that were answered by this court in **Atugonza** and **Atukwasa** (supra)

The purpose of this judgment is therefore to address part of the second issue that was framed above, in as far as it relates to the two decisions of this court stated above. I write because the principles that are laid down by this court in the process of interpretation of provisions of the Constitution do not solely apply to the particular statutes that are

considered in a particular process of interpretation. The ratios and dicta stand and may be applied over time, even in the interpretation of other penal provisions as they were applied in this petition, unless they are set aside by the Supreme Court sitting in an appeal from this court. The partial interpretation of a provision of the Constitution leaves a gap in which though this court has interpreted a provision, the courts render decisions that are contrary to a provision that has already been interpreted.

This court in **Uganda v Godfrey Onegi Obel, Constitutional Petition/Reference No 24 of 2011,** held that interpretation by this Court of any legal provision *vis-à-vis* the Constitution and its legal effect is not limited to the parties concerned in the case in which the interpretation is made. That it constitutes a binding pronouncement of the law, subject to appeal to the Supreme Court. This Court siting as a Constitutional Court therefore, cannot or should not hear and determine the same substantive and legal questions about the interpretation of the Constitution more than once because they become *res judicata.* I will therefore analyse the two decisions that counsel for the respondent drew to our attention as having conclusively disposed of the issue regarding the constitutionality of sections 11 and 20 of the Anti-Corruption Act (ACA).

In **Damian Akankwasa v Uganda**, **Constitutional Petition No. 004 of 2011,** the petitioner therein was charged with the offence of Causing Financial Loss contrary to section 20 of the Anti-Corruption Act. It was alleged that he committed the offence between 13th August 2007 and 29th February 2008. When he appeared in court to take a plea, his Advocate prayed that a constitutional reference be made to this court. The question that was referred was as follows:

Whether the charging and the prosecution of the accused under section 20 (1) of the Anti-Corruption Act No. 6 of 2009 for offences allegedly committed between August 2007 and February 2008 is inconsistent with Articles 28 (7) and (12) of the Constitution.

At the hearing of the reference, counsel for the petitioner argued that this court gave a wrong interpretation to Article 28 (7) and (12) of the Constitution in **Francis Atugonza v Uganda** (supra). That therefore, the court should depart from it. Counsel further argued that the provisions of Article 28 (7) and (12) are absolute and derogating from them is prohibited under Article 44 (c) of the Constitution. Further, that charging the petitioner under section 20 (1) for acts allegedly committed between August 2007 and February 2009, before the enactment of the ACA and before the creation of the offence, contravened the stated provisions of the Constitution. Counsel added that sections 11 and 20 (1) of the Anti-Corruption Act were not a re-enactment of sections 87 and 269 of the Penal Code Act. He pointed out that the difference between the former and the new offence of Causing Financial Loss created by the ACA was mainly the enhancement of the sentence. And that therefore, the enactment of the new offence could not be a continuation of the former offence.

In reply, counsel for the respondent submitted that the offence of Causing Financial Loss under the Anti-Corruption Act, 2009 is the same as that under the Penal Code Act. And that Article 28 (7) of the Constitution only requires that criminal charges be brought in respect of offences which are founded on acts or omissions which at the time they took place constituted a criminal offence. That the words used in the two sections are similar as well as the titles, except that the sentence was enhanced. He maintained that it was lawful to charge the petitioner under section 20 (1) of the Anti-Corruption Act.

The court *(Mpagi-Bahigeine, DCJ, Byamugisha, Kavuma, Nshimye and Arac-Amoko, JJCC)* then held, and it is important that I reproduce the relevant part of the decision here, verbatim, that:

> ***The requirement of Article 28(7) as we understand it is that for a person to be charged with a criminal offence under any legislation the facts or omissions allegedly committed must have constituted a criminal offence which is defined under the law and there has to be a sentence prescribed for it. The test to be applied is whether the acts or omissions allegedly committed by an accused person constituted a criminal offence at the time they were committed.***
>
> *The acts which the applicant is alleged to have committed and which it is alleged caused financial loss to National Forest Authority occurred between 13th August 2007 and 29th February 2008. During this period there was a criminal offence of causing financial loss defined under section 269 of the Penal Code Act which has been repealed by the Anti-Corruption Act. There was also a punishment prescribed for it.*
>
> *Section 20 of the Anti- Corruption Act in our view is a re-enactment of section 269 of the Penal Code Act. The only difference between the two sections as counsel for the applicant submitted, (is that) the sentence in the latter Act was enhanced.* ***We do not consider the difference in the sentence material.*** *The facts constituting the offence meet the criteria of Article 28(7). Causing financial loss was a criminal offence between 13th August 2007 and 29th February 2008.*
>
> *The applicant/petitioner was properly charged in our view.*
>
> ***This reference raises similar issues as those that were raised in Constitutional Reference No. 31/2010 - Uganda v Atugonza Francis*** *in which this court ruled that section 11(1) of the Anti-Corruption Act was not inconsistent with Article 28(7) and (12) of the Constitution. The ruling in that reference applies to the instant reference with the result that we dismiss it with costs.*
>
> *{My Emphasis}*

It is clear from the excerpt above that though the petitioner in the Reference raised issues about the whole of clause (12) of Article 28, which requires that the criminal offence with which an accused person

is convicted must define both the offence and the penalty, the court totally downplayed or disregarded the change in the definition of the penalty brought about by section 20 of the ACA.

Mr Akankwasa appears to have started the process to appeal against the decision to the Supreme Court. He filed in that court applications for interim orders to stay execution and for substantive orders to prevent the trial in the Anti-Corruption Court from continuing, pending the hearing of his proposed appeal(s). The court heard the applications for interim orders but rejected them, stating that reasons for their decision would be provided later.

The two substantive applications that Mr Akankwasa filed to stay the implementation of the decisions of this court in the references pending the hearing of his appeal to the Supreme Court were consolidated by the court and considered together as **Constitutional Applications No 007** and **009 of 2011, Akankwasa Damian v Uganda**. During the hearing of the applications the Supreme Court addressed a factor that is often considered during such applications; whether the proposed appeal to the court sitting as an Appellate Court in a constitutional matter had a likelihood or probability of success. It was in that process and for that purpose that the Supreme Court considered the decisions of the Constitutional Court in the two References relating to his trial.

However, with the greatest respect, in doing so the Supreme Court appears to have substantively considered the provisions of Articles 28 (7) and (12) of the Constitution *vis-à-vis* sections 269 of the Penal Code Act and section 20 of the Anti-Corruption Act. I say so because what is disclosed in an application for stay of execution pending appeal is not necessarily what is raised and argued in the substantive appeal. Much is left out that may come to light during the appeal. But going forward,

the learned Justices of the Supreme Court reproduced and considered the decision of this Court, which I reproduced above *verbatim*, at page 5 of this judgment, and then held thus:

> *"We were not satisfied that the holding of the Constitutional Court had no merit and that the appeal was likely to succeed."*

The court then concluded the two applications for stay of the orders of this court as follows:

> *"We are of the view, therefore, that the likelihood of success of the appeal was not apparent from the submissions of the applicant.*
>
> *We were not satisfied that the applicant will suffer irreparable injury if the application was not granted and the appeal will not be rendered nugatory. In our view, the balance of convenience was tilted in favour of having the trial expedited so that the charges against the applicant will be determined.*
>
> *It was for those reasons that we dismissed the applications for interim orders of stay of execution pending the hearing of the main applications for stay of execution."*

It is pertinent to note that Mr Akankwansa never got to file an appeal against the decision of this court in respect of his challenge in his trial to section 20 of the Anti-Corruption Act. Further, that the Supreme Court, though it was sitting in an application that arose from a Constitutional Reference, did not render a decision in any appeal against the decision of this court. Instead, the Court rendered a decision in an application for stay of the orders of this court, pending appeal. The court seems to have disposed of an appeal that was, in my view, not yet before it. This is a very important distinction of the facts for this court because this court sitting as the Constitutional Court does not have the mandate to review the decisions of the Supreme Court sitting in an appeal from this court. Had the apex court rendered a decision in an appeal from this court from the decisions and orders on the matter,

it would have put it far beyond reach of this court to review its own decisions. It could have also obviated the error that was made by this court when it disregarded the second limb of Article 28 (12) about the prescription of a penalty.

I would therefore find that it was not correct for counsel for the respondent in this petition to assert that the Supreme Court confirmed the decision of this court in respect of the questions regarding the legality or constitutionality of section 20 of the Anti-Corruption Act in **Constitutional Reference No. 004 of 2011**, **Damian Akankwasa v Attorney General.**

The decision in **Francis Atugonza** (supra) is important because it informed the decision of this court in **Damian Akankwasa** (supra). I will therefore review the import of that decision before I arrive at my conclusion as to whether this court conclusively and properly settled the question relating to the interpretation of section 20 of the ACA, *vis-à-vis* Article 28 (8) and (12) of the Constitution of the Republic of Uganda.

In the Reference brought by **Francis Atugonza** (supra) the trial in the Anti-Corruption Court was for the offence of Abuse of Office contrary to section 11 of the Anti-Corruption Act, 2009. The accused objected to the charge because the Anti-Corruption Act came into force on 25th August, 2009, much later than the acts that he was charged with were committed. He complained that this offended or violated Articles 28 (7) and (12) of the Constitution. The trial judge framed a question for interpretation by this court in the following terms:

> ***"Whether the charging of the accused under the Anti-Corruption Act, 2009 which commenced on 25 August, 2009, for the offence***

committed between December 2007 and December 2008 is consistent with Articles 28 (7) and (12) of the Constitution."

The repealed provision for Abuse of Office in section 87 (1) of the Penal Code Act was as follows:

87. Abuse of office.

(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 act prejudicial to the interests of his or her employer or of 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 term not exceeding seven years.*

{Emphasis added}

The impugned provision in section 11 (1) of the Anti-Corruption Act, 2009 provides as follows:

11. Abuse of office

(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 act prejudicial to the interests of his or her employer or of 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 one hundred and sixty-eight currency points or both.*

{Emphasis added}

It is my view that in order to come to a comprehensive answer to the issue that I am addressing in this opinion, it is still pertinent to consider the arguments that were advanced then upon which this court came to its decision in the matter. Counsel for the petitioner in that Reference complained that there was an absence of a grandfather clause under the new ACA to cover the transitional period. He pointed out that this was a different situation from that in other new statutes, like the

Uganda People's Defence Forces Act (UPDF Act) No. 7 of 2005 and the Labour Disputes Arbitration Act, No. 8 of 2006. Counsel further asserted that the applicant could not have had the *mens rea* to commit an offence that was not in existence at the time and that therefore this was retrospective application of legislation. He prayed that the court finds that charging the applicant under the ACA for an offence committed before the Act came into existence was inconsistent with Articles 28 (7) and (12) of the Constitution, and for appropriate directions to the lower court.

In reply, counsel for the respondent argued that it was not a requirement that persons must be charged under existing laws. That Article 28 (7) and (12) only require 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. That the law allows for criminal charges to be brought against a person in respect of acts or omissions which at the time they were committed constituted an offence, even where the law establishing those offences has since been repealed. He maintained that section 11 of the Anti-Corruption Act was a re-enactment of section 87 of the Penal Code Act. And that therefore, section 11 of the Anti-Corruption Act had to be viewed with modifications so that the reference to the offence of Abuse of Office, as it was stated in section 87 of the Penal Code Act, is construed as a reference to the re-enacted section 11 of the Anti-Corruption Act. And that this was because the acts committed by the applicant constituted offences under the repealed section 87 of the Penal Code Act.

Counsel for the respondent further argued that the fact that a heavier penalty was added was a question to be considered by the courts at the time of sentencing, under Article 28 (8) of the Constitution. And that if

the trial judge imposed a harsher sentence under the new Act, there would be inconsistency with the Constitution. That however it would be the duty of counsel present to point that out to the court.

The court then set out the provisions of Articles 28 (7) and 12 of the Constitution and stated that the two constitutional provisions prohibit the retrospective charging of a person, especially with an undefined offence. The court further considered the language of section 87(1) of the Penal Code Act *vis-à-vis* section 11 (1) of the Anti-Corruption Act and was of the view that the provisions were plain and unambiguous and therefore, the words would be given their natural, literal meaning. The court then found that section 11 (1) of the ACA was a reproduction of section 87 (1) of the Penal Code Act, with only the modification regarding the fine.

In its judgment the court *(Mpagi-Bahigeine DCJ, Byamugisha, Kavuma, Nshimye and Arac-Amoko, JJCC)* further considered the object of the ACA, as it is stated in its preamble, and then observed that:

> *"With the foregoing in mind, it is a general rule that when a statute is repealed and all or some of its provisions at the same time re-enacted, the re-enactment is considered a reaffirmation of the law, and the 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 Volume 36 paragraph 719****. Thus the vital function of the grandfather clause alluded to ... would be superfluous in this case, where there is no interruption in the operation of the law."*

The court then came to the following conclusion:

> *"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 treats 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 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"*

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.

This reference thus stands dismissed with costs."

Once again, with the greatest respect to their Lordships, the court did not consider the importance or effect of the severer penalty that was brought about by the new provision for the offence of Abuse of Office in section 11 (1) of the ACA. This was so in spite of the fact that counsel for the petitioner in the Reference offered submissions about it and the respondent submitted in reply thereto. And also poignantly, that counsel for the applicant prayed that court gives directions with regard to sentencing to the lower court.

The principle of legality that is partly embodied in Article 28 (12) of the Constitution requires the existence of a legal basis in order to impose a sentence or a penalty. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which

made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision. The provision therefore comprises qualitative requirements, in particular those of accessibility and foreseeability. These qualitative requirements must be satisfied with regard to both the definition of the offence and the penalty that the offence in question carries, or its scope.

I am therefore of the opinion that in the cases of **Akankwasa** and **Atugonza** (supra) it was incumbent upon this court to consider both of the qualitative limbs of Article 28 (12) of the Constitution with respect to the import of the provisions of the ACA. The aspect of the sentence imposed was just as important as the definition of the offence; it was therefore ***material*** to the crux of the interpretation of the impugned provisions. In that regard therefore, I accept the proposition by counsel for the petitioner that it is necessary for this court to review its decisions where they appear to have occasioned a partial interpretation or misinterpretation that could continue or continues to operate contrary to the provisions of the Constitution, with the possibility of resulting in injustice. This petition presented an opportunity for this court to do so.

It is pertinent to the issues in this opinion to recall that Uganda is signatory to the United Nations Declaration on Human Rights (UDHR). Objective XXVII of the National Objectives and Directive Principles of State Policy, which we are enjoined to apply in interpreting the Constitution, or any other law, provides that one of the foreign policy objectives shall be the respect for international law and treaty obligations. UDHR is the source of Article 28 (8) of the Constitution. The constitutional imperative in that provision simply echoes Article 11 of the UDHR which provides that:

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*

{My Emphasis}

The Supreme Court of India dealt with the issue of the retrospective application of penalties by the trial court in **Commissioner of Wealth Tax, Amritsar v Suresh Seth; 1981 AIR 1106, 1981 SCR (3) 419**. In relation to the assessment of wealth tax against a taxpayer for his wealth after the amendment of the Wealth Tax Act, with regard to the retrospective application of the new provisions of the Act, the court observed and held that:

"A liability in law ordinarily arises out of an act of commission or an act of omission. When a person does an act which law prohibits him from doing it and attaches a penalty for doing it, he is stated to have committed an act of commission which amounts to a wrong in the eye of law. (sic) Similarly, when a person omits to do an act which is required by law to be performed by him and attaches a penalty for such omission, he is said to have committed an act of omission which is also a wrong in the eye of law.(sic) Ordinarily a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefrom gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion. In the case of acts amounting to crimes the punishment to be imposed cannot be enhanced at all under our Constitution by any subsequent legislation by reason of Article 20 (I) of the Constitution which declares that no person shall be subjected to a

penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In other cases, however, even though the liability may be enhanced it can only be done by a subsequent law (of course subject to the Constitution) which either by express words or by necessary implication provides for such enhancement."

The decision of the High Court of Orissa in **Gangaram Patel v. State of Orissa 1995 I OLR 333**, is also instructive about the retrospective application of penal statutes. While considering the retrospective application of the Narcotic Drugs and Psychotropic Substances Act, 1985, in the face of Article 20 (1) of the Constitution of India, the equivalent of Article 28 (7) and (8) of the Constitution of Uganda; the court explained the principles that flow from Article 20 (1) as follows:

"The general principle as embodied in Art. 20(1) is that a statute can be made to operate retrospectively by/ express enactment to that effect or by necessary implication of law. Ex post facto laws may be classified as follows: (a) every law that makes an action done before the passing of the law and which was innocent when done criminalises and punishes that action, (b) every law that aggravates a crime or makes it greater than it was, when committed, (c) every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed; and (d) every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offence in order to convict the offender. Laws affecting rules of evidence and procedure are not covered by Art 20(1). Hence such rules may be made to operate retrospectively so as to apply to the prosecution for offences committed even before the passing of such rules. (See Salian Singh v. State of Punjab; AIR 1964 SC 464). Retrospective effect cannot be given to a law punishment for an offence, so as to cover offences committed prior to the making of the law. (See Commissioner of Health Tax Amritsar v. Suresh Seth: AIR 1981 SC 1106; ..."

The Constitutional Court of the Republic of South Africa in **Donald Veldman v The Director of Public Prosecutions (Witwatersrand Local Division) [2005] ZACC 22; 2007 (3) SA 210 (CC),** considered

the retrospective application of a penal provision that was amended during the course of a criminal trial. The court found, at paragraph 18 of the judgment (Mokgoro, J) that:

> *"When a punishment is prescribed by legislation for specific crimes, an increase in that punishment entitles an accused person to the benefit of the prescribed punishment applicable before the increase took effect if the change occurred after the commission of the crime but before sentencing. Therefore, the application of that increase can only be prospective."*

However, it is not evident that the petitioner in this case complained that the retrospective application of the sentence provided for by the ACA in sections 20 and 46 thereof was in contravention of the principle of legality in the Constitution. Except that in the arguments relating to the definition of the offence, Article 28 (12) was cited, and even then not in relation to the penalty prescribed by sections 20 and 46 of the ACA. In that regard, it has been established that the Court of Appeal and the Supreme Court comprehensively resolved the issue about the definition of the offence as a ground of appeal. I therefore saw no need to belabour it here.

Nonetheless, it is evident from the judgement of the Court of Appeal that in ground 4 of the appeal the petitioner complained that the sentence of 12 years' imprisonment that was imposed on him was only two (2) years below the maximum penalty of 14 years. That in addition, it was combined with an order barring the petitioner/appellant from holding office for a period of 10 years after conviction. The petitioner then contended that the sentence was unlawful and harsh, and that the court should set it aside. The Court of Appeal dismissed this ground of appeal. It found and held, at pages 19-20 of the judgment that:

"We have not found anything in this case to suggest that the learned trial judge acted upon a wrong principle or overlooked any material factor.

Clearly ground 4 of the appeal is not in respect of severity of sentence but further concerns only its legality. This court has power to reduce a sentence if it considers that the sentence is manifestly harsh or excessive. It has not been alleged in this ground that the sentence is harsh and excessive. In this case we have not been called upon to find so. ***Had that been the case we would probably have been inclined to reduce the sentence. Since its severity is not the subject of this appeal, we shall not interfere with the sentence.***

It is contended that the sentence is illegal. The sentence of 12 years' imprisonment for the offence of causing financial loss is perfectly legal and we hold so.

That sentence does not include the sanction of barring the appellant from holding public office for 10 years after completion of service of the sentence. This sanction is imposed by the law under section 46 of ACA and follows as a consequence of conviction. Court has no discretion in this matter, it cannot impose it, remove it or vary it.

Section 46 of the anticorruption act states as follows: - ...

The judge was simply stating what the law is and he cannot be faulted for doing so. We accordingly uphold the sentence."

{My Emphasis}

The two sentences highlighted above seem to me to be the reason why the petitioner continues to complain about his sentence. He thus appealed the decision of the Court of Appeal to the Supreme Court, and in ground 3 in **SCCA No 02 of 2017** he complained that the Court of Appeal erred in law when it failed to properly consider his submissions with regard to the legality and severity of the sentence imposed by the court of first instance.

The appellant then submitted that the sentence of 12 years for Causing Financial Loss was harsh and excessive. The respondent pointed out that the severity of the sentence was not addressed by the Court of Appeal and therefore it should be dismissed.

The Supreme Court relied on the decision in the case of **Sekitoleko Yudah & Others v Uganda, SCCA No 33 of 2013,** for the time honoured principles that an appropriate sentence is a matter for the discretion of the sentencing judge. That each case presents its own facts upon which the trial judge exercises his discretion. Further that it is the practice that an appellate court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or if the court is satisfied that the sentence imposed by the trial judge was manifestly excessive so as to amount to an injustice. The court, at pages 30-31 of its judgment, then found and held that:

> *"We shall not address the 2nd limb of ground 3 as this is not allowed by section 5 (3) of the Judicature Act and the Court of Appeal correctly ignored to address the same.*
>
> *The 1st limb is on the legality of the sentence imposed and confirmed by the Court of Appeal, which we shall address. This court has in several cases set criteria to be followed before it can interfere with the discretion of the sentencing court in arriving at the sentence being appealed against. We find the appellant's sentence of 12 years' imprisonment for Causing Financial Loss contrary to section 20 of the Anti-Corruption Act imposed by the trial court and confirmed by the Court of Appeal a legal sentence. We find no reason to interfere with it."*

It is apparent from the decisions of the Court of Appeal and the Supreme Court that with regard to the principle of legality that is enshrined in Article 28 of the Constitution, both courts only considered section 20 of the ACA in as far as it related to Article 28 (7) and (12) of the Constitution. And in relation to clause (12) both courts focused only on the definition of the offence and not the penalty prescribed by law. While it is also clear that counsel for the petitioner did not specifically address the retrospective application of the penalties that had been brought about by the ACA, the question goes to the root of the purpose of the criminal trial. The resultant purpose is to either punish the offender

and/or recompense the victim. It is for that reason that the penalty for an offence is specifically provided for under Article 28 (7), (8) and (12) of the Constitution. The three clauses all fall under the right to fair hearing, which are specifically guaranteed by Article 44 (c) of the Constitution; there shall be no derogation from the enjoyment thereof.

I would therefore find that the sentencing of the petitioner under section 20 ACA, which provided for a severer penalty than the former provision for the offence of Causing Financial Loss in section 269 of the Penal Code, was clearly in contravention of the imperatives in Articles 28 (7), (8) and (12) and 44(c) of the Constitution.

In the final determination of the petition, Bamugemereire and Madrama, JJCC, found that the sentence imposed under section 20 ACA occasioned no injustice to the petitioner, and I agree. However, the fact that there was no injustice occasioned by the trial court was not by design but merely by default. The correct process, in my opinion, would have been for the trial court to deliberately sentence the petitioner under the penalty that obtained under section 269 of the Penal Code, the law that obtained at the time the offence was alleged to have been committed. [See **Ronald Veldman v DPP** (supra)]

In conclusion, I agree that the petition ought to be dismissed with no order as to costs.

Dated at Kampala this 27th day of June 2023.

Irene Mulyagonja
JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 26 OF 2021

DAVID CHANDI JAMWA:: PETITIONER

VERSUS

THE ATTORNEY GENERAL:::RESPONDENT

CORAM: HON. JUSTICE JUSTICE CATHERINE BAMUGEMEREIRE, JA/ JCC
HON. JUSTICE STEPHEN MUSOTA JA/ JCC
HON. JUSTICE CHRISTOPHER MADRAMA, JA/ JCC
HON. JUSTICE MUZAMIRU M. KIBEEDI, JA/ JCC
HON. JUSTICE IRENE MULYAGONJA JA/ JCC

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC

I have had the benefit of reading in draft the Judgment prepared by my learned sister, Hon. Justice Catherine Bamugemereire, JCC.

I concur that the Petition is a disguised Appeal, raises no question for Constitutional interpretation and should be dismissed in the terms proposed.

Signed, dated and delivered at Kampala this 27th day of June 2023

.....
MUZAMIRU MUTANGULA KIBEEDI
Justice of the Constitutional Court