

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 08 OF 2008
BETWEEN
R/O 133 MAJOR GENERAL JAMES KAZINI::::::::::::: PETITIONER
AND
ATTORNEY GENERAL:::::::::::::RESPONDENT

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

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HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE C.N.B. KITUMBA, JA

HON. JUSTICE C. K. BYAMUGISHA, JA

HON. JUSTICE A.S. NSHIMYE, JA

THE JUDGMENT OF HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA

The petitioner, Major Gen. James Kazini, is the immediate past commander of Uganda Peoples Defence Forces (hereinafter referred to as UPDF). He filed this petition under **Articles 137 and 50 of the Constitution** seeking various declarations and redress from this court on the following grounds:

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(a) That the proceedings involving the petitioner in respect of the UPDF/GCM/024/04 and judgment arising therefrom, the basis of the conviction and sentence which were subsequently appealed from in the Court Martial Appeal Court Cases No. 002 of 2008 and No. 003 of 2008 and/or are inconsistent with articles 28 (1) and 44 (c) of the Constitution in so far as they were presided over by a forum that was improperly established and improperly constituted.

(b) That the petitioner's criminal prosecution in respect of UPDF/GCM/O24/04,UPDF/GCM/077/05,UPDF/GCM/O78/05 and

UPDF/GCM/O51/07 in the General Court Martial and the Court Martial Appeal Court is discriminatory against the petitioner denies him equal protection of law and is inconsistent with and/or in contravention of the provisions of articles 21(1), (2) and (3) of the constitution in so far as it permits double jeopardy and inconsistent prosecution of civil offences in both General Court Martial and Civil Courts.

10 (c) *That the institution of proceedings in the General Court Martial against the Petitioner in respect of UPDF/GCM/O51/07 and UPDF/GCM/O24/04 involving the alleged offence of abuse of office c/s 87 (1) of the Penal Code Act is inconsistent with and/or contravenes articles 28 (1), 44(c) and 120 (3) (b) of the Constitution in that it violated the exclusive mandatory constitutional obligation of the Director of Public Prosecutions.*

(d) *That the petitioner's trial in respect of UPDF/GCM/O24/04, UPDF/GCM/078/05 and UPDF/GCM/051 is a nullity in law and therefore unconstitutional as it contravenes and or is inconsistent with articles 28 (1) and 44 (c) of the Constitution.*

20 (e) *That the petitioner's trial in respect of UPDF/GCM/O24/04, UPDF/GCM/077/05, UPDF/GCM/078/05 and UPDF/GCM/O51/07 is a nullity in law and thus unconstitutional as it was not conducted by a duly constituted court as envisaged under articles 2 (2), 126, 128-132, 134-135, 137-139, 210 and 265 of the Constitution.*

(f) *That the acts of denying your petitioner of the evidence and exhibits used by the prosecution in the trial of the petitioner in UPDF/GCM/O24/04, before they were used against him and judgment arising therefrom, was in contravention of his right to a defence and fair trial contrary to article 28 and 44 (c) of the Constitution.*

(g) *That regulation 20 (1) and (2) of the UPDF (Court Martial Appeal Court) Regulations S.I. 307-7 which limits the petitioner's right to appeal to the*

Uganda Court Martial Appeal Court in civil offences is discriminatory against the petitioner and is inconsistent with and/or in contravention of articles 21 (1) (2) & (3), and 28 (1), 44 (c), 126 (a), 129 (1) & (2) and article 132 of the Constitution.

(h) That regulations 22 and 23 of the UPDF (Court Martial Appeal Court) Regulations S.I. 307-7 are inconsistent with and/or in contravention of article 128 (1) & (2) of the Constitution in so far as they allow interference with Court Martial's discharge of its judicial duties.

1. Therefore the petitioner prays that the Court may:

10 *(a) grant a declaration that the proceedings involving the petitioner in respect of UPDF/GCM/024/04 and the judgment arising therefrom contravene and/or are inconsistent with articles 28 (1) and 44 (c) of the Constitution.*

(b) Grant a declaration that action of the respondent in criminally prosecuting the petitioner in criminal cases No. UPDF/GCM/024/04, UPDF/GCM/077/05, UPDF /GCM/078/05 and UPDF/GCM/051/07 in the General Court Martial is discriminatory and contravenes articles 21(1), (2) and (3), 45 and 126 (1) & (2) (a) of the constitution.

20 *(c) Grant a declaration that the proceedings in the General Court in respect of UPDF/GCM/051/07 and UPDF/GCM/024/04, involving the alleged offence of abuse of office c/s 87 (1) of the Penal Code Act contravenes and/or are inconsistent with articles 120 (3) (b), 28 (1) and 44(c) of the Constitution.*

(d) Grant a declaration that regulation 20 (1) and (2) of the UPDF (Court Martial Appeal Court) Regulations are unconstitutional in as far as they discriminate against the

petitioner by restricting his right of appeal in respect of civil offences in contravention of articles 20 (1), 21 (1) (2) & (3), and 28 (1), 44 (c), 126 (a), 129 (1) & (2) and article 132 of the Constitution.

(e) Grant a declaration that regulations 22 and 23 of the UPDF (Court Martial Appeal Court) Regulations S.I. 307-7 are unconstitutional for being inconsistent with and/or in contravention of article 128 (1) & (2) of the Constitution in so far as they allow interference with Court Martial's discharge of its judicial duties.

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(f) Grant a declaration that the respondent's act of denying your petitioner access to the High Command Probe Committee Report the basis upon which the petitioner is being prosecuted is inconsistent with and/or contravenes articles 28 (1) and (3)(c), 44 (c) and 126 (1) & 2 (A) of the Constitution.

(g) Grant a declaration that all the prosecution of and proceedings in respect of UPDF/GCM/O24/04, UPDF/GCM/077/05, UPDF/GCM/O78/05 and UPDF/GCM/O51/07 contravene and/or are inconsistent with articles 20 (1) & (2), 21 (1) & (2) & (3), 28 (1) & (3) (c), 44 (c), and 126 (1) & (2) of the Constitution and therefore, null and void.

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(h) Grant an order that the cases be discontinued as a nullity and your petitioner be discharged from criminal prosecution in the General Court Martial and in the Court Martial Appeal Court in respect of criminal cases UPDF/GCM/024/0, UPDF/GCM/078/05 and UPDF/GCM/051/07 and the Court Martial Appeal Cases No. 002 of 2008 and No. 003 of 2008 respectively.

- (i) *Grant an order of certiorari quashing your petitioner's illegal prosecution in respect of the cases UPDF/GCM/024/0, UPDF/GCM/078/05 and UPDF/GCM/051/07 and No. 003 of 2008 respectively.*
- (j) *Grant an order of general damages to your petitioner.*
- (k) *Grant your petitioner the costs of the petitioner with a certificate to the three counsel*
- (l) *Grant your petitioner such other relief at the Court may deem fit and just.*

10 The petition is supported by the affidavit of the petitioner sworn on the 3rd day of July 2008.

The Attorney General filed an answer to the petition denying all the allegations and contending that the petition did not disclose any question for constitutional interpretation.

On 18th December 2008, the parties, in a scheduling conference, agreed on the following facts:

20 That the petitioner was charged before the General Court Martial vide the General Court Martial criminal cases No. UPDF/GCM/O24/04, UPDF/GCM/077/05, UPDF/GCM/O78/06 and UPDF/GCM/O51/06, with the following offences:

1. Abuse of office c/s. 87 (1) of the Penal Code Act.
2. Causing financial loss c/s. 239 (1) of the Penal Code Act.
3. Forgery c/s 432 of the Penal Code Act.
4. Uttering false documents c/s 351 of the Penal Code Act.
5. Conspiracy of defraud c/s 399 of the Penal Code Act.
6. Disobedience of lawful orders c/s 177 of the Penal Code Act.
7. Neglect of official duty c/s 117 of the Penal Code Act.

On 27th March 2008, the petitioner was convicted of causing financial loss and sentenced to three years imprisonment vide UPDF/GCM/024/04. He appealed to the Court Martial Appeal Court against both the conviction and sentence. He was, however, released on bail pending further determination of the appeal.

The petitioner further contends that his trial, conviction and sentence vide UPDF/GCM/024/04 and his continued trial in respect of other cases are unconstitutional, hence this petition.

- 10 The respondent, contends that the trial, conviction, sentencing of the petitioner in respect of UPDF/GCM/024/04 and his continued trial in respect of other cases are unconstitutional.

The parties agreed on the following issues to be resolved by the court:

1. *Whether the Petition raises matters for constitutional interpretation.*
2. *whether the petitioner's continued trial at the General Court Martial in respect of UPDF/GCM/051/06 and that at the Court Martial Appeal Court no. 3 of 2008 involving the offence of abuse of office c/s 87 (1) of the Penal Code Act contravenes and/or is inconsistent with Article 28 (1), 44(c) and 120 (3) of the Constitution.*
3. *Whether the trial of the petitioner at the General Court Martial in*
20 *UPDF/GCM/O24/04, UPDF/GCM/077/05, UPDF/GCM/O78/06 and*
UPDF/GCM/O51/06 by the different court panels contravenes the petitioner's right to a fair trial enshrined under Article 28 (1) and 44 (c) of the Constitution.
4. *Whether the trial, conviction and sentence of the petitioner at the General Court Martial by a coram different from the one that originally tried the case with*

constantly alternating membership infringed the petitioner's right to a fair trial in contravention Article 28 (1) and 44 (c) of the Constitution.

5. *whether the refusal by prosecution to abide by the directive of the General Court Martial to provide the petitioner with documentary evidence that he required to prepare his defence and cross examine the witnesses contravened the Petitioner's right to a fair hearing as enshrined in Article 28 (1) and 44 (c) of the Constitution.*

6. *whether the use of partial reports and video excerpts by the prosecution upheld the General Court Martial, without opportunity of full reports and video, violated the petitioner's right to a fair trial enshrined in article 28 (1), 44 (c), 126 (1) (2) of the*
10 *Constitution.*

7. *whether the respondent's act of denying the petitioner access to the High Command Probe Committee Report on the issue of Ghost Soldiers and infighting in the UPDF, the basis of the petitioner's prosecution, contravened Article 28 (1)&), 44(c) and 126 (1) and (2) of the Constitution.*

8. *Whether the constant interference with the General Court Martial's discharge of it's judicial duties by the Convening Authority in respect of the trials of all the impugned cases contravened the petitioner's right to a fair hearing enshrined in Articles 28 (1), 44 (c) and 128 (1) and (2) of the Constitution.*

9. *Whether or not the record of proceedings and judgment thereof in respect of*
20 *UPDF/GCM/24/04 that do not indicate quorum and are not signed by the members of the coram do not infringe the petitioner's right to a fair trial as enshrined in Articles 28 (1) and 44 (c) of the Constitution.*

10. *Whether or not the prosecution of the petitioner in respect of the charges of abuse of office c/s 87 (1) of the Penal Code Act and causing financial loss c/s 269 (1) of the Penal Code Act in the UPDF/GCM/024/04 and UPDF/GCM/051/06 does not constitute double jeopardy and inconsistent with Articles 29 (1), 28 (1), and 44 (c) of the Constitution.*

11. *Whether the continued trial of the petitioner at the General Court Martial on the offence triable by civil courts under the Penal Code Act is discriminatory and offends the petitioner's right to a fair trial enshrined in Articles 28 (1), 21 (1)(2) & (3), and 126 (1) and (2) of the Constitution.*

12. *Whether the institution of proceedings without being duly sanctioned charge sheets is not inconsistent with and/or in contravention of Article 128 (1) and (2) of the Constitution.*

10 13. *Whether Regulations 22 and 23 of the UPDF (Court Martial Appeal Court) Regulations S.I. 307-7 are inconsistent with and/or in contravention of article 128 (1) & (2) of the Constitution.*

14. *Whether Regulation 20 (1) and (2) of the UPDF (Court Martial Appeal Court) Regulations S.I. 307-1 are inconsistent with and/or in contravention of articles 20 (1), 21 (1) (2) & (3), and 28 (1), 44 (c), 126 (a) 128 (1) & (2) of the Constitution.*

At the hearing of this petition, on 14th July 2009, Mr. Kenneth Kakuru and Dr. James Akampumuza represented the petitioner while Mr. Martin Mwangutshya, State Attorney, appeared for the respondent.

20 **ISSUE NO. 1**

At the commencement of the hearing, the respondent contended that this Petition did not disclose any cause of action. It did not raise any matters for constitutional interpretation while the petitioner maintained that it did, under article 137 (3). This Court, however, observed that although the petition was badly drafted and could have been struck out on that basis, the issues for determination by the court had been agreed upon by the parties at the scheduling conference. Most importantly it has been held by the Supreme Court that

once a party makes an allegation that he is aggrieved by an act or omission by any authority which contravenes the constitution and that his rights are thereby infringed, this is sufficient to move the court to look into such allegations under **article 137 (3)** of the constitution. **Ismail Serugo v. Kampala City Council and Attorney General– Constitutional Appeal No. 2 of 1998.**

Ground No.I would be decided in the affirmative.

ISSUE NO. 2

10 Issue No. 2 is “*Whether the petitioner’s continued trial at the General Court Martial and the Court Martial Appeal Court for the offence of abuse of office c/s 87 (1) of the Penal Code Act without the required consent of the DPP contravenes and or is inconsistent with Article 28 (1), 44 (c) and 120 (3) of the Constitution*”.

Mr. Kakuru submitted that the petitioner was charged in the General Court Martial (GCM) with the offence of abuse of office c/s 87 (1) of the Penal Code Act. However, section 88 of the Penal Code Act, categorically states that no person shall be prosecuted for offences under sections 85, 86 or 87 without the consent of the DPP. In this case the petitioner was charged in the GCM without the consent of the DPP as required by the Penal Code Act. Learned counsel further submitted that even if the consent had been
20 obtained it would have been of no consequence because **Article 120 (3) (b) of the Constitution** is to the effect that the DPP has authority to institute proceedings in any Court other than the Court Martial.

Counsel argued that the offence of abuse of office could not therefore be instituted in the General Court Martial and that the petitioner having been charged, tried and convicted and the judgment delivered in respect thereof was a complete nullity contrary to **article 28 (1)** of the Constitution. He pointed out that the right to a fair trial is a fundamental right which is non derogable, citing **Col (Rtd.) Kizza Besigye & 22 Others vs. Attorney General, Constitutional Petition No. 12 of 2006.** He argued that since the DPP has no

control and power to institute proceedings in the Court Martial, the Court Martial cannot try cases such as abuse of office whose institution requires the prior Consent of the DPP. Therefore the charging, trial, conviction and sentencing of the petitioner was unconstitutional and contravened **articles 28 (1) and 44 of the Constitution.**

In reply, Mr. Mwangutshya learned State Attorney submitted that whereas it is true that **Articles 28 (1) and 44 (c)** of the Constitution guarantee the right to fair trial nevertheless **article**

120 (3) (b) prohibits the DPP from instituting any criminal proceedings in a court martial.

10 Citing **Section 197 of UPDF Act 7/2005** which establishes the General Court Martial, Mr. Mwangutshya pointed out that the same **Act section 179** creates the service civil offences under **sub section (1)** thereof for which a person subject to military law who offends against the Penal Code Act in Uganda, or any other enactment is liable.

Section 179 (2) prescribes the penalty to be in accordance with the relevant law and may in addition face dismissal with disgrace from the Defence Forces or any less punishment prescribed by this Act.

Section 2 of the UPDF Act defines a service offence to mean an offence under this Act or any other Act for the time being in force, committed by a person while subject to military law.

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Mr. Mwangutsya maintained therefore that the petitioner is a serving army officer whose rank is RO33 Major Gen. Kazini. He is therefore, subject to military law under **Section 119 (1) of the UPDF Act** which defines persons subject to military law to include every military officer of a Regular Force. He argued that Constitutional Petition No. 12 of 2006 cited by Mr. Kakuru is distinguishable from the instant case in that Dr. Kizza Besigye was a retired officer at the time the decision was made whereas the instant case deals with a serving army officer. Therefore, although the DPP has no powers to institute proceedings in Court Martial, the petitioner's trial was constitutional as it was done within the ambit of the constitutional and the UPDF law. The learned Senior State

Attorney concluded that issue No. 2 requires no interpretation by this Court. He, therefore, prayed that issue 2 should be dismissed.

The impugned Section 87 (1) of the Penal Code Act reads:

“87. Abuse of office.

10 (1) *A person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interest of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to imprisonment for a term not exceeding seven years”.*

Section 88 goes on to state:

“88. Consent of the Director of Public Prosecution.

A person shall not be prosecuted for an offence under section 85, 86 or 87 without the written consent of the Director of Public Prosecutions”.

20 Though amongst the DPP’s functions is to institute criminal proceedings in any court of competent jurisdiction, the court martial is exempted under **article 120 (3) (b) of the constitution**. Apparently this is because **Section 179 of the UPDF Act** prescribes service trial of civil offences to which persons subject to military law are subject. The offences the petitioner is faced with are service civil offences under **Section 179** which provides:

“179 (1) a person subject to military law, who does or omits to do an act—

(a) In Uganda, which constitutes an offence under the Penal Code Act or any other enactment;

(b) Outside Uganda, which would constitute an offence under the penal Code Act or any other enactment if it had taken place in Uganda, Commits a service offence and is, on conviction, liable to punishment as prescribed in subsection (2).

This states:

(2) Where a military court convicts a person under subsection (1), the military court shall impose a penalty in accordance with the relevant enactment and may, in addition to that penalty, impose the penalty of dismissal with disgrace from the Defence Forces or any less punishment prescribed by this Act.”

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The petitioner being a serving army officer, number R.033, is thus subject to military law. Since **Article 120 (3) (b) of the Constitution** prohibits the DPP from instituting court martial proceedings, but does not say such proceedings shall not take place in the court martial the petitioner’s trial under **Section 87 of the Penal Code Act** as a serving officer before the GCM was constitutional. Any reference and comparison to **Constitutional Petition No. 12 of 2006, Col (Rtd) Kiiza Besigye and 22 others v. Attorney General** is most unhelpful since it concerned a retired officer who was therefore not subject to military laws. There is thus no contravention of **articles 28(1) and 44(c) of the constitution.**

20 **Issue No 2** would fail.

Issues 3, and 4 and 9 were treated together by Mr. Kakuru. They concern the question of fair trial. This complaint concerns the trials in UPDF/GCM/024/04; UPDF/GCM/077/05; UPDF/GCM/077/05; UPDF/GCM/078/08. Mr. Kakuru cited a litany of irregularities, including irregular and inconsistent panels some with less than the prescribed coram of 12 and often headed by different chairmen at different times during the occurrence of a trial, coupled with often unsigned, charge sheets

Relying on **Arvind Patel v Uganda, SCCA No. 36/2005**, Mr. Kakuru submitted that there should be a limit to the number of corams to try a case. He argued that changing panels was contrary to Regulation **71 (4) of the UPDF (rules of procedure) Regulations**

30 **SI. 307-1** which prohibits members of a panel from absenteing themselves except in

matters of very personal tragedy of death of the chairperson or of the judge advocate. He asserted that this contravened **articles 28 (1) and 44 (C)**. The trials were therefore unconstitutional.

In reply Mr. Mwangutshya, learned State Attorney pointed out that the cause lists attached to the petitioner's affidavits were evidence of quorum. The quorum for the GCM is determined from the number of people appearing from the record of proceedings and not the cause lists attached. He cited several sections of the UPDF Act concerning the constitution of the GCM. He specifically referred to **Section 183** which provides that
10 rules and principles applicable in civil courts may apply to GCM except where they are inconsistent with the UPDF Act. This means any irregularity would be remedied under the civil procedure rules and would not call for interpretation of the constitution.

He pointed out that **Section 198 (c)** prescribes the quorum of 5 members when the GCM is trying a capital offence. In this case, and according to the petitioner's affidavit (paragraphs 23 and 24, six members were consistent throughout the proceedings. The rationale in the case of **Arvind Patel v. Uganda (Supra)** referred to by Mr. Kakuru is to the effect that any number of magistrates as would be necessary may hear and record evidence through the process as long as each understands the record so far. Learned State
20 Attorney submitted that the membership of the panels was always within the permissible prescribed limit.

I find that the charges against the petitioner were for non-capital offences. These were civil offences under the Penal Code Act, but are service civil offences when committed by a serving officer. Under **Section 183 of the UPDF Act** the rules of Civil Courts are available to the petitioner and are applicable except where they are altered or are inconsistent with the Act. Therefore, the petitioner should have utilised the mechanisms afforded by the civil courts rules. It thus becomes clear that there is no contravention of the constitution. Issues 3, 4 and 9 would fail.

Issues No. 5, 6 and 7.

Mr. Kakuru also discussed these together. He submitted that the petitioner requested for documents which were in the hands of the prosecution but were denied. He pointed out that this was admitted in the respondent's answer who, however, contended that it did not amount to denial of a fair trial. He cited **Soon Yeon Kong and Another v. Attorney General-Constitutional Reference No. 6 of 2007** where this court ruled that denial of documents upon which charges were premised infringed on the right to a fair trial, thus amounting to trial by ambush.

- 10 Mr. Mwangutshya contended that denial of copies of documents in the hands of the prosecution is only a procedural matter. The petitioner should have applied for copies under **Sections 62, 64 and 65 of the Evidence Act** which course is open to him under **section 183** of the UPDF Act which makes Rules of Civil Courts applicable.

While I entirely agree with Mr. Mwangutshya's argument I also find that **Section 227 (1) (a) UPDF Act** further provides an aggrieved party to the proceedings in a court martial with the option of an appeal to an appellate court against the legality or propriety of any or all the findings which opportunity the petitioner ignored. I would therefore find no contravention of or inconsistency with any constitutional provision under issues **5, 6 and**

20 **7.**

ISSUES NO. 8 and 12

Regarding issues No. **8 and 12**, learned counsel, Dr. Akampumuza, for the petitioner submitted that the constant interference by the convening authority contravened the right to a fair trial as envisaged by **Articles 128 and 44 (c) of the Constitution**. He contended that **Regulations 22 and 23 of the UPDF (Rules of Procedure) Regulations S.I. 307-1** are unconstitutional and contravene **Article 128 (1) and (2) of the Constitution**. He pointed out that this anomaly is raised in the petitioner's affidavit but not challenged by the respondent.

Learned Counsel argued that Reg. 22 obligates the Court Martial to report about its proceedings to the convening authority and that therefore the convening authority thereby controls the proceedings before the General Court Martial. This amounts to a direct interference with the independence of the court martial as a judicial body. This prejudiced the petitioner's right to a fair trial as encapsulated in **Articles 28, 44 (c) and 128 of the Constitution**. He cited **Col (Rtd.) Kizza Besigye & 22 Others vs. Attorney General, Constitutional Petition no. 12 of 2006**, for his contention and prayed that the above provisions be struck out as being unconstitutional.

10 In reply the learned Senior State Attorney agreed with the constitutional provisions of **Articles 28 (1)** for a fair and speedy hearing, **Article 44 (c)** which entrenches the non-derogable right to a fair hearing and **article 128 (1) and (2)** which prohibits interference with the exercise of judicial powers. He, however, contended that the petitioner has neither shown how his right to a fair hearing was interfered with nor did he show any evidence of interference in contravention with the said articles.

The Regulations attacked by Dr. Akampumuza read:

Reg. 22 of the Uganda Peoples Defence Forces (Rules of procedure Regulations SI 307-1 provides:

- 20 (1) **An accused may, before pleading to a charge, object to it on the grounds that it is not correct in law or that it is not framed in accordance with the Regulations; and if he does so, the prosecutor may address the court in answer to the objection, and the accused may reply to the prosecutor's address.**
- (2) **If the court upholds the objection, it shall either amend the charge if permissible under regulation 67 of these Regulations or adjourn and report to the convening authority; but if there is another charge or another charge sheet before the court, the court may, before adjourning under this regulation, proceed with the trial of that other charge or**
- 30 **charge sheet.**

(3) When a court reports to the convening authority under this regulation, the convening authority shall –

(a) If the convening authority approves the decision of the court to allow the objection –

(i) dissolve the court

(ii) where there is another charge sheet before the court to which the objection does not relate and which the court has not tried, direct the court to proceed with the trial of the other charge or charge sheet only; or

(iii) amend the charge to which the objection relates if permissible under regulation 67 of these Regulations and direct the court to try it as amended;

(b) If the convening authority disapproves the decision of the court to allow the objection

(i) direct the court to try the charge;

(ii) where there is another charge or another charge sheet before the court to which the objection does not relate and which the court has not tried, direct the court to proceed with the trial of that other charge or charge sheet only; or

(iv) Convene a fresh court to try the accused”

Similarly, clause (3) of Reg. 23 provides:

(3) When a court reports to the convening authority under this regulation, the convening authority shall

(a) if the convening authority approves the decision of the court to allow the plea, dissolve the court;

(b) if the convening authority disapproves the decision of the court

- (i) refer the matter back to the court and direct it to proceed with the trial; or
- (ii) Convene a fresh court to try the accused.”

I have reproduced these Regulations 22 and 23 in extenso to show that they embody mechanisms to check on the possible infringement of the accused’s nonderogable fundamental rights by the convening authority. The petitioner, however, did not show that he exhausted the options and remedies available to him under the civil courts rules, applicable under **section 183 of the UPDF Act**. The proceedings in a court martial must necessarily be and is left to the sound discretion of the convening authority. In absence of anything to the contrary the civil court must assume that the discretion was properly exercised.

Further more, I do not accept Mr. Mwangutsya’s submission that **Regulations 22 and 23 of the UPDF (Rules of Procedure)** Regulation S.I 307-1 were repealed under **Cap.307** by **S.256 of the UPDF Act**. This section reads:

“256 Repeal of Cap 307 and saving

- (1) The Uganda People’s Defence Forces Act is repealed.
- (2) Notwithstanding the repeal specified in subsection (1)-
 - (a) all things lawfully done under the repealed enactment which are of force and effect immediately before the commencement of this Act, including any regulations, rules or orders made, decisions made by any body created or directions made, decisions given under the repealed Armed Forces Act, 1964 saved by the repealed enactment which are of force and effect immediately before the commencement, and anything done under a military

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court warrant or under any such regulation, rules orders or directions, shall, so far as consistent with this Act and anything done under it, continue of force and effect after the commencement, and such continuance shall have effect notwithstanding any change in the authorities empowered to do or effect such thing; any such regulations, rules, orders or direction shall continue in force until they expire according to their terms or are revoked by regulations or orders, directions and instructions made or given by a competent authority under this Act.”

Regulations 22 and 23 are therefore still in force in so far as applicable until expressly revoked by authority.

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I would add that these regulations are rules for the government and discipline of the army. They are binding upon all within the sphere of the legal and constitutional authority. It is clear that they are superadded to the civil law, for regulating the citizen in his character of soldier. I would not declare them null and void as I find them not to have contravened any constitutional provisions under issues **8 and 12**. Rather it is the petitioner who failed to enforce his rights where he could have.

Again I find that issues **8 and 12** would fail.

ISSUE NO. 10

This issue was abandoned by both counsel.

Issues No. 13 and 14

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On issue No. 13, Dr. Akampumuza submitted that the continued trial by the Court Martial of offences triable by Civil Courts under the Penal Code Act, contravenes **Articles 21, 28 and 128 (1) and (2) of the Constitution** which guarantee equality before the law and the

right to a fair trial. He sought to contrast the petitioner's case with that of his two senior army colleagues who were already tried in the Civil Courts by Chief Magistrate at Buganda Road and who would not meet the same fate as himself under **section 179 (2) UPDF Act.**

Counsel pointed out that the petitioner underwent discriminatory treatment during the trial in two ways. Firstly, Regulation 20 (1) and (2) of the UPDF (Court Martial Appeal Court) Regulations S.I. 307-7, makes the appeal to the Court to be final except as in matters provided for under para (2). The petitioner was thereby discriminated against
10 because he could not appeal to civil courts as his colleagues who had the right to appeal up to the Supreme Court. Secondly, when tried, convicted and punished in a civil court, the convict does not lose his ranks. However, the petitioner's trial and conviction in a Court Martial would expose him to disgrace and he would lose his rank as envisaged by s. 221 of the UDF Act which lists the scale of punishments in respect of service offences.

He stated that his submission on issue no. 13 adequately covered issue no. 14 and reiterated the earlier prayers.

On issue No. 14, the learned Senior State Attorney maintained that Regulations 20 and 21 are no longer enforceable as law in Uganda because they were repealed by **S. 256 of the**
20 **UPDF Act.** Hence, none of those provisions require constitutional interpretation. I have dealt with this aspect under issues 8 and 12. Regarding appeals Reg. 20 (1) and (2) of the UPDF (Court Martial Appeal Court) **Regulations S.I. 307-7 provides:**

“20. Appeals to be final.

(1) Except as provided in subregulation (2) of this regulation, any determination by the court of any appeal or other matter which the court has power to determine under the provisions of the Act or of these Regulations shall be final and no appeal shall lie from the court to any other court.

(2) In the case of an appeal against a conviction involving a sentence of death or of life imprisonment that has been upheld by the court, the appellant shall have a right of further appeal to the Court of Appeal.”

In the instant case, petitioner who is being tried for civil offences has the right of appeal to the Court Martial Appellate Court which is final for a serving officer.

I have already commented on the mechanisms embodied in the Regulations, to check on the possible infringement of the accused’s fundamental rights. I would point out that the jurisdiction of court martial is fundamentally statutory. This is a special court of limited
10 jurisdiction, being called into existence for special purposes to perform particular duties. Its proceedings cannot therefore be as protracted as is often the case in civil courts. As I pointed out above the purpose of the court martial proceedings is for disciplining military officers. This has to be promptly, determined.

Grounds **13 and 14** would also fail.

In sum all the issues raised in the petition concerned merely enforcement by the petitioner of the options available under the civil courts rules.

20 I would therefore dismiss the petition with costs. He is not entitled to any of declarations/remedies sought.

Since my Lords S.G.Engwau,JA C.N.B. Kitumba,JA C.K. Byamugisha,JA and A.S.Nshimye,JA all agree the petition stands dismissed with costs.

Dated at Kampala this ...12th ...day of ...October...2009

HON. JUSTICE A.E.N. MPAGI-BAHIGEINE,

30 **JUSTICE OF APPEAL**

JUDGMENT OF ENGWAU, JA

I have had the benefit of reading, in draft, the lead judgment prepared by my sister Alice E. Mpagi-Bahigeine, JA and I entirely agree with her findings and decisions. I have nothing useful to add. The petition must fail.

Dated this ...12th ...day of October, 2009.

S.G.Engwau

Justice of Appeal

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JUDGMENT OF C.N.B.KITUMBA, JA

I have had the benefit of reading in draft the judgment of Mpagi-Bahigeine, JA, I concur, and have nothing more useful to add.

Dated this 12th day of October, 2009

C.N.B.Kitumba

Justice of Appeal

20 **JUDGMENT OF BYAMUGISHA, JA**

I had the benefit of reading in draft form the lead judgment that Bahigeine, JA prepared. I concur with it.

Dated at KAMPALA THIS ...12th ...day of ...October...2009

C.K.BYAMUGISHA

JUSTICE OF CONSTITUTIONAL COURT

JUDGMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading the lead judgment in draft of Hon. Justice Mpagi Bahigeine, JA.

I agree with her reasoning that the Petition lacks merit and should therefore fail, with no order as to costs.

Dated at Kampala this ...12thday ofOctober...2009

A.S.Nshimye

10 **JUSTICE OF APPEAL**