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THE REPUBLI OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA.

(CORAM: S.T. MANYINDO, DCJ; G.M. OKELLO, J; A.E.M. BAHIGEINE, J; J.P.M. TABARO, J; AND F.M.S. EGONDA NTENDE, J;)

CONSTITUTIONAL PETITION NO. 1 OF 1996

MAJOR GENERAL DAVID TINYEFUZA ..... PETITIONER

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

RULING OF THE COURT.

During the cross examination of Hon. Amama Mbabazi, CW 1, by learned Counsel for the petitioner, Mr. Lule S.C., a document, copies of which had initially been annexed to the petitioner's affidavit in support of his petition, was put to the witness. It was alleged to have been addressed to the witness and copied to all members of the High Command which would have included the petitioner. The witness admitted having received a message from the President which was copied to all members of the High Command directing him to chair a meeting of the High Command. He declined to say whether the document put to him was a copy of the message he received, claiming that he would have to check with the documents in his possession. He was quick to add that documents of the nature of the document put to him was restricted information in the army. He wondered how, Counsel for the Petitioner came to possess the document put to him.

At that stage, the question of admissibility of this document became an issue, with the learned Solicitor General, Mr. Kabatsi objecting to its admissibility. Counsel for the Petitioner sought an adjournment, which was granted, to enable him address court on this issue. On the 4th March, 1997, we heard the addresses of both leading counsel for the parties and reserved our ruling on the matter. This now is our ruling. We shall start by setting out the arguments of Counsel in the matter. Mr. Lule submitted that the onus to establish relevancy

And once he succeeds on the issue of relevancy then the burden to show that it is inadmissible shifts to the party seeking to exclude it. He referred to Sections 8, 9 and 14 of the Evidence Act and submitted that the document sought to be tendered is relevant in relation to the elements raised in those Sections. He submitted that the document shows preparation or a state of mind giving rise to a conduct by a party to a suit or by the parties agent; that it also introduces a fact in issue and rebuts the Respondents contention that no opinion has been arrived at in regard to the Petitioner's resignation and that it is relevant for the determination of the issues before the court.

Mr. Lule S.C. contended that if this document was excluded, the Petitioner's right to enjoy a fair hearing enshrined in Article 28 of the Constitution and made non-derogable by Article 44 of the Constitution would be violated. For the court would have excluded evidence essential to the determination of the Petitioner's rights. Mr. Lule S.C. also referred to Article 44 which grants any citizen a right of access to information in the hands of the state subject to certain exceptions where such information is likely to prejudice the security or soveregnity of the state. But the onus would be upon the person claiming that such information falls within this exception to produce evidence before the court could make such a finding.

Mr. Lule S.C. further contended that in case the court found that the security of the State may be impaired by the disclosure, the Court could under Article 28(2) of the Constitution hear the matters that touch on the security of the State in Camera, away from the Public and the press. For the evil intended to be avoided was disclosure to the Public and the Press. He referred to a number of English decisions which he submitted were dealing with the Common Law position which in his opinion, was comparable to our present Constitutional Provisions on the subject. These were:-

(i) Robison V. State of South Australia [1931] AC 704.

(2) Conway V Rimmer & Another [1968] AC 910

(4) British Steel Corporation vs. Granada Television [1981] AC 1096

(5) BURMAH Oil Co. Ltd vs. Governner & Co. of the Bank of England [1980] AC 1090.

Relying on these decisions, he submitted that the court must examine the document in issue first before forming an opinion one way or the other. The English Courts operate under a system of Parliamentary Sovergnity unlike in Uganda, where it is the Constitution which is supreme, rather than Parliament. Mr. Lule S.C. concluded that whatever reason may be advanced in the name of Public interest, this must be subordinated to the upholding of fundamental rights and freedoms. And that if the contrary was true it would have been expressly stated so in the Constitution. Mr. Peter Kabatsi, the Learned Solicitor General, opposed the admissibility of this document on basically three grounds. Firstly, that the document in question was not an original document and was not in conformity with the form of material upon which
such documents are transcribed, the source being a Radio message. He submitted that according to the testimony of Hon. Amama Mbabazi the Radio Message would be recorded in a message book but the document shown to him was not in that form. The document appeared to be a copy of the document copied from the minute book in original hand. He was not certain that the message in the document is the same message as the other members of the High Command received. Mr. Kabatsi dismissed the matter of relevancy of the document, contending that the court must first rule on its admissibility before dealing with its relevancy.

Secondly, Mr. Kabatsi submitted, relying on Section 121 of the Evidence Act that this document relates to affairs of state and was therefore inadmissible without the consent of the head of department. He referred to the evidence of Hon Amama Mbabazi which he said was very categorical about this matter. He contended that Section 121 was not affected by Article 41 of the

Constitution, which in any case, contains an exception to the right of access to information if the matter touches on state security. He submitted that S. 121 and other Laws were saved by Article 273 of the Constitution.

Thirdly, Mr. Kabatsi, contended that the Petitioner failed to follow the correct procedure in gaining access to the document he desired to put in evidence. This was provided for under Section 74 of the Evidence Act which deals with access to Public documents.

Mr. Kabatsi referred to Field's Law of Evidence, 10th Edition which is a text book on the Indian Evidence Act, whose section 123 is similar to Section 121 of our Evidence Act. Without referring to any particular case therein, he submitted that we should find Indian decisions interpreting this Section more persuasive than English decisions which deal with the Common Law rather than a statutory enactment. He conceded that the courts can inquire into the validity of the claim for state privelege but once state privilege is accepted, the document in question is inadmissible.

Mr. Kabatsi further submitted that Article 44 is not absolute and when read together with Article 41 permits derogation in matters related to state security. He concluded that this is a highly classified document falling within information excepted by Article 41. He prayed that the document be found inadmissible, but if found admissible, the public and the press be excluded from the hearing related to it. He was somewhat apprehensive that the document, if admitted, would form part of the court record and judgement; and consequently, could become public, which was the evil desired to be eliminated by its inadmisibility.
We have looked at the document sought to be admitted in this case. Without setting out its contents, it is clear to us that it, inter alia, deals with matters that are in issue in the Petition before us.

To that extent the document is relevant to the case for the Petitioner. Hon. Amama Mbabazi admits that the petitioner could have received a copy of the Message addressed to the Minister of State for Defence and copied to all the members of the High Command which include the Petitioner. It is the case for the Petitioner, as put to Hon. Amama Mbabazi, that the Petitioner received the message in the document in question. The testimony of Hon. Amama Mbabazi which was to the effect that the message calling for the meeting of the High Command was received by the Petitioner; communication of this nature is highly classified and is not supposed to be bandied about; it is intended to keep the confidentiality of information and that he would not confirm the correctness of the message unless he compared it with the message as recorded in the messages book. The Petitioner laid the necessary back ground for the document to be put to the witness. The witness was ready and willing initially to identity the contents, especially as he is in a position to compare with his own record of the same message. We would not accept the arguements by Mr. Kabatsi that this document not being the original document received by the witness or not being in the form the witness expected it to be was inadmissible. It is not in dispute that the communication in issue was a simultenous radio communication to several people including the Petitioner. The document put to him is alleged to be the contents of the Radio message addressed to all of them. It is the substance of the communication that was put to the witness. And his response was, inter alia, a recognition of the same. It is up to the Respondent to choose to deal with the details of the contents of the document or not in re-examination. Otherwise the document, in our view, cannot be rejected on the ground that it is not in the form the witness expected it to be. The recording of the message at the various reception centres to which it was sent would form an original document of the message so received and recorded at that particular reception point.

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Mr. Kabatsi appeared to cast doubt on the contents of the document when he submitted that he is not sure that the contents of this document are similar with the messages received by other members of the High Command. This is a matter that can be dealt with by calling further evidence. But it is axiomatic, that in the next breath, it is the contention of the Respondent that this document is protected from disclosure to court by Section 121 of the Evidence Act., What must be protected under Section 121 of the Evidence Act are "official records relating to any affairs of state" In our opinion to invoke Section 121, one must be satisfied that the document in question is an official record relating to affairs of state. If it is not an official record, then Section 121 cannot be invoked. Therefore, if, as the Learned Solicitor General submitted this document was protected from court by Section 121 of the Evidence Act, it must necessarily be an official record relating to affairs of state. It cannot therefore be rejected on the ground that it is not an official record of the recording or transcribing of the radio message received by the witness and other members of the High Command including the Petitioner. Unless Mr. Kabatsi's reliance on Section 121 of the Evidence Act was in the alternative to his first ground, the two may appear to be inconsistent with each other. He did not set it up as an alternative head of opposition.

We wish now to turn to the consideration of Section 121 of the Evidence Act together with Articles 28, 41, 43, 44 and 273 of the Constitution of Uganda. It may be pertinent to point out that the Evidence Act is of quite old vintage in this jurisdiction having come into operation on 1st August, 1909, as Mr. Kabatsi so rightly pointed out.

Section 121 provides:-

> "No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned, who shall give or with hold such permission as he thinks fit.
> (emphasis ours.)"

It is clear from the foregoing section that where a matter related to affairs of state evidence of it could be inadmissible in court if it came from unpublished official records relating to any affairs of state except with the permission of the officer at the head of the department. In the instant case, that consent is not available. From a perusal of the extract from Field's Law of evidence given to us by Mr. Kabatsi, it is clear that it is not enough for the officer at the head of the Department or counsel for the state to claim privelege, the state has a duty to establish that the privelege applies. It is possible for the court to find that the privelege does not apply depending on the facts of the case.

At page 5290 of the book it is stated:-

".....An invocation of a supposed inherent secrecy in all official acts and records can lend itself" to mere sham and evasion" and applied in such a spirit,

> 'it tends to become merely a technical advantage on the side of the party who happens to be interested as an official and to be in possession of important proof."

There is a long catena of decisions in which warnings have been given by courts of the menace which the supposed privilege implies to individual liberty and private right, and to the potency of its abuse. The highest courts consider the privilege is a narrow one and most sparingly to be exercised."

The principle behind section 123 of the Indian Evidence Act which

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The principle behind section 123 of the Indian Evidence Act which is similar to our section 121 is stated at page 5289 of Field's

> "1. Principle - it is no doubt true that Section 123 is a recognation of the principle that interest of all subjects of the state is superior to the interest of any one of them, but at the sametime, the state must show that the claim of privelege strictly falls within the four corners of the provisions of the Law which tends to deprive the subject of evidence on matters directly in issue"

Section 121 and all other existing Law at the time of the promulgation of the current constitution was saved by Article 273 of the Constitution.

It reads:-

> " 273(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this constitution shall not be affected by the coming into force of this constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with this Constitution.
>
> 2. For the purposes of this article, the expression "existing Law" means the written and unwritten Law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or Statutory Instrument enacted or made before that date which is to come into force on or after that date."

The Evidence Act is part of the existing written Law and it must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. This is necessary, not only because it is provided for under Article 273 of the Constitution, but because under Article 2 the Constitution is the Supreme Law of the land with binding force on all authorities and persons throughout Uganda. And it prevails, under Article 2(2) over any other Law or Custom Inconsistent with it, and such Law or Inconsistency shall be void. In applying any Law in existence at the time of the promulgation of this Constitution, it has to be tested against the provisions of the Constitution under Articles 2(2) and 273 in order to ensure that it conforms to the Constitution.

The Petitioner has canvassed Articles 28(1) 41, 43 and 44 as establishing a superior right of the Petitioner to have the document admitted in evidence against the case for none-admission based on section 121 of the Evidence Act. We shall set out the said articles.

Article 28 (1) reads:-

> "In the determination of Civil rights and obligations or any Criminal charge, a person shall be entitled to a fair, speedy and Public hearing before an independent and impartial court or tribunal established by law."

Article 41 states:-

> (1) Every citizen has a right of access to information in possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or Sovereignity of the State or interfere with the right to privacy of any other person.
>
> (2) Parliament shall make Laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

(emphasis is ours.)"

Article 43 deals with the general limitation on fundamental Rights and other human rights and freedoms. It states:-

> "(1) In the enjoyment of the rights and freedoms prescribe in this Chapter, no person shall prejudice the fundamental or other human rights and freedom of others or the public interest.

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(2) Public interest under this article shall not permit -

(a) political persecution;

(b) detention without trial

(c) any Limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstratably justifiable in a free and democratic society, or what is provided in this Constitution."

Article 44 then further entreches certain rights by prohibiting derogation from the enjoyment of the following rights and freedoms -

(a) freedom from torture, cruel, inhuman, or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to fair hearing;

(d) the right to an order of habeas Corpus"

Before discussing the above provisions and their relationship to the matters before us now, it may be useful at this stage to set out what principles we regard as applying to the Interpretation of Constitutional provisions. We wish to refer, in this regard to the remarks made by Warren C.J. in Troop vs. Dulles 356 US 86, 2L Ed 630, 785 ct 590 (1958):-

"In concluding as we do that the eighth Amendment forbids congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the Constitutionality of an Act of the National Legislature is challenged. No member of the court believes that in this case the statute before us can be construed to avoid the issue of Constitutionality. That issue confronts us, and the task of resolving it is inescapably ours.

This task requires the exercise of judgement, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.

We are oath bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The judiciary has the duty of implimenting the Constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the constitution should be examined with special deligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, Living principles that authorise and limit governmental powers in our nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this court, we must apply those rules. If we do not the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of those provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged Legislation. We must apply those Limits as the Constitution prescribes them, bearing in mind both the broad scope of Legislative discretion and the ultimate responsibility of Constitutional Adjudication."

These remarks were cited with approval in Zimbabwe Supreme Court decision of A Juvenile vs. the State 1989 LRC (const) 774 at page 787 by Dumbutshena C.J. We would respectfully agree that it is the duty of this court to enforce the paramount commands of the Constitution. The current thrust of highly persuasive opinions from courts in the common wealth is to apply a generous and purposive construction of the Constitution

We believe that this is in harmony with the three fold injunction contained in Article 20(2) commanding the respect of; upholding and promoting of rights and freedoms of the individual and groups enshrined in Chapter 4 by all organs and agencies of government and by all persons. To hold otherwise, may be to suggest that Article 20(2) is idle and in vain.

We now turn to the construction of Article 41 of the Constitution. This provision confers on all citizens the right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or soveregnity of the state or interfere with the right to the privacy of any other person. A citizen, including the applicant, is given a right of access to information in the possession of the state or any of its organs. This right is restricted only in cases where release of the information is likely to prejudice, as claimed in this case, the security of the state.

If the state objects to release of the information it must show that the release of the information is likely to prejudice the Security of the state. This can only be stablished by evidence to show the prejudice the security of the state would suffer. No evidence has been adduced to support such a claim.

Secondly, it would appear the mischief is in the release of information to the citizen, probably with the consequence that such information may be made Public prejudicing the security of the state. If the release is in a limited context, i.e. if it is denied to the Public and the press but made available to the court and the parties for the determination of issues between the state and such party, then, prejudice to the security of the state is averted. This is possible by holding a hearing in Camera as authorised by Article 28(2) of the Constitution. The document in question, it is conceded, is in the knowledge of the Petitioner. He was one of the persons intended to receive it. It is upon the [illegible] the release of this document would prejudice the

It is not enough to raise State Security without more. The exception in Article 41 cannot be said to be consistent with Section 121 of the Evidence Act as argued by Mr. Kabatsi. In our opinion, Section 121 gives unquestioned power to the head of Department to give or withhold permission as he thinks fit to a person who desires to produce such a document. He is the sole judge of this matter. He does not have to give a reason or be accountable to anybody for the exercise of this power. If applied together with Article 41 of the Constitution, it would override a Citizen's right of access to information in Government hands which is a fundamental right enshrined in Chapter 4 of the Constitution. The head of Department could deny a citizen the right of access to information which is not excepted by Article 41; for affairs of state as a term of art is much wider than security of the state or Sovereignity or interference with right to privacy.

It is important to note that the right of access to information could be said to be one of the latest generation of rights. It is not referred to in the 1967, 1966 and 1962 Constitutions. In our view Article 41 overrides Section 121 of the Evidence Act which section could unreasonably be used to deny vital information to the Citizens by Government and or its officers. As stated in Field's Law of Evidence, at page 5290 there is along catena or chain of decisions in which warnings have been given by the Courts of the menace which the supposed privelege implies to individual liberty and private rights and to the potency of its abuse. It is this menace, in our view, that Article 41 sets out to correct. The right of access to information must include the right to use such information in a court of law in support of a Citizen's case. We find that Section 121 of the Evidence Act is inconsistent with Article 41 of the Constitution. And therefore it cannot bar the admissibility of the document in question.

It may perhaps be pertinent by analogy to refer to remarks of a Singaporean court of Appeal decision in Chng suan Tze and others vs. Minister of Home affairs and others [1989 LRC [cons] 683. In that case the court was considering judicial

The issue was whether to apply a subjective or an objective test. The court at page 710 stated:-

> "There is one other reason for rejecting the subjective test. In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of Law demands that the Courts should be able to examine the exercise of discretionary power. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which the Parliament has decided it can exercise its discretion, such an exercise of discretion would be ultra vires the Act and a Court of Law must be able to hold it to be so."

The Constitution has determined that a Citizen shall have a right of access to information in state hands. It has determined the exceptions in a manner that is inconsistent with the application of Section 121 of the Evidence Act. It is no longer for the head of Department to decide as he thinks fit. That unfettered discretion, has been overturned by Article 41 of the Constitution. And now, it is for the Court to determine whether a matter falls in the exceptions in Article 41 or not. And to do this, the state must produce evidence upon which the Court can act. It has not done so in this instance.

We now turn to consider the right to a fair hearing under articles 28(1) and 44. We have already found that the document in question is relevant to the case for the Petitioner in accordance with Sections 8, 9, and 14 of the Evidence Act. If the Petitioner is to enjoy a fair hearing which affords him an opportunity to canvass all matters before the Court that would support his case, then he ought to be allowed, subject to the Law, to put in evidence, all such evidence receivable by this court, that supports or purpots to support his case. Fair hearing connotes that in accordance with the Law, a party is given the necessary opportunity to canvass all such facts

Under Article 44 no derogation is permitted from the enjoyment of the rights set out therein and under Article 44(c) is the right to fair hearing. Mr. Kabatsi submitted that Article 44 must be read with Article 41. We do not agree. To accept this arguement would be to do violence to the clear language of Article 44.

It states :-

> "Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms :-
>
> (a)
>
> (b)
>
> (c) the right to fair hearing."
>
> [empasis is ours.]

The language is clear. It admits of no other construction. It prohibits any derogation from the enjoyment of the rights set out therein regardless of anything else in the Constitution. It is a complete and full protection of the right to fair hearing. It is important to note that in article 44, fairhearing does not go alongside speedy and Public hearing which are its sisters in Article 28(1) of the Constitution. Speedy and Public hearing is not protected under Article 44. This would, in our view, explain the provisions in Article 28(2) of the Constitution which allow the hearing in Camera, without the press or the Public for reasons of, inter alia, public order or national security. As the right to fair hearing cannot be derogated from, including on grounds of Public Order or National Security, the Constitution in Article 28(2) allowed the Court to exclude the Public and the press from a hearing where reasons of Public Order or National Security require. We are therefore not able to agree with Mr. Kabatsi that the right to fair hearing is derogable. It is non-derogable. The Constitution has commanded so. And it is our duty to exact compliance.

Both Mr. Kabatsi and Mr. Lule S.C. prayed that in case we hold that this document is admissible the Court should hold the hearing that relates to it in Camera as it touches on the Security of the state. We have noted that the state did not adduce evidence in this regard. But it was conceded by Mr. Lule S.C. on the 27th February 1997 that this was a matter of state security.

We have examined the document and we are of the same view that some matters therein appear to relate to State Security. In the result we overrule Mr. Kabatsi's objection but we order that the proceedings as much as they relate to the document in question be held in Camera. The Public and the Press will accordingly leave Court.

Dated at Kampala this 6th day of March, 1997.

Sgd: S.T. MANYINDO
DEPUTY CHIEF JUSTICE.

Sgd: G.M. OKELLO
JUDGE.

Sgd: A.E. MPAGI-BAHIGEINE
JUDGE

Sgd: J.P. TABARO
JUDGE.

Sgd: F.M.S. EGONDA-NTENDE
JUDGE.

I certify that this is the true copy of the original.

MURANGIRA J.
REGISTRAR COURT OF APPEAL.