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THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 16 OF 2016

BOB KASANGO PETITIONER

10
VERSUS

1. ATTORNEY GENERAL
2. DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENTS

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC

15
Hon. Mr. Justice Geoffrey Kiryabwire, JA/JCC

Hon. Mr. Justice Cheborion Barishaki, JA/ JCC

Hon. Mr. Justice Stephen Musota, JA/JCC

Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA/JCC

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JUDGMENT OF JUSTICE KENNETH KAKURU, JA/ JCC

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The petitioner in his amended petition dated 8th June 2016 states that he is a Ugandan of sound mind and a person presently being prosecuted in different Courts in Uganda by the Director of Public Prosecutions. Further that, he has suffered and is likely to further suffer the infringement of his fundamental rights as a result of unconstitutional acts of Director of Public Prosecutions.

He sought the following orders and declarations:-

- (i) *The prosecution of the Petitioner by the DPP is supposedly conferred upon him under Article 120 (3) (a) & (b), under Chapter Seven of the Constitution of the Republic of Uganda 1995.*

- 5 (ii) *That in August 2015, Judge Mike Chibita was appointed Judge of the High Court of Uganda, pursuant to Articles 142(1) and 143(e) & (2) of Chapter Eight of the Constitution, a position he continues to hold to date.*
- (iii) *The appointment of Judge Mike Chibita as DPP while holding the position of judge are inconsistent with the Constitution to the extent that they cause a fusion of the Executive and Judiciary and undermine the independence of the judiciary and the separation of powers that the Constitution requires and envisages;*
- 10
- (iv) *That in so far as the appointment of Judge Mike Chibita as DPP is unconstitutional, the exercise by the DPP of executive powers conferred under Article 120 of Constitution is unconstitutional, unlawful and void to the extent of inconsistency with the holding of the two constitutional offices.*
- 15
- (v) *That the appointment of Judge Mike Chibita as DPP was and continues to be void ab initio and unconstitutional to the extent of its inconsistency and compromise the independence of the judiciary and the constitutional principal of separation of powers.*
- 20
- (vi) *That by virtue of his unconstitutional appointment and subsequent unconstitutional exercise of prosecutorial powers under Article 120 of the Constitution, the prosecution of the Petitioner by the DPP is unconstitutional, unlawful and void.*
- 25
- (vii) *That the terms and conditions of service under which Judge Mike Chibita currently serves as DPP, differ from those of a Judge and in contravention of the Constitution.*

5 2. WHEREFORE the Petitioner brings this Petition as an aggrieved person and in
the public interest and prays that the Honorable Constitutional Court be
pleased to grant the following declarations and orders:

10 A. The appointment of the Judge Mike Chibita as DPP while
holding the office of High Court judge is inconsistent with the
Constitution and the principles of separation of powers and
independence of the judiciary and therefore unconstitutional and
void ab initio.

15 B. A declaration that the current DPP is holding office contrary to
the principles of "separation of powers" and "the independence of
the judiciary" enshrined in Articles 128(1), (2) & (3), 129 of the
Constitution.

20 C. A declaration that the prosecution of the Petitioner by the DPP
in purported exercise of powers conferred under Article 120 of the
Constitution is unconstitutional and such prosecutions are a
nullity.

The petition is accompanied by the petitioner's affidavit. It states follows:-

1. **THAT** I am a male adult Ugandan and the Petitioner in the above Petition and
in such capacity I depone to the facts herein.
2. **THAT** in June 2016 I filed an Amended Petition with a Supporting Affidavit.
- 25 3. **THAT** at the time I deponed to the facts in the first and Main Affidavit, the facts
to which I depone in this Supplementary Affidavit had not occurred and I could
to that end not depone to them.



- 5 4. **THAT** the facts deponed to in this Supplementary Affidavit were only contemplated but came to pass and are relevant to the Petition and the justiciable determination of the issues for consideration before the Court.
- 10 5. **THAT** I verily believe that the admission of this Affidavit on record and as part of the evidence in support of the Petition does not in any way prejudice the Respondent.
- 15 6. **THAT** on the 11th day of August 2016, when Session Case No. 0003/2016 came up for hearing at the High Court (Anti Corruption Division) I made an application to the Learned trial Judge to stay the proceedings pending the determination of Constitutional Petition No.16 of 2016 in which as Petitioner I am challenging the constitutionality of the appointment of the DPP and therefore the legality / validity and the fairness of the trial.
- 20 7. **THAT** I further prayed to the trial judge that she could in the alternative or in addition to the Petition, refer the matters I had raised before her to the Constitutional Court for determination as had been done in Constitutional Petition No. 46 of 2011: Hon. Sam Kutesa of 2 Ors V. Attorney General and Anor, and Constitutional Reference No. 54 of 2011: Hon. Sam Kutesa of 2 Ors V. Attorney General and Anor, in the same High Court-Anti-Corruption Division.
- 25 8. **THAT** the Learned trial judge declined to stay the trial in spite of the binding Supreme Court decision that I brought to her attention and the mandatory command of the Constitution in this regard. (The relevant extract of the Record of Proceedings is annexed and marked "BKS 1").
9. That trial proceeded although I expressed my protest.
10. **THAT** in July 2017 during the continuation of the trial, the DPP who personally consented to the charges against me and was prosecuting, in an interview with



- 5 the Independent News Magazine, positively stated that he had talked to the
judiciary and applications such as the kind I made to have a Criminal
Prosecution stayed by a civil court would not be granted as the judiciary had
given him assurance to that effect. (A copy of the relevant interview is annexed
and marked "**BKS2**").
- 10 11. **THAT** upon reading the interview and response of the DPP who is also a judge
of the High Court and prosecuting me before a fellow Judge of the High Court,
my initial fears and suspicion of external interference by the Prosecutor with
the trial and that a fair trial was not possible, were confirmed.
- 15 12. **THAT** both the reality and perception of unfairness were reinforced by the
refusal of the Presiding Judge to grant the application to stay the trial and the
confirmation by the DPP that he had privately spoken to and gotten assurances
from the judiciary that those applications would not be granted.
- 20 13. **THAT** the realities that the DPP as Judge of the High Court could and did in fact
influence the decisions of courts in criminal trials outside the courtroom is a
grave infringement upon the criminal defendant's right to a fair trial and I
verily belief I was a victim.
- 25 14. **THAT** in the course of the trial, in which one of the charges against me was
"Forgery of a judicial Document", a High Court Judge -Hon. Judge John Eudes
Keitirima had denied execution of the impugned Court orders, alleging his
signature was forged.
15. **THAT** unknown to me, the DPP and the police had sought the expert opinion of
a government Document Examiner as to the authenticity of the signatures and
handwriting on the orders.



- 5 16. **THAT** the Document Examiner who appeared for the prosecution as **PW16 - Sebuwufu Erisa** testified that he found strong similarities between the specimen signatures of the Hon. Judge Keitirima and those on the impugned Orders.
- 10 17. **THAT** PW16 also testified that he suspected that the genuine signatures of the Hon. Judge Keitirima could have been superimposed on to a fake document since he was working with photocopies.
- 15 18. **THAT** PW16 further testified that he requested for the originals of the impugned court orders but the police did not give them to him and further that if he had the originals, he would have conclusively determined if there had been a superimposition of signature or not.
19. **THAT** PW16 testified as well that the superimposition of a signature cannot be on an original.
- 20 20. That PW16 finally testified that what he stated in his testimony about the faint lines and superimposed signature was only suspicion (The relevant extracts of the testimony of PW16 from the Record of Proceedings is contained in "BKS 1 ").
- 25 21. **THAT** Hon. Judge John Eudes Keitirima testified for the prosecution as PW3 and admitted on oath that the photocopies were made from the High Court Civil Registry and handed to the Police and further that it was he and CID who were last in the chain to handle the originals of the impugned Court Orders and that he handed the originals to a Police officer called Idro Obulejo.
22. **THAT** other witnesses including a Registrar of Court - **Erias Kisawuzi** also testified for the prosecution that he saw the originals of the impugned Orders with the police and that he being familiar with the signature of Hon. Judge Keitirima he formed the opinion that the signature was that of Hon. Keitirima.

5 Both respondents opposed the petition, contending in the answer to the petition that:-

- a. *The Petition is misconceived, frivolous and vexatious and raises no issues or questions for interpretation by this Honorable Court.*
- b. *The Respondent has not by any act or omission violated or infringed any provisions of the Constitution as alleged by the Petitioner in this matter.*
- 10 c. *The Petition is merely an abuse of Court process intended to frustrate the criminal prosecution of the Petitioner in the High Court of Uganda for the heinous crimes that he allegedly committed.*
- d. *The Petitioner shall not in any way be prejudiced by the dismissal of this*
- 15 *Petition by this Honorable Court.*

Representation

When this petition came up for hearing on 25th January 2019 the petitioner who is a lawyer and an advocate of the High Court of Uganda opted to represent himself. Leave was granted to him to do so. It was well within his right.

20 The respondents were represented by *Ms. Christine Kahwa*, Ag Director, Civil Litigation at the Attorney General Chambers together with *Mr. Richard Adrole* Senior State Attorney.

The Petitioner's case

25 The petitioner opted to proceed by way of written submissions and his conferencing notes on record. He was also granted leave to address the Court orally.

He submitted that, Hon. Judge Mike Chibita was appointed Judge of the High Court of Uganda in 2010, a position he continues to hold to date. In October 2013, whilst still holding the position of Judge of the High Court of Uganda, he was appointed to the

30 Constitutional office of Director of Public Prosecutions. As Judge of the High Court,

5 he was appointed by the President upon the advice of the Judicial Service Commission and with the approval of Parliament.

He subsequently took the Judicial Oath in the Fourth Schedule to the Constitution of the Republic of Uganda (hereinafter "the Constitution"). As DPP, he was as well
10 appointed by the President upon the recommendation of the Public Service Commission and with the approval of Parliament under Article 120 (1) of the Constitution. Before and subsequent to his appointment as DPP, he did not resign his appointment to the Judicial Bench within the meaning and command of Article 252(1), (2) and (3) of the Constitution. The Hon. Judge Chibita to date holds two
15 Constitutional appointments - as judge on the Judicial Bench of the High Court and as DPP in the Executive arm of government.

In 2013, Justice Chibita as the DPP partially prosecuted the Petitioner at Buganda Road Chief Magistrate's court whereupon the Petitioner was acquitted of all charges. The DPP appealed to High Court in 2015 and the appeal was partially successful.

20 The Petitioner has appealed to the Court of Appeal. In 2015 the DPP prosecuted the Petitioner at City Hall Court in Kampala and the Petitioner was acquitted of all charges on a directed acquittal on a No Case to Answer in September 2017. No appeal was preferred.

In April 2016, the DPP indicted the Petitioner in the High Court (Anti corruption
25 Division-ACD). The Petitioner filed this Petition challenging the authority and Constitutionality of the alleged exercise of prosecutorial powers by DPP since 2013, and sought a stay of the Proceedings pending the final disposal and determination of this Petition. The learned trial Judge declined to grant the application, reasoning that only the Petitioner and not his co-accused had made the application.

5 The Petitioner brings this Petition seeking the interpretation of various Articles of the Constitution relating to the dual - appointments of the Hon. Judge Mike Chibita as Judge of the High Court and as DPP simultaneously, and seeking declaratory orders.

As a Judge of the High Court, Hon. Judge Chibita took the Judicial Oath to "... exercise
10 *the judicial functions entrusted to me ...*" and he continues to uphold and honor that Oath as a member of the Judiciary. His cardinal duty being that of an independent, impartial and neutral arbiter in disputes between individuals and between individuals and the State.

On the other hand, as DPP, he became and also continues to be a member of the
15 Executive and its Chief Prosecutor and Criminal Litigator. In that second role, he occupies the position of partiality as the representative and advocate of the interests of the Executive in criminal disputes between the State and its citizens or other individuals/entities. The two roles are in clear conflict and the second one is something no Judge who upholds and honors the Judicial Oath should ever do in a
20 constitutional government democracy.

As the old adage goes, "*justice should not just be done but must be seen to be done*". Justice is a special commodity dispensed by Judges and the perception the reasonable member of the public holds of the individual Judge ultimately reflects upon the entire judiciary, If as in the case of Hon. Judge Chibita, the public holds the
25 perception that the dual-appointment makes one arm of the government, in this case the Judiciary, an extension of the other, in this case the Executive, as a result of the fusion caused by the impugned appointments, then the independence and integrity of the judiciary is compromised by such fusion and in the eyes and minds of the public. The DPP as Chief Public Prosecutor is licensed to appear in advocacy
30 before courts of law on behalf of the State. He often delegates this duty. However, there cannot be fair play if the DPP appears by proxy or were to appear in person

5 before a Magistrate lower in judicial hierarchy than he is or before a fellow Judge in prosecution of a criminal defendant.

The prosecution has an unfair advantage in that regard and no fair trial can be said to be in play as the Magistrate or Judge will be mindful of the fact that the prosecutor is a superior or colleague - perceptions are most often more powerful
10 than reality and have lasting effects, often negative.

Furthermore, the prosecutor who is also a member of the Judicial Bench would now be at the bar! In this situation, the apprehension in the mind of the criminal defendant and the reality of the roles being played out by the DPP, would not qualify such a trial as "fair before an independent and impartial tribunal."

15 The dual roles of the current DPP are contrary to the administration of justice - he is an investigator, prosecutor and judge. He sanctions prosecutions before his fellow judicial officers.

Article 120(2) commands that, "*A person is not qualified to be appointed Director of Public prosecutions unless he or she is qualified to be appointed a judge of the High
20 Court*", such qualifications being set out under Article 143(e) of the Constitution.

The Constitution only requires the DPP to hold the same qualifications as those requisite to be appointed Judge of the High Court and that is where the "fusion" of qualification ends. Article 120(2) is not a permissive provision of the Constitution that would allow the appointment of a sitting judge of the High Court to a position
25 in the Executive arm of government such as DPP.

In appointing the Hon. Mike Chibita to the dual roles of High Court judge and DPP and to continue to hold both, the appointing authority acted contrary to constitutional commands and in the breach of age old constitutional principles of separation of powers and incompatibility of office.

5 In any event, the matter is factually and legally *res judicata*, and this Court is, pursuant to the doctrine of *stare decisis*, bound by its own previous decisions unless there is very compelling reason or change of circumstances to justify a departure. In this case, there is absolutely no justification for any such departure, I submit and the Court is to that end bound by its own precedent. The Constitutional Court has
10 unequivocally pronounced itself on the Constitutionality of appointment of a judge to a prosecutorial role in *Constitutional Petition No. 10 of 2008: Jim Muhwezi & 3 Others V. Attorney General & Anor* in which it applied with approval decisions from Kenya, South Africa, Lesotho, Canada and also learned authors.

The petitioner went on to submit that, if this Court is to come to the finding, that the
15 appointment of the Hon. Judge Chibita to the Executive arm of Government as DPP while continuing to be a sitting member of the Judicial Bench and Judicial arm of government was and is unconstitutional and therefore a nullity and a breach of the Constitutional doctrines of separation of powers and incompatibility of office, then it follows that the unconstitutionality of his appointment voided his actions as DPP
20 *ab initio* and as is retrospectively null and void. The legality of the actions of an office bearer only derives from the legality of his or her appointment. He argued that, the actions gain validity from the root of the appointment.

It was submitted that, when the appointment, as in the instant case, is without legal validity to the extent of its unconstitutional nature, then it follows that the actions of
25 the unconstitutional appointee are invalid *ab initio*. As per the principle of law expressed in the Latin maxim - ***ex turpi causa non oritur actio*** - No cause of action or right can flow from an illegality. Therefore, he argued if the appointment of Hon. Judge Chibita as DPP is unconstitutional, he maintains no legal right, both retrospectively and prospectively, to exercise the Constitutional powers conferred
30 under Article 120(3) of the Constitution.

5 Most crucially, his participation in the prosecutory process as DPP, whether directly
or by delegation, taints the process and vitiates the trial, rendering it unfair and
illegal since there cannot be said to be a lawful and proper trial before an
independent and impartial tribunal. A criminal prosecution before a court of law
cannot take place without a prosecutor. Where, as in this case, the public prosecutor
10 acted illegally, the trial was to that extent incurably tainted with illegality and its
fairness impermissibly compromised to the detriment of the criminal defendant, in
this case, the Petitioner.

He asked Court to allow the petition and to grant the remedies sought in the
petition.

15 **The Respondents' case**

For the respondents, it was submitted that, the appointment of Justice Mike Chibita
to serve as Director of Public Prosecutions on contract while still holding the office
of the Judge of the High Court was neither irregular nor illegal.

However, the main thrust of the respondents' case was that in the event that this
20 Court finds that the appointment was illegal or irregular, the decision made by
Justice Chibita whilst holding the two offices would still be valid. Finding otherwise
would create an absurdity.

Counsel pointed out, that, in the event that an appointment of a judicial officer was
found to have been illegal on account of forgery or misrepresentation his or her
25 decision preceding such funding would still be valid as holding otherwise would
result into an absurdity.

In conclusion Counsel asked Court to dismiss this petition in its entirety. However
this Court should be inclined to find for the petition an issue one, it should find on
30 issue 3 that the decisions Justice Chibita made while holding the office of the
Director of Public Prosecutions cannot be invalidated on that account.



5 **Resolution by Court**

I would answer the first issue in affirmative, it is not in dispute that this petition raises question that require the interpretation of the Constitution under Article 137. This is conceded to by the respondent, in the additional affidavit in support of the respondents' answer to the petition.

10 The second issue is whether the appointment and a High Court Judge to head the Directorate of Public Prosecutions is unconstitutional and contrary to the doctrine of separation of powers enshrined under Article 128(1), (2) and (3) and 129 of the Constitution.

I have carefully perused the pleadings before me and the authorities cited to me. I have also listened carefully to the submissions of the petitioner and Counsel for the respondents.

Both parties are in total agreement as to the position of the law as set out in *Hon. Jim Muhwezi and 3 Others Vs Attorney General and Another Constitutional Petition No. 10 of 2009*. In that petition this Court was required to determine whether "the appointment of the Inspector General of Government from the Judicial Bench contravened Articles 128(1) and (2), 223(3) and (4), 144(2), (3) and (4), 224 and 225 of the Constitution.

This issue related to the appointment of Hon. Justice Faith Mwendha as the Inspector General of Government. In that petition, it was submitted for the petitioner that at the time of appointment as Inspector General of Government, she was a sitting Judge of the High Court, which office was governed by the Article 128 of the Constitution.

Further that, upon her appointment as Inspector General of Government, done under Article 223 of the Constitution, she did not resign her office as a Judge of the

5 High Court. It was pointed out by Counsel for the petitioner in that petition, that the
Inspector General of Government under Articles 225 and 230 of the Constitution has
powers to investigate arrest, cause arrest, and prosecute or cause prosecution in
respect of cases involving corruption. This role could not be legally performed by a
sitting Judge as it would contravene the principle of separation of powers as
10 enshrined in the Constitution.

For the respondent it was submitted that, the appointment of the Inspector General
of Government from the bench was constitutional. Further that, she had been
granted leave of absence by the judiciary to enable her performance her duties as
Inspector General of Government. It was the respondents' case that, while she
15 performed her duties of Inspector General of Government she did not perform any
functions as a Judge and did not receive salary from the Judiciary.

This Court held that:-

20 *"In a nutshell, the duty of a judge is to adjudicate disputes in society and
to interpret and enforce the law. In doing so the judicial officer and
judiciary are independent of any person or authority. On the other hand
the duties and functions of the IGG, include, the powers to investigate,
arrest, cause arrest, prosecute, cause prosecution in respect of cases
involving corruption, abuse of authority or of public office.*

25 *Now, it is a cardinal principle of our jurisprudence that a judge must be
Independent, Impartial and just to all manner of people. He must take
the judicial oath to inculcate these principles in his person. How do these
duties, functions and powers of a judicial officer relate to those of the
IGG? Are they related in such away that a person under the judicial oath
can take another oath to perform the duties of the IGG without conflict?*



5 *How would one individual honour two oaths to perform conflicting duties and exercise conflicting powers?*

Further that;-

10 *“In our judgment the functions and powers of the IGG are incompatible with those of a judicial officer and it was a gross violation of the provisions of the Constitution separation of powers and the independence of the judiciary. The answer to question (b) above is in the affirmative. To the extent that the appointee was a sitting judge, it was null and void.”*

In conclusion the Court stated:-

15 *“We have held that the appointment of a judge to the post of Inspector General of Government or Deputy Inspector General violates the Constitution because the job is not compatible with that of a judge. It violates the principle of Separation of Powers enshrined in our Constitution. It also contravenes article 223(4) which provides that the IGG or Deputy IGG "shall not, while holding office, hold any other office of emolument in public service.*

20

The office of "judge" in Uganda is an office of emolument and nobody can lawfully hold the office of IGG while at the same time holding the post of judge. A judge should on appointment as IGG be required to relinquish the judicial office in order to take the oath of the office of the IGG.”

25

I have been constrained to reproduce the excerpts above in *extenso* due to the similarity of that petition with this one before us.

5 The questions sought to be answered in this petition were answered in the *Jim Muhwezi* petition (Supra). I agree with the above decision entirely. This petition to that extent does not raise any fresh question for interpretation of the Constitution by this Court. The principles set out on *Jim Muhwezi and others* petition (supra) in respect of the office the Inspector General of Government (IGG) applies *mutates*
10 *Mutadis* to the office of the Director of Public Prosecutions.

There is nothing on record to show that Hon. Justice Mike Chibita, resigned his appointment as a Judge of the High Court of Uganda before he took oath of and assumed the office of the Director of Public Prosecutions. None has been provided. On the other hand sufficient evidence has been provided by the respondent to show
15 to the satisfaction of the Court that he continued to be regarded by the judiciary as sitting Judge on special assignments. This is not disputed by the respondents. The respondent has not provided this Court with any evidence of his resignation from his judicial office. The head of the Public Service has not provided us with one. The Judicial Service Commission has not done so either.

20 I therefore find that, Hon Justice Mike Chibita did not first resign as a Judge of the High Court before his appointment to the office of the Director of Public Prosecution. His appointment as the Director of Public Prosecutions therefore was null and void and in contravention of Article 223(4) of the Constitution.

In *Jim Muwhezi* (supra) while considering the question as to the legality of the acts
25 of Hon Justice Faith Mwendha performed while she held the office of the Inspector General of Government observed and held as follows:

*"The office of the Inspector General of Government must be separated from its holder. The Inspectorate of Government is not a one man or one woman show. The IGG has deputies, Inspectors, Investigators, Legal Officers, Accountants
30 and other officers who help the Inspectorate fulfil its mandate. Any defect in*

5 *the appointment of the holder of that office does not nullify everything he does*
in office as long as they are within the constitutional mandate of that office. In
that regard, it would be absurd to nullify everything Justice Mwendha did in
office for a period of four years merely because her appointment was not in
10 *accordance with the Constitution. It should be noted that the powers that the*
IGG exercises are vested in the Inspectorate. Article 223 of the Constitution
provides that the Inspectorate of Government consists of the IGG and such a
number of Deputy IGGs as Parliament may prescribe. Therefore whatever
Hon. Justice Mwendha did while in office remains valid as long as it was within
the mandate of the Inspectorate of government."

15 Once again I agree with the above principle of law. It is applicable to the petition in
respect of the office of the Director of Public Prosecution *Mutatis Mutandis*.

In this regard therefore I find that all that was done by Hon. Justice Mike Chibita
while performing the duties of the Director of Public Prosecutions remains valid. I
must categorically state however, that hence further any appointment of a Judge to
20 any other executive or constitutional office prior to his or her resignation would
render his or her actions invalid on account that the law is now well settled.

In the result I would issue the following orders and declarations:-

(1) This petition succeeds in part to the extent that the appointment of
Hon. Justice Mike Chibita as the Director of Public Prosecution, while
25 he was at the same time a substantive Judge of the High Court of
Uganda contravened the doctrine of separation of powers enshrined in
chapters Six, Seven and Eight of the Constitution and Articles 128(1),
(2) and (3), 129 was therefore null and void.



5 (2) That the appointment of Hon. Justice Mike Chibita as the Director of Public Prosecution while he was still a sitting Judge of the High Court of Uganda contravened Articles 120 and 128 of the Constitution.

10 (3) The investigations, arrest and prosecution of the petitioner by the Director of Public Prosecution, while Hon. Justice Mike Chibita held the office of the Director of Public Prosecution did not contravene any Article of the Constitution.

15 (4) Henceforth the appointment and actions of a Judge to any other executive or constitutional office prior to his or her resignation render his or her actions invalid.

20 (5) I award costs of this petition to the petitioner, for the reason that at the time Hon. Justice Chibita was appointed the Director of Public Prosecutions on 14th October 2013 this Court had already delivered the Judgment in *Jim Muhwezi and Others vs Attorney General* (supra) which decision was ignored by the appointing authority.

As the other members of the Coram agree, it is so ordered.

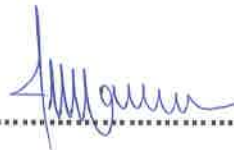
25 Before I take leave of this matter, I would like to observe that, Judges and Justices are still being assigned and or appointed to various executive and constitutional offices. The relevant authorities especially the Judicial Service Commission must ensure that before a Judge or Justice takes up another appointment, he or she first resigns.

30 Judicial officers as custodians of justice must comply with this constitutional requirement. They must not be seen to be contravening the very constitution they took oath to uphold, while requiring others to uphold it.



5 It is hereby declared that this Judgment is not in persona. It is in rem. Consequently any appointment of a judicial officer to any executive or constitutional office prior to his or her resignation from the judiciary shall be null and void *abinitio* and his or her actions shall be invalid.

10 **Dated at Kampala** this^{18th} day of ^{March}..... 2021.



Kenneth Kakuru

15 **JUSTICE OF APPEAL/CONSTITUTIONAL COURT**

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1. ATTORNEY GENERAL

2. DIRECTOR OF PUBLIC PROSECUTIONS

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HON. MR. JUSTICE KENNETH KAKURU, JA/JCC

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA/CC

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HON. MR. JUSTICE CHEBORION BARISHAKI, JA/CC

HON. MR. JUSTICE STEPHEN MUSOTA, JA/CC

HON. MR. JUSTICE KIBEEDI MUZAMIRU MUTANGULA, JA/CC

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE JA/CC

20 I have had the privilege of reading the Judgment in draft of the Hon Mr. Justice Kenneth Kakuru for which I am in totally agreement. I however wish to add a few words of my own in this petition which I hope will add to the clarity of our final position.

The Facts.

The facts and grounds of the Petition are well articulated in the Judgment of Hon. Mr. Justice Kenneth Kakuru. I agree that the Petition brings in the interpretation of various provisions of the Constitution with regard to the dual appointment of the Hon. Judge Mike Chibita (Judge of the High Court as he then was) simultaneously as Judge of the High Court and Director of Public Prosecutions (DPP). The Petitioner argued that the dual appointment of Hon. Judge Chibita contravened Articles 120 (1); 252 (1), (2) and (3) of the Constitution of Uganda. It is the case for the Petitioner that the Hon. Judge should have resigned his position as Judge on being appointed DPP but did not.

The case for the Petitioner

It is the case for the Petitioner that the Hon. Judge holding a position in both the Executive and Judicial branch of Government also violated some common tenants of the office of a Judge. He submitted that having taken the oath of office as a Judge he could not be seen to discharge his cardinal duty of being an independent impartial and neutral arbiter in criminal matters. He added as the common adage goes *"that justice must not only be done but also seen to be done"*.

The Petitioner also argued that the second Respondent as a Judge would have unfair influence over other judicial officers while acting as a prosecutor because they would see him as a colleague. Such a trial would then not be regarded as being dispensed as an independent and impartial tribunal.

Furthermore, the dual appointment of Judge and DPP was inconsistent with the doctrine of separation of powers between the different arms of government especially the judiciary and executive.

The Petitioner relied on the Constitutional Petition of **Jim Muhwezi & 3 ors V the Attorney General and anor** Constitutional Petition No. 10 of 2008 which involved the appointment of a sitting Judge (Judge Faith Mwendha [as she then was]) as the Inspector General of Government (IGG) was contrary to Articles 128 (1) and (2) and (4), 144 (2), (3) and (4) and 224 and 225 of the Constitution. The IGG in that Petition under Articles 225 and 230 of the Constitution like the DPP had powers to investigate arrest and prosecute corruption cases. In that matter this appointment was found to be unconstitutional for very much the same reasons as the Petitioner has argued in this Petition.

10 The Petitioner argued that as a result of the above constitutional violations, the appointment and all the resultant endorsements for prosecutions by the Judge were void ab initio. This nullity would as act retrospectively from the time of the assumption to office of the Judge as the DPP.

15 The spin-off of this argument is that it followed that the trial and conviction of the Petitioner under Criminal Session No. 0003 of 2016 was null and void.

The Case for the Respondents.

20 The Respondents opposed the Petition. Counsel for the Respondents acknowledged that the Petitioner sought Court to find that the appointment of Judge Chibita as DPP was unconstitutional; which they denied. Counsel argued that the said appointment was neither irregular and or illegal.

Counsel submitted that even if the Court found that the appointment of the judge was unconstitutional then the decisions he made while the DPP would not be invalid as that would cause an absurdity and that the Petition be dismissed.

Resolution of Petition

I am in agreement with Justice Kenneth Kakuru that this Court is bound by its earlier decision of this Court in the **Jim Muhwezi Petition** (Supra). In that Petition, which was argued by the present Petitioner (then as counsel) it was held as follows: -

“The fact that we have found on the third issue that Mrs. Faith Mwendha was irregularly appointed IGG and held that office during the investigation of the GAVI Funds does not affect our findings on issues No.1 and No.2. The office of the Inspector General of Government must be separated from its holder. The Inspectorate of Government is not a one man or one woman show. The IGG has deputies, Inspectors, Investigators, Legal Officers, Accountants and other officers who help the Inspectorate fulfil its mandate. Any defect in the appointment of the holder of that office does not nullify everything he does in office as long as they are within the constitutional mandate of that office. In that regard, it would be absurd to nullify everything Justice Mwendha did in office for a period of four years merely because her appointment was not in accordance with the Constitution. It should be noted that the powers that the IGG exercises are vested in the Inspectorate. Article 223 of the Constitution provides that the Inspectorate of Government consists of the IGG and such a number of Deputy IGGs as Parliament may prescribe. Therefore, whatever Hon. Justice Mwendha did while in office remains valid as long as it was within the mandate of the Inspectorate of government.”

It follows that even though this Court in the Muhwezi case found that the appointment of Justice Mwendha was irregular and hence unconstitutional, it did

not follow that her actions as IGG were invalid as that would amount to an absurdity as her powers were shared with her deputies whose appointment was not irregular. Justice Kenneth Kakuru correctly agreed with this position. This would have been resolved differently if the Respondents had shown that the Judge had actually resigned his position as a Judicial officer before taking up his appointment as the DPP.

The above notwithstanding, I am inclined find that since the actions of Judge Chibita as DPP were effected under and in compliance with the mandate of the DPP under Article 120 (3) (a) and (b) of the Constitution it would be absurd to reverse all those decisions as his appointment had not been contested on appointment as this would amount to retrospective annulment.

In the case of ***Callist Andrew Mwatella & 2 others v. East African Community Reference No.1 of 2005***, the East African Court of Justice (EACJ) applied the doctrine of prospective annulment as opposed to the retrospective annulment. In this case, the Applicant challenged the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs and the Council's decision in relation to Bills pending before the East African Legislative Assembly. The Applicant alleged that contrary to Article 14 of the East African Community Treaty, the Council had not been lawfully established and neither was it properly constituted during the contested meeting. The Applicant sought a Court order that the Council's report for the disputed meeting was null and void ab initio as well as all directives, decisions and actions taken during the meeting. In this regard, the court held that the disputed meeting was unlawful and the contested decisions it handed down in that meeting in respect of the two Bills were invalid. However, since the Council

had been in place much earlier since 2001 and had undoubtedly made a number of decisions which it would be unwise to disturb by reason of its findings. The EACJ was of the considered opinion that this was a proper case to apply the doctrine of prospective annulment – which the court held to be good law and
5 practice.

In the **Callist Andrew Mwatella** case (Supra), the doctrine of prospective annulment was applied to determine the validity of the actions of the Council and whether it was necessary to invalidate all the good decisions which the improperly established Council had made since its establishment.

10 In the case of *Defrenne v. Sabena [1981] 1 All ER 122*, the plaintiff sued her employer for not giving her equal pay with the rest of the men with whom she was serving in a similar capacity. The Plaintiff's claim was brought under Article 119 of the EEC treaty which came into force in October 1967, which required all member states to enact a law which required employers to pay male and female
15 employees equally for equal work. The Plaintiff was claiming compensation for the period between February 1963 and February 1966. The court held that it is appropriate to take exceptionally into account the fact that, over a prolonged period, the member states have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law. The
20 court granted the Plaintiff's claim but further observed that it was required to declare the law for the future only except for those who had already commenced legal proceedings. Therefore, the court held that employees could only rely on Article 119 of the EEC Treaty if it has been incorporated into the national laws of their respective states.

In the above case, the doctrine of prospective annulment was applied in the interpretation of a statute with specific regard as to how the provisions of the treaty would be enforced.

5 I find that the doctrine of prospective annulment is not only applicable in annulling earlier decisions but it is also applicable in determining the validity of the decisions of a person in authority. This doctrine is also applicable in the interpretation of statutes.

10 I further find that the doctrine of prospective annulment would also further support the decision not to nullify earlier decisions of Judge Chibita following the finding now that his appointment was unconstitutional and therefore irregular.

With this addition I would equally uphold the Orders and Declarations of the Hon. Mr. Justice Kenneth Kakuru.

15 Dated at Kampala this 18th day of March 2021



Justice Geoffrey Kiryabwire JA/CC

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 16 OF 2016

*(Coram: Kenneth Kakuru, Geoffrey Kiryabwire, Cheborion Barishaki, Stephen
Musota & Muzamiru. M. Kibeedi, JJCC)*

BOB KASANGO.....**PETITIONER**

VERSUS

1. ATTORNEY GENERAL

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

JUDGMENT OF CHEBORION BARISHAKI, JA/JCC

I have had the benefit of reading in draft the judgment of my learned brother Kenneth Kakuru, JCC and I agree with him that this petition should succeed in part. I also agree with the declarations and orders he has proposed.

In my view, if this Country is to adhere to the rule of law, then the principle of separation of powers has to be seen to be in practice. A judge cannot work for both the executive and Judiciary at the same time as there is bound to be a conflict of interest which in turn will erode the independence of the judiciary. The Courts are duty bound to protect this independence at all times so as to ensure that there is access to justice for all people in the Country.

Dated at Kampala this¹⁸..... day of ...^{March}..... 2021.


Cheborion Barishaki

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 16 OF 2016
BOB KASANGO ::: PETITIONER
VERSUS

- 1. ATTORNEY GENERAL**
2. DIRECTOR OF PUBLIC PROSECUTIONS :::: RESPONDENTS

CORAM: Hon. Justice Kenneth Kakuru, JA/JCC
Hon. Justice Geoffrey Kiryabwire, JA/JCC
Hon. Justice Cheborion Barishaki, JA/JCC
Hon. Justice Stephen Musota, JA/JCC
Hon. Justice Muzamiru Mutangula Kibeedi JA/JCC

JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft, the judgment of my brother Justice Kenneth Kakuru, JA/JCC.

I agree that the questions sought to be answered in the current petition were answered in **Jim Muhwezi and 3 others Vs Attorney General and another Constitutional Petition No. 10 of 2009**. This petition does not raise any fresh question for interpretation of the Constitution by this court. The principles set out in Jim Muhwezi and others (supra) in respect of the office of Inspector General of Government (IGG) applies *mutates mutandis* to the office of the Director of Public Prosecutions (DPP).

Since Hon. Justice Mike Chibita had not resigned as a Judge of the High Court before his appointment to the office of the DPP, his appointment is null and void and in contravention of Article 223(4) of the Constitution. Nevertheless, in order to avoid any absurdity, all that was done by Justice Mike Chibita as DPP remain valid.

But, as ordered by my brother Justice Kenneth Kakuru JA/JCC, henceforth, any appointment of a Judge to any other executive or constitutional office prior to his or her resignation would render his or her actions invalid.

Finally, I agree with the orders and declarations made by Hon. Justice Kenneth Kakuru JA/JCC.

Dated this 18th day of March 2021



Stephen Musota

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Kakuru, Kiryabwire, Cheborion, Musota & Kibeedi, JJA/JCC)

CONSTITUTIONAL PETITION No. 16 OF 2016

BOB KASANGOPETITIONER

VERSUS

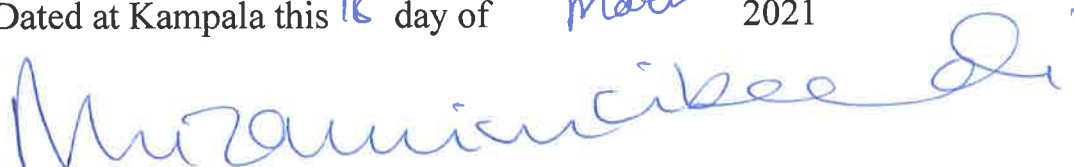
1. ATTORNEY GENERAL

2. DIRECTOR OF PUBLIC PROSECUTIONSRESPONDENTS

Judgment of Muzamiru Mutangula Kibeedi, JA/JCC

I have had the advantage of reading in draft the lead Judgment prepared by my Learned Brother, Kakuru, JA/JCC. I concur with his reasoning and the Orders and Declarations he has proposed. I have nothing useful to add.

Dated at Kampala this 16th day of March 2021



Muzamiru Mutangula Kibeedi

JUSTICE OF APPEAL/ CONSTITUTIONAL COURT