

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CORAM: OWINY - DOLLO DCJ, KAKURU, EGONDA-NTENDE, OBURA AND MUHANGUZI JJA.
5 CONSTITUTIONAL REFERENCE NO. 49 OF 2010
(Arising from Tororo Criminal Case No. 0340 of 2010)

BETWEEN

10 1. DR. EMMANUEL OTAALA
 2. OFUMBI TIMOTHY
 3. OPOYA CHARLES

..... PETITIONERS

AND

15 ATTORNEY GENERAL RESPONDENT

JUDGMENT OF THE COURT

Introduction

20 This is a Constitutional Petition brought under **Article 137** of the Constitution of the Republic of Uganda, 1995, the Constitutional Court (Petitions and References) Rules S.I. 91 of 2005 and all enabling laws.

 The Petitioners were, following a complaint against them of assault, investigated under Police File Tororo CRB 1668/ 2010 and
25 subsequently charged in Court under Tororo Chief Magistrate's Court Criminal Case No. 0340/ 2010; *Uganda v Dr. Otaala Emmanuel & 2 others*.

 It transpired that the Petitioners made a counter complaint of assault which is being investigated under Tororo CRB 1671/ 2010. No charges have been preferred to date.

The Petitioner contends that the decision to prefer charges against them under CRB 1668/ 2010, whilst no charges have been preferred against the suspects under CRB/ 1671/ 2010 points towards abuse of legal process.

5 The Respondent denies the allegations and contends that the Reference is without merit.

Representation

At the hearing, the respondent was represented by Philip Mwaka, Principal State Attorney and Counsel for the Petitioner was not present
10 in Court. We take notice there is an affidavit of service acknowledging that the Petitioner was duly served. The parties had filed written submissions.

Issues

- 15 1. Whether the application by the Office of the Resident State Attorney, Tororo, for warrant of arrest of the Petitioners in Criminal Case No. 340/ 2010, when the Police file had been called by the Director of Public Prosecutions (DPP) for directions, was contrary to Article 120 (5) of the Constitution.
- 20 2. Whether the prosecution of the Petitioners in the said Criminal Case No. 340/2010, while ignoring the Petitioner's earlier complainants to police amounts to political persecution and therefore contrary to Article 43 of the Constitution.

The Respondent objected to and still objects to the word 'ignoring' as argumentative and an improper manner of framing issues, which
25 should be couched in neutral terms.

Case for the Petitioner

The Petitioners requested that issue 2 be dropped and proceed with issues 1 and 3.

5 The Petitioner contends in the written submissions that there is unequal application of the criminal law against the participants regarding the events that occurred at Mulanda Church in Uganda on the 20th August 2010. Counsel further contends that whereas the Respondents have deemed it fit to put on trial the Petitioners herein, who were in fact the victims, moreover on incomplete evidence, the
10 suspects in Tororo CRB 1671/2010 who perpetuated the said fracas and injured the Petitioners have not been called to account for their actions for the day.

In light of *AG Vs Susan Kigula & 417 Ors Constitutional Appeal No. 03/2006* Counsel submitted that the process of bringing a person to trial
15 commences with the arrest of that person and that arrest should be premised on concrete evidence not on mere conjecture or surmise.

Counsel submitted that the criminal proceedings against the Petitioners are in contravention of **Article 43** of the Constitution; and that all this is a move to politically silence the Petitioner.

20 Counsel highlighted that the prosecution of the Petitioners in Tororo Criminal Case No. 0340/2010, while ignoring their earlier complaints to police in Tororo CRB 671/2010, yet both matters arose from the same incident, infringed on the Constitutional provisions of equality and those that bar political persecution.

25 **Issue 1**

Counsel for the Petitioner submitted that the pursuit of an arrest warrant by the Resident State Attorney Tororo against the Petitioner, well knowing that their trial could not take off, and the fact that the allegations they were basing on to seek the arrest of the Petitioners
5 herein were still being investigated, was an abuse of the due process; and in violation of Article 120(5).

Case for the Respondent

Counsel for the Respondent preferred to handle issue 1 and 3 together because the gist of the two issues is the same. Counsel submitted that
10 the Petitioners do not deny that there was an altercation between them, which gave rise to the charges under the respective files mentioned. Counsel submitted that the affidavit of the Resident State Attorney Tororo outlines the circumstances under which the Petitioners were investigated and charged. In this regard Counsel
15 submitted that this was done in accordance with the Director of Public Prosecution's Constitutional mandate, since there was sufficient evidence to charge the Petitioners.

Counsel submitted further that after being charged, the Petitioners made a complaint to the Director of Public Prosecution who called
20 their file for further perusal; but this does not affect the prosecution of the Petitioners as they await the decision of the Director of Public Prosecution. Counsel stated that the mandate of the Director of Public Prosecution under Article 120 (1) of the 1995 Constitution was discussed in the *Constitutional Petition No. 09/2008; Mugoya Kyawa Gaster*
25 *Vs AG*; where emphasis was put on the mandate of the Director of Public Prosecution under Article 120 (3) (e) in "instituting criminal

proceedings, taking over and continuing with criminal proceedings as well as discontinuing criminal proceedings.”

Counsel further stated that in the execution of its mandate, the Director of Public Prosecution is given wide discretion to prefer
5 charges based on the evidence presented and uncovered during the investigations by the police; and in that regard the Director of Public Prosecution decides which matters are ready for trial and those that require further investigations. Counsel thus contends that the Petitioners’ allegations are mere speculations and that they have not
10 in anyway demonstrated malice or abuse of the legal process.

With regard to applying for a warrant of arrest, counsel submitted that a warrant of arrest is applied for depending on the individual circumstance of each case; and it is trite law that the Court only issues it “for good cause” in the circumstances of each case. Counsel
15 submitted further that asking Court to review the issuance of warrants of arrest of the Petitioners amounts to inviting this Court not only to examine the discretion of the Director of Public Prosecution in exercising his Constitutional mandate, but also to review the discretion of the presiding Magistrate in issuing the warrant.

20 Counsel contends that its trite law that where the Petitioner feels that his Constitutional rights were violated in the process of being arrested, detained and prosecuted, he is free to seek a remedy in the appropriate Court under Article 50 of the Constitution or under the appropriate cause of action in the proper jurisdiction.

25 **Case for the Petitioners in Rejoinder**

Counsel for the Petitioners submitted that the Petitioners are not challenging the Constitutional mandate of the Director of Public Prosecution; but rather the exercise of its mandate while infringing on Article 120 (5).

5 Counsel submitted that it would amount to a travesty of justice and gross abuse of legal process for the Director of Public Prosecution to be left at liberty not to present charges against the perpetrators of criminal acts and instead present them as witnesses against victims of their criminal acts.

10 **Court's Consideration**

It is incumbent on this Court, in the course of interpreting the Constitution, especially the provisions on the protection and enforcement of fundamental rights and freedoms enshrined therein, to apply the generous and purposive principle of interpretation. Thus,
15 it must construe the Constitution in a manner that avails the individual the unfettered benefit of the protected rights and freedoms. Court must approach the construction of the limitations to the fundamental rights and freedoms, provided for in the Constitution, restrictively; with the consequence that the individual
20 retains the rights or freedoms in question, but without doing violence to the language used in the Constitution. Secondly, all provisions of the Constitution relevant to a particular issue must be looked at as a whole, rather than in isolation, and thus retain harmony in the Constitution.

25 It is with these principles in mind that we approach the matter before Court. We therefore proceed to handle the two issues together

because they are really the same. It is not in contention that the Petitioners are facing charges of assault under Tororo Criminal Case No. 0340/2010 and that the Petitioners filed complaints to the Director of Public Prosecution in Tororo CRB 671/2010 which await
5 determination by the Director of Public Prosecution. Article 43 of the Constitution states;

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

10 *(2) Public interest under this article shall not permit;*

(a) Political Persecution

(b) detention without trial

15 *(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.*

It is clear that arraigning the Petitioners in Court on charges preferred by the Director of Public Prosecution does not violate any right provided for under the Constitution. The issue to be resolved is
20 whether proceeding with prosecuting Criminal Case No. 0349/2010 is political persecution under Article 43 (2) (a) of the Constitution. We do not think so. The facts in the case of *Attorney General vs Susan Kigula & 417 Ors; Constitutional Appeal No. 03/2006* are distinguishable from the case before us; because in that case the petitioners were all on death
25 row and their case was an attempt to have capital punishment declared unconstitutional and abolished.

Article 23 (4) of the Constitution states:

"A person arrested or detained-

(a) for the purpose of bringing him or her before a Court in execution of an order of a Court; or

5 (b) Upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda,

10 Shall, if not earlier released, be brought to Court as soon as possible but in any case not later than forty eight hours from the time of his or her arrest."

It is not in contention that there was an altercation at Mulanda Church of Uganda grounds; and following a complaint, the Petitioners were arrested, investigated under police file Tororo CRB 1668/2010 and subsequently charged in Court under *Criminal Case No. 0340/2010*
15 *Uganda vs. Dr. Otaala Emmanuel & 2 Ors.* It is also not in contention that the Petitioners filed a complaint with the Director of Public Prosecution which, currently, is being addressed for further inquiries ordered by the Director of Public Prosecution, after which, a final determination would be made in both files.

20 It is also the Petitioner's submission that all these actions taken against them is a move to frustrate his political career. However, it is our view that all these are assumptions; and in the circumstances the Resident State Attorney and the Court were simply doing their job. This does not in any way infringe on the right of the Petitioner under
25 **Article 43 (2) (a)** of the 1995 Constitution of Uganda. Article 120 (3) (d) grants the Director of Public Prosecution power to discontinue

criminal proceedings instituted by himself or herself at any stage before judgment is delivered.

In light of the above, it is clear that the Director of Public Prosecution has power to withdraw any criminal proceedings before judgment is entered. This entails withdraw of charges and discharge of the accused person. However, this does not operate as a bar to any subsequent proceedings on the same facts against the accused person if the discharge is made before the close of the prosecution case, or before the accused is called upon to make a defence. Neither does it imply that such decision cannot be challenged if it leads to an infringement of the Petitioners' right.

Article 120 (5) mandates the Director of Public Prosecution to exercise this power with due regard to public interest, the interest of administration of justice and the need to prevent an abuse of administration of justice and the need to prevent an abuse of legal process. Looking at the record on file, it is not in contention that after arrests were made, an investigation was done on what happened during the incident and charges were preferred by the Director of Public Prosecution as it the mandate of the Director of Public Prosecution so to do.

Article 28 of the Constitution provides that once a person is charged, they are entitled to a fair hearing. Court then makes a decision, to either convict or acquit, basing on the evidence submitted and proved in Court. As it is, being charged does not by itself prove the guilt of a person. The burden to prove the guilt of the accused person still lies with the State; and the accused person then has an opportunity to be

heard before an impartial Court for the charges preferred. In other words an inquiry or further investigation into a matter does not halt a trial before Court.

5 As regards the issuance of the arrest warrants, we have perused the record of proceedings from the lower Court; and it is clear therefrom that the arrest warrants were preferred after criminal summons were issued. Only one person, out of the three who were summoned, appeared in response. It is our view that the Resident State Attorney and Magistrate acted within their Constitutional mandate to issue the
10 warrants; and in doing this, they did not in any way infringe the rights of the Petitioners. It is our view that it is not an abuse of the due process for Court hearing to go on in a case which is already in Court and has not been withdrawn by the Director of Public Prosecution; even where a complaint by an accused person is being attended to by
15 the Director of Public Prosecution.

For the reasons advanced above, we do declare that-

- a. The issuance of a warrant of Arrest against the Petitioners by Court on the application by of the Resident State Attorney does not violate Article 120 (5) in the circumstances of this case.
- 20 b. Continuation of the prosecution of a matter before Court, even where the accused person has lodged a complaint with the Director of Public Prosecution, does not in anyway infringe on the rights of the Petitioners provided for under Article 43 of the Constitution.
- 25 c. There is no justification for ordering a stay of the prosecution of the Petitioners.

We hereby order that the case file be returned to the trial Court to comply with the directions of this Court.

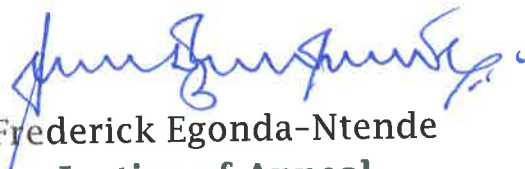
Dated at Kampala this 2nd day of March 2020



Alfonse C. Owiny - Dollo
Deputy Chief Justice



Kenneth Kakuru
Justice of Appeal



Frederick Egonda-Ntende
Justice of Appeal



Hellen Obura
Justice of Appeal



Ezekiel Muhanguzi
Justice of Appeal