

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Owiny-Dollo, DCJ., Kakuru, Egonda-Ntende, Obura & Muhanguzi, JJA)

Constitutional Petition No. 23 of 2011

BETWEEN

BARIHAIHI GRACE PETER.....PETITIONER NO.1

FRED BIRYOMUMAIISO..... PETITIONER NO.2

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

1. The petitioners were arrested in 2002 and charged with treason at Buganda Road Court in Criminal Case No. 640 of 2002. They were on remand for over a period of one year. On the 9th of May of 2013, they were granted bail by the Chief Magistrate Court at Buganda Road. They answered bail before the magistrate's court for over a period of 9 years in accordance with the terms of the bail.
2. The petitioners claim to have made many complaints to the magistrate's court to that effect. The court on all occasions stated that it had no jurisdiction to discontinue the proceedings against the respondent, to try the case or to order the DPP to commit the case for trial to the High Court. They eventually filed

an application for judicial review in the High Court which quashed the proceedings and awarded the petitioners damages.

3. That the above events aggrieved the petitioners who have come to this court seeking a declaration that Section 1 of the Trial on Indictments Act Cap 23 is inconsistent with Articles 28(1), 28(3)(c), 28(3)(e), 23(3), and 23(6)(a) of the Constitution.
4. In answer to the Petition, the respondent contended that this Petition is improperly before this court as the alleged claims are in respect of enforcement of rights and freedoms and not matters for constitutional interpretation. The respondent contended that section 1 of the Trial on Indictments Act does not contravene the constitution. The respondent prayed for the petition to be dismissed on the ground that it is misconceived and frivolous.
5. The Petition was accompanied by the affidavits of the petitioners and the answer to the Petition is supported by an affidavit sworn by Kasibayo Kosia, a State Attorney in the respondent's chambers.

Submissions of Counsel

6. At the hearing, the petitioners were represented by Mr. Laudislus Rwakafuzi. The respondent did not appear.
7. Counsel for the Petitioner contended that section 1 of the Trial on Indictments Act contravenes Article 28(1) of the Constitution in the sense that a person charged by an offence triable by the High Court cannot take a plea when the

charge is read to him or her during committal proceeding due to the fact that an accused person appears before a court that has no power to take a plea. This is contrary to Article 28 (1) of the Constitution that requires that a person be produced before a court of competent jurisdiction to determine his or her rights. That an accused appearing before a magistrate's court with no jurisdiction to try the case is an infringement on the accused's right to a fair and speedy hearing before a competent, independent and impartial court.

8. That due to the requirement of committal proceedings, a speedy trial is negated contrary to Article 28 (1) of the Constitution. The petitioners were of the view that committal proceedings bar the accused person from being brought before a court of competent jurisdiction. The accused cannot make an informal application for bail as provided for under Article 23 (6) (a) of the Constitution unless and until the prisoner has been on remand for at least half a year.
9. That due to the requirement of committal proceedings, an accused is arrested and remanded without knowing the actual charge against him or her which is contrary to Article 23 (3) of the Constitution that requires a person arrested or detained to be informed immediately of the charge against him or her. That equally, a person on remand cannot challenge the charges against him or her since no formal charge exists till after committal proceeding which contravenes Article 28 (3) (c) of the Constitution that guarantees an accused person's right to prepare his or defence.
10. He contended that section 1 of the Trial on Indictment Act ousts the unlimited original jurisdiction of the High Court which is contrary to Article 139 of the Constitution. That committal proceedings are a nullity in so far as persons

charged with capital offences and offences punishable by life imprisonment are not availed legal representation during the proceedings which is contrary to Article 28(3) (e) of the Constitution. Counsel for the petitioner prayed for costs.

11. The respondent contended in the answer to the Petition that committal proceedings do not infringe Articles 28 (1), 28 (3) (c), 28 (3) (e), 23 (3), and 23 (6) (a) of the Constitution as the petitioners contended. That they instead foster efficiency in trial which is in line with Article 28 (1) of the Constitution.

Analysis

12. The main contention in this petition is whether section 1 of the Trial on Indictments Act ousts the jurisdiction of the High Court under Article 139 of the Constitution. Article 139 (1) of the Constitution states:

'The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.'

13. Section 1 of the Trial on Indictments Act states that :

'The High Court shall have jurisdiction to try any offence under any written law and may pass any sentence authorised by law; except that no criminal case shall be brought under the cognisance of the High Court for trial unless the accused person has been committed for trial to the High Court in accordance with the Magistrates Courts Act.'

14. Article 79 (1) of the Constitution grants Parliament power to make laws on any matter for the peace, order, development and good governance of Uganda. The Trial on Indictments Act was enacted to consolidate the law relating to the trial of criminal cases on indictment before the High Court and the matters incidental thereto.
15. Section 1 of the Trial on Indictment Act recognizes the jurisdiction of the High Court under Article 139 and further bars the High Court from hearing any criminal case in which the accused person has not been committed to the High Court for trial. The contention that this section ousts the jurisdiction of High Court is not correct. Section 1 is procedural. It merely sets down the practice of approaching the court for purposes of trial in criminal matters. Although Article 139 (1) of the constitution gives the High Court unlimited original jurisdiction, this does not render unconstitutional laws that set out the procedure to be followed for this jurisdiction to be exercised.
16. The Supreme Court of Zambia interpreted how article 94 of their Constitution should be construed in relation to other laws governing the exercise of the jurisdiction of the High Court in the case of Zambia National Holdings Limited and United National Independence Party (UNIP) V. The Attorney-General S.C.Z. JUDGMENT NO. 3 OF 1994. Article 94 (1) of the Constitution read:

‘There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial Relations Act unlimited or original jurisdiction to hear and determine any civil or criminal proceedings under

any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law'

17. The Supreme Court in its judgement stated:

'In order to place the word "unlimited" in Article 94(1) in its proper perspective, the jurisdiction of the High Court should be contrasted with then of lesser tribunals and courts whose jurisdiction in a cumulative sense is limited in a variety of ways. For example, the Industrial Relations Court is limited to cases under a single enactment over which the High Court has been denied any original jurisdiction. The Local Courts and Subordinate Courts are limited as to geographical area of operation, types and sizes of awares and penalties, nature of causes they can entertain, and so on. The jurisdiction of the High court on the other hand is not so limited; it is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. Indeed, Article 94(1) must be read as a whole including phrases like "under any law and such jurisdiction and powers as may be conferred on it by this constitution or any other law." It is inadmissible to construe the word "unlimited" in vacuo and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional. The expression "unlimited jurisdiction" should not be confused with the powers of the High Court under the various laws. As a general rule, no cause is beyond the competence and authority of the High Court: no restriction applies as to type of cause and other matters as would apply to lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations

such as those one finds in mandatory sentences or other specification of available penalties or, in civil matters, the types of choice of relief or remedy available to litigants under the various laws or causes of action...

18. I am persuaded by the foregoing view that 'unlimited jurisdiction' does not imply that the court seized with such jurisdiction cannot comply with procedural laws at the same time. Such procedural laws do not oust the unlimited jurisdiction of the court.

19. Committal proceedings are a pre-trial procedural requirement for persons who have been charged with criminal offences to be tried by the High Court. It is a procedural mechanism that does not oust the jurisdiction of the High Court. It follows that if a party wishes to take benefit of the exercise of the High Court's jurisdiction – as indeed with all other courts – such a party must bring its claim properly by adhering to the procedure prescribed by the law.

20. The petitioners also contended that committal proceedings are contrary to Article 28 (1) of the Constitution. Article 28 (1) guarantees the right to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law in both criminal and civil matters. Under Article 44 of the Constitution, this right is non-derogable.

21. In my view committal proceedings are intended to promote the right to a fair trial. Committal proceedings do not infringe on an accused's right to a fair hearing. Under section 168 of the Magistrate's Courts Act, the court must explain to the accused person the nature of the charge against him or her

during committal proceedings. The substance of the indictment and summary of the case is read to the accused person and copies of the same are availed to him or her. These must contain particulars that are necessary to give the accused person reasonable information as to the nature of the offence with which he or she is charged. This is to enable the accused person to prepare for his or her defence. The accused can also apply for pretrial disclosure of material statements and exhibits subject to the discretion of the trial court. See Soon Yeon kong kim and Another v Attorney General, Constitutional Reference No. 6 of 2007 (unreported).

22. The petitioner does not attack section 168 of the Magistrates Courts Act that provide for an accused to be provided with 'a summary of the case' rather than the original formulation before that Act was amended, which was 'a summary of the evidence' that was to be adduced at the trial. I suppose, however, that the ill effects of this formulation have been rendered otiose by the decision in Soon Yeon kong kim and Another v Attorney General (supra) compelling the state to provide disclosure of the evidence to be adduced against the accused before the commencement of the trial.

23. I disagree with the petitioners' contention that committal proceedings contravene the accused's right to be informed of the charge against him. Article 28 (3) (b) provides that every person who is charged with a criminal offence shall be informed immediately, in a language that the person understands, of the nature of the offence. The practice of committal proceedings does not offend this right.

24. This right accrues before committal proceedings are conducted. My understanding of section 168 (1) of the Magistrate's Act and the practice is that persons accused of offences only triable in the High Court are first charged in the Magistrate's court and then their files are committed to the High Court for trial. The accused becomes aware of the offence charged against him or her as soon as he or she is produced before the magistrates' court and the charges are read out. An accused does not have to wait for committal proceedings to challenge the legality of charge brought against him or her.

25. Article 28 (3) (e) of the Constitution categorically states that where an accused person is charged with a criminal offence which carries a sentence of death or life imprisonment, he is entitled to legal representation at the expense of the State. This requirement is mandatory. The right accrues on being charged. This would be immediately before or on appearing for the first time at a magistrates' court where the charges are read out. However there is no correlation between lawfulness of committal proceedings and the infringement of this right. The fact that an accused person is not provided with legal counsel during committal proceedings does not render the provisions for committal proceedings unconstitutional. It is the failure to provide counsel which is independent of committal proceedings that would breach Article 28 (3) (e) of the Constitution. An accused can enforce his right to legal representation at the expense of the state in the normal way of enforcement of fundamental rights.

26. I now turn to the last issue of whether section 1 of the Trial on Indictment Act violates the accused's right to apply for bail. The enjoyment of bail is embedded in the right to personal liberty which is provided for under Article 23 of the Constitution. Article 23 (6) (a) of the Constitution provides that :

'Where a person is arrested in respect of a criminal offence

(a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;'

27. In the case of Attorney General v Tumushabe, SC Constitutional Appeal No.3 of 2005 (unreported), Mulenga JSC, with the concurrence of the other members of the court, stated:

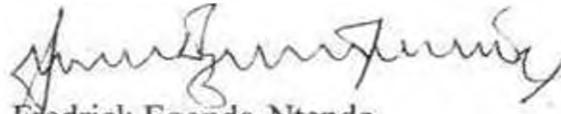
'It is clear to me that clause 6 of article 23 applies to every person awaiting trial for criminal offence without exception. Under paragraph (a) of that clause, every such person at any time, upon and after being charged, may apply for release on bail, and the court may at its discretion, grant the application irrespective of the class of criminal offence, for which the person is charged.'

28. It is clear that the constitution guarantees the right to apply for bail for persons who have been charged with a criminal offence, regardless of whether one has been committed for trial or not. Section 1 of the Trial on Indictments Act does not infringe the right to bail. In instances where the accused person has been remanded in custody for over 180 days before the case is committed to the High court, that person has to be released on bail on such conditions as the court considers reasonable. In circumstances where the 180 days on remand have not

expired and the accused has not be committed, he or she is at liberty to apply for bail before the High Court.

29. In conclusion I would hold that the petitioners are not entitled to any of the declarations or remedies sought. In the result, I would dismiss the petition. As the respondent did not appear at the hearing of the petition I would make no order as to costs.

Signed, dated and delivered at Kampala this 8th day of July, 2018.


Fredrick Egonda-Ntende
Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Owiny-Dollo, DCJ, Kakuru, Egonda-Ntende, Obura & Muhanguzi, JJA)

CONSTITUTIONAL PETITION NO. 23 OF 2011

BETWEEN

BARIHAIHI PETER..... **PETITIONER NO. 1**

FRED BIRYOMUMAI SO..... **PETITIONER NO. 2**

AND

ATTORNEY GENERAL **RESPONDENT**

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment prepared by my learned brother Egonda-Ntende, JA and I agree with his findings on each ground of the petition. I also agree with the conclusion that the petitioners are not entitled to any of the declarations or remedies sought and therefore the petition be dismissed with no order as to costs.

Dated at Kampala this.....^{8th} day of.....*July*.....2018.

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Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Muhanguzi, Madrama Izama, JJCC / JJA]

CONSTITUTIONAL PETITION NO. 23 OF 2011

BETWEEN

BARIHAIHI GRACE PETER _____ PETITIONER NO. 1
FRED BIRYOMUMAIISO _____ PETITIONER NO.2

AND

ATTORNEY GENERAL _____ RESPONDENT

JUDGMENT OF ALFONSE C. OWINY-DOLLO, DCJ

1. I have read the draft judgment of my brother, Egonda-Ntende, JCC / JA. I agree that this petition should be dismissed for the reasons he gives.
2. As Kakuru, Obura and Muhanguzi, JJCC / JJA, agree this petition is dismissed with no order as to costs.

Dated, signed and delivered at Kampala this 8th day of July, 2019


ALFONSE C. OWINY-DOLLO
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 23 OF 2011

1. BARIHAIHI GRACE PETER
2. FRED BIRYOMUMAIISO PETITIONERS

VERSUS

THE ATTORNEY GENERAL RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ

Hon. Mr. Justice Kenneth Kakuru, JA/ JCC

Hon. Mr. Justice Egonda-Ntende JA/ JCC

Hon. Lady Justice Hellen obura JA/ JCC

Hon. Mr. Justice Ezekiel Muhanguzi JA/ JCC

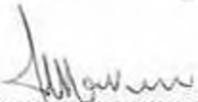
Judgment of Hon. Mr. Justice Kenneth Kakuru

I have had the benefit of reading in draft, the Judgment of my learned brother Hon. Mr. Justice F. M. S Egonda-Ntende.

I agree with him that this Petition must fail for the reasons set out in his Judgment. I also agree that in the circumstances of this Petition no order be made as to costs.

I have nothing else useful to add.

Dated at Kampala this 8th day of July 2018.

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Kenneth Kakuru

JUSTICE OF APPEAL/ JUSTICE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Owiny – Dollo, DCJ. Kakuru, Egonda-Ntende, Obura and Muhanguzi, JCC)

CONSTITUTIONAL PETITION NO. 23 OF 2011

BETWEEN

BIRIHAIHI GRACE PETER.....PETITIONER NO. 1

FRED BIRYOMUMAISHO.....PETITIONER NO.2

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT OF EZEKIEL MUHANGUZI, JCC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, The Hon. Mr. Justice Fredrick Egonda-Ntende, JCC.

I agree with the reasons given, the conclusions reached and orders proposed and have nothing useful to add.

Dated at Kampala this 8th day of July, 2018.



EZEKIEL MUHANGUZI

JUSTICE OF THE CONSTITUTIONAL COURT