

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
**CONSTITUTIONAL COURT APPLICATIONS NOS.11
AND 12 OF 2013**

5 *(Arising from Constitutional Petition No.10 of 2013)*

BETWEEN

RO/0296 COL. FENEKANSI MUGYENYI :::::::::::::::APPLICANT

VERSUS

THE ATTORNEY GENERAL OF UGANDA :::::::::::::::RESPONDENT

10 CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, AG.DCJ

 HON. MR. JUSTICE A.S. NSHIMYE, JA/CC

 HON. MR. JUSTICE REMMY KASULE, JA/CC

RULING

15 This Ruling is in respect of **Constitutional applications Nos.**
11 and 12 of 2013 for substantive (No.11/2013) and interim
(No.12/2013) orders to issue against the Respondent restraining
the UPDF General Court Martial Court at Makindye to stop its
prosecution of the applicant in **General Court Martial Court**
Criminal Case No.UPDF/GCM/004/2013 till the disposal of
20 **Constitutional Petition No.10 of 2013.**

Dr. Akampumuza and Simon Kabenge Tendo appeared for the applicant while Ms Christine Kaahwa, Senior State Attorney represented the Respondent.

The background to the applications is that on 27.03.2013 the applicant, a Colonel in the Uganda Peoples Defence Forces (UPDF) was arrested and charged before the General Court Martial Court in the stated Criminal **Case No.UPDF/GCM/004/2013** with kidnapping or abducting with intent to confine a person contrary to **Section 244 of the Penal Code Act, Cap.120** and conduct prejudicial to good order and discipline contrary to **Section 178 (1) (2) and (5) of the UPDF Act No.07 of 2005.**

It was alleged that on 16.03.2013 at 9:00 a.m at Bunga, Makindye Division, Kampala District, the applicant wrongly confined, kidnapped and/or abducted one Lt. Col. Ndamira Ndozi Zackaria alias Eric, a Democratic Republic of Congo (DRC) citizen, seeking asylum in Uganda from his home.

By having trespassed on the property of the said stated Lieutenant Colonel, on the same day, time and place, the applicant had committed conduct which was prejudicial to the good order and discipline of the Defence Forces.

The applicant denied the charges and his trial at the Court Martial Court began on 27.03.2013 at Makindye.

On 12.04.2013, the applicant, on bail, lodged in Court **Constitutional Petition No.10 of 2013** contending that he was being charged and prosecuted before the General Court Martial Court contrary to the Constitution. He also filed **Applications Nos.**

11 and 12 to restrain the UPDF General Court Martial Court from continuing with the prosecution, pending the determination of the Constitutional Petition.

The applicant asserts in the constitutional petition that, being a senior UPDF officer, he had the mandate and efficacy vested in the UPDF to deal with issues of entry into Uganda of renegade Congolese rebel fighters of whom Lt. Col. Ndamira Ndozi Zackaria alias Col. Eric, is. Therefore, his being charged and prosecuted constricts that mandate and efficacy of the UPDF to secure Uganda and is thus inconsistent with **Articles 208 (1) (3), 209 (a) and 210 (a) and (c) of the Constitution.**

He further contends in the petition, that in contravention of the Constitution, he had been arrested and detained in custody beyond the constitutionally prescribed period of 48 hours without being produced before a court of law. His telephone had been confiscated and tampered with, his home searched without a search warrant/ court order, access to his lawyers, doctor and next of kin had been denied and his detention had been in filthy conditions without food and medicine in an ungazetted CMI centre at Makindye Military barracks, contrary to the Constitution. The General Court Martial Court before which he was being tried was not independent as its members were ever changing. He had also been denied access to exhibits. He prayed this court through the petition, to declare his trial a nullity and for the court to award him general and exemplary damages. Through the two applications, he prays that this court stops his being criminally prosecuted until the constitutional petition is disposed of.

The respondent in reply to the petition and the two applications, filed affidavits sworn by RO/10674 Capt. M.E. Odongo, of UPDF, RO/06609 Major A. Bwegendaho, Judge Advocate to the Court Martial Court, RO/11274 Capt. Frederick Kangwamu the Court
5 Martial Prosecutor and Adrale Julie of Uganda Police.

Relying on the affidavits filed, respondent's counsel urged this court to find that the applicant had not adduced credible evidence of being denied the right to a fair hearing at his Court Martial trial.

The burden is upon the applicant to convince this court that
10 **Constitutional Petition No.10 of 2013**, prima facie, raises triable issues for constitutional interpretation. See: **Constitutional Court Application No.18 of 2007: Hon. Jim Muhwezi Vs Attorney General (Twinomujuni JA, as he then was,).**

The applicant's case, as we appreciate it, is that in Count II of
15 the charge he is charged with conduct prejudicial to good order and discipline **c/s 178(1)(2) and (5) of the UPDF Act No.07 of 2005**, and at the same time in the particulars of the offence he is stated to have trespassed on the property of Lt. Col. Ndamira Ndozi alias Col. Eric which is also a distinct criminal offence. The applicant thus
20 asserts, that he is being required to answer two distinct criminal offences clothed in one count II of the charge and that this is contrary to **Article 28(2)(b)** in that he is not being informed of the exact nature of the offence against him in respect of which he has to defend himself. Is it conduct prejudicial to good order and
25 discipline or is it criminal trespass that he has to defend himself against, the applicant wonders.

We agree with the applicant's submission that, prima facie, it appears that he is being made to answer in one and the same count II a charge of criminal trespass and at the same time that of conduct prejudicial to good order and discipline contrary to **Section 178 (1) (2) and (5) of the UPDF Act No.07 of 2005**. In our view the applicant has in this instance made out a case requiring constitutional interpretation as to whether or not he is not being tried contrary to **Article 28(2)(b)** of the Constitution, which is a non derogable right under **Article 44 of the Constitution**.

10 In **Gilbert Asiimwe Vs Attorney General, Constitutional Court Application No.15 of 2010, this court, (Twinomujuni, JA, as he then was,)** stated:

15 **“In my humble view, a violation of human rights that does not constitute a denial of the right to a fair hearing under Article 28 and 44 of the Constitution does not per se entitle the applicant to an order to stay the proceedings in the lower court.....**

We have already found that in this instant case, the applicant has made out a prima facie case in that he is being required to answer to two crimes, separate and distinct in their own nature, yet the two are being bundled up in one count. This raises a probability of infringing **Article 28(2)(b) of the Constitution** as it is not clear which exact crime the applicant is being required to answer and defend himself against.

25 We note also that the applicant alleges that some other acts/omissions denied him the right to a fair hearing under

Articles 28 and 44 of the Constitution. These are: the applicant being denied access to his lawyers, not being afforded the necessary documents for him to adequately prepare his defence, being forced to take a plea, the Court Martial Court first consulting higher authorities before making decisions in the course of his trial, the composition and membership of the said court changing from time to time as the trial goes on, and being subjected to torture and inhuman treatment in the course of his arrest and trial. The respondent denied these assertions.

10 We have, on consideration of the applicant's affidavit, as well as those affidavits filed in reply for the respondent, and the respective annexures thereto, come to the conclusion that the truth or falsehood of each one of the allegations said to be unconstitutional can only be ascertained at the stage of consideration of the constitutional petition on its own merits. This too, is therefore, another legitimate consideration for allowing these two applications.

20 All in all we conclude that the applicant has made out a prima facie case of a probability of being denied the right to a fair hearing by being tried by the General Court Martial Court on a charge sheet which apparently contravenes **Article 28(2)(b) of the Constitution.** This is therefore a case where the Constitutional Court should pronounce itself on the issues raised. We have recently held in **Constitutional Application No.09 of 2013: Hassan Basajjabalaba and Another Vs Attorney General**, ".....that at certain stages of the criminal proceedings against the applicants at both Buganda Road Chief Magistrates Court and at the Anti-Corruption Division of the High Court, fundamental

principles of natural justice as enshrined in Article 28 of the Constitution were overlooked in such a way that the damage and injury this might have caused to the applicants is irreparable.....”.

5 We adopt the same reasoning in these two instant applications.

Accordingly, both applications are allowed. We order that prosecution of the applicant in the General Court Martial Appeal Court in **Criminal Case No. UPDF/GCM/004/2013** be stayed pending the disposal of **Constitutional Petition No.10 of 2013**, or
10 until further orders of this court.

These applications arise from a court martial criminal prosecution and as such we find it appropriate that each party bears its own costs of the application.

We so order.

15 Dated at Kampala this ...8thday
of.....July.....2013.

S.B.K. Kavuma
AG. DEPUTY CHIEF JUSTICE

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A.S. Nshimye
JUSTICE OF APPEAL

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Remmy Kasule
JUSTICE OF APPEAL