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**THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA
CONSTITUTIONAL PETITION NO. 45 OF 2016**

HON. MICHAEL KABAZIGURUKA.....PETITIONER

10

VERSUS

ATTORNEY GENERAL.....RESPONDENT

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**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC
 Hon. Lady Justice Hellen Obura, JA/ JCC
 Hon. Mr. Justice Stephen Musota, JA/JCC
 Hon. Mr. Justice Christopher Madrama, JA/JCC
 Hon. Mr. Justice Remmy Kasule, Ag. JA/JCC**

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JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC

I have had the benefit of reading in draft the Judgment of my learned brother Madrama JCC and that of my learned sister Obura JCC.

They have both ably set out in detail the questions before us.

25 They have reproduced the Sections of the impugned law and the Articles of the Constitution that are stated to have been contravened.

They have also set out representations, the questions for determination and the submissions of Counsel.

I have no reason to reproduce them here.

30 I will therefore restrict myself to the resolution of the questions set before us.

5 **Questions for Interpretation**

The questions for determination are set out in the submissions of the petitioner as follows:-

- 10 1. *Whether the General Court Martial established under Section 197 of the Uganda Peoples Defence Forces Act is a competent court within the meaning of Articles 28(1), 126(1), 129(2) and (3) of the Constitution of the Republic of Uganda.*
- 15 2. *Whether section 197 of the UPDF Act, 2006 is inconsistent with and in contravention of Articles 28(1), 126(1), 129(2) and (3) and 210 of the Constitution of the Republic of Uganda to the extent that it purports to create a court of law without Constitutional authority.*
- 20 3. *Whether Section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28(1) and 44(c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the Court Martial over any criminal offence including non disciplinary offences and over every person.*
- 25 4. *Whether the act of charging/arraigning the Petitioner before the General Court Martial holden at Makindye is inconsistent with and in contravention of Article 28(1) of the Constitution of the Republic of Uganda.*
- 30 5. *What remedies are available to the parties?*

I would rephrase issue 5 as follows:-

“whether the petitioner is entitled to the orders and declarations set out in the petition”.

35 On the basis of a long list precedents set by this Court and the Supreme Court sitting as a Constitutional Appellate Court, from *Attorney General vs Major General David Tinyenfuzza, Supreme Court Constitutional Appeal No. 1 of 1997* to *Male Mabirizi vs Attorney General Constitutional Petition No. 49 of 2017*, Consolidated with *Constitutional Petition No.3 of 2018, Uganda Law Society, Constitutional Petition No.5 of 2018, Hon. Gerald Karuhanga Kafureeka and 4 Others, Constitutional Petition No.10*

5 of 2018, *Prosper Businge and 3 Others and Constitutional Petition No.13 of 2018, Abaine Jonathan Buregyeya vs Attorney General* the Supreme Court and this Court have laid down the principles of constitutional interpretation and the extent of its jurisdiction under *Article 137* of the Constitution. I will therefore not belabor to reproduce them here. I will however, at all time keep them in mind. From the
10 pleadings of both parties and the issues setout above there is no doubt whatsoever, that this petition raises questions for constitutional interpretation.

Resolution of Issues

Issue 1

15 “Whether the General Court Martial established under Section 197 of the Uganda Peoples Defence Forces Act is a competent court within the meaning of Articles 28(1), 126(1), 129(2) and (3) of the Constitution of the Republic of Uganda.”

The impugned Section 197 of the UPDF Act provides as follows:-

197. General Court Martial

- 20 (1) *There shall be a General Court Martial for the Defence Forces, which shall consist of-*
- (b) two senior officers;*
 - (a) a Chairperson who shall not be below the rank of Lieutenant Colonel;*
 - (c) two junior officers;*
 - (d) a Political Commissar; and*
 - (e) one non-commissioned officer,*
- all of whom shall be appointed by the High Command for a period of*
30 *one year.*
- (2) The General Court Martial shall have unlimited original jurisdiction under this Act and shall hear and determine all appeals referred to it from decisions of Division Courts Martial and Unit Disciplinary Committees.*
- (3) The General Court Martial shall have revisionary powers in respect of*
35 *any finding, sentence or order made or imposed by any Summary Trial Authority or Unit Disciplinary Committee, to be exercised in accordance with the provisions of Part XIII of this Act.*

(4) The General Court Martial may sit at any place.

The above section of the UPDF Act ought to be read together with the long title of that Act which provides that:-

10 *“An Act to provide for the regulation of the Uganda Peoples’ Defence Forces in accordance with article 210 of the constitution, to repeal and replace the Armed Forces Pensions Act and the Uganda Peoples’ Defence Forces Act, and for other related matters.”*

15 When both of the above are read together it appears clearly that, that they reveal the intention of Parliament in enacting the impugned law. The purpose of the impugned law was to provide for Regulation of UPDF in accordance with *Article 120* of the Constitution. That Article provides as follows:-

210. Parliament to regulate the Uganda Peoples’ Defence Forces.

20 *Parliament shall make laws regulating the Uganda Peoples’ Defence Forces and, in particular, providing for—*

(a) *the organs and structures of the Uganda Peoples’ Defence Forces;*

25 (b) *recruitment, appointment, promotion, discipline and removal of members of the Uganda Peoples’ Defence Forces and ensuring that members of the Uganda Peoples’ Defence Forces are recruited from every district of Uganda;*

30 (c) *terms and conditions of service of members of the Uganda Peoples’ Defence Forces; and*

(d) *the deployment of troops outside Uganda.(Emphasis added)*

The UPDF Act in my view was never intended to be an Act of general application. It is a statute of special and limited application. *Article 210* of the Constitution, (Supra)

5 from which Parliament derived the power to enact the impugned law, is itself very restrictive. That power only relates to UPDF and to UPDF alone. It does not extend to regulation or adjudication of crime set out under other legislation. Those functions are provided for in other Articles of the Constitution that establish the Judiciary, the Police and Prisons service and Directorate of Public Prosecutions
10 among others. Under *Article 209(c)* in relation to civilians, the role of UPDF is:- to foster harmony and understanding between the defence forces and civilians. *Section 197* of the UPDF Act clearly states that "there shall be a Court Martial for the defence forces. . ." (Emphasis added).

The UPDF Act emphasises the restrictive nature of the General Court to Martial by
15 limiting the Court's jurisdiction to the UPDF. In this regard Subsection (2) of *Section 197* of that Act stipulates that:-

"The General Court Martial shall have unlimited original jurisdiction under this Act. . ."

In my view, emphasising that the jurisdiction of the General Court Martial is limited
20 to the provisions of the UPDF Act, by necessary implication means that its jurisdiction does not extend to other Acts of Parliament. The composition and the power of appointment of the Court Martial members by the UPDF High Command further emphasize it's restrictive nature. Parliament clearly intended that the jurisdiction of the General Court Martial extends only to the UPDF.

25 The General Court Martial therefore is a specialised Court, setup by Parliament for the purpose of dealing with military discipline within the UPDF.

Accordingly it lacks all the tenets of an ordinary Court of law established under Chapter Eight of the Constitution. The Court Martial clearly is not part of the Judiciary. It is part of the executive arm of government established under Chapter

5 Twelve of the Constitution which provides for the County's Defence and National Security.

Several attempts by the executive to place the General Court Martial under the same footing as Courts of Judicature has in my view originated confusion and discord among jurists, legal practitioners and scholars. It is simply trying to fit a square peg
10 in a round hole.

Parliament in the impugned sections of the UPDF Act created overlapping jurisdiction between the General Court Martial and the Civil Courts of Judicature. This has created discord and confusion.

It is the duty and jurisdiction of that Court to interpret and apply the Constitution in
15 such away and to resolve the absurdity created by the impugned Section of the UPDF Act.

I must state from the outset that the General Court Martial created under Section 197 of the UPDF Act is a competent military Court established under *Article 210 (a)* of the Constitution specifically to deal with military discipline. This in no way
20 connotes that, the General Court Marital is a competent Court for the purpose of Article 28 of the Constitution.

The question is not whether the Court Martial is competent Court, but rather whether it is an independent and impartial Court, envisage under Article 28.

This question was ably answered by the Court Appeal in *2nd Lt. Ambrose Ogwang, Court of Appeal Criminal Appeal No. 107 of 2013* delivered on 8th November 2018.
25 The Court of Appeal observed and held as follows:-

"Article 28 of the Constitution has already been set out above. It requires that in 'the determination of any criminal charge' an accused 'shall be

5 entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.'

10 No doubt the Division Court Martial is established by law, the Uganda People Defence Forces Act, 2005. The question is whether it is independent. Independent in the above article 28 (1) can only be understood in the general constitutional architecture of separation of powers. In particular article 128 (1) of the Constitution that provides,

15 '(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.'

20 This requires that a court must be independent of the authority that brings the charges or trial. The judges of an independent court cannot be under the administrative control of the authority that brings the charges. In order to secure the independence of the courts the courts are placed under a different arm of the state known as the Judiciary with security of tenure and insulation from control of the Executive which originate criminal charges with the exception of private prosecutions which are brought by private individuals.

30 Military Courts, appointed by the High Command, are basically organs of the army intended to ensure operational efficiency and discipline of officers and militants of the Uganda Peoples Defence Forces. That is the purpose and thrust of military justice or' at reason service offences are created under the Uganda Peoples Defence Forces Act under Part VI of the Act over which Military Courts exercise jurisdiction.

35 Military courts are quasi-judicial bodies that must observe certain principles of law but have limited jurisdiction, similar to police disciplinary courts and other limited jurisdiction bodies. However, what is significant and of constitutional importance, in our view, is section 179 of the UPDF Act. It states:-

5 *'Service trial of civil offences*

(1) A person subject to military law, who does or omits to do an act-

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

15 *(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 a punishment as prescribed in subsection (2).*

20 *(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.*

25 *The effect of this provision is to turn all criminal offences under the law of this country into service offences for persons subject to military law. Secondly the effect is profoundly transformative of military courts from being limited jurisdiction quasi- judicial bodies into general jurisdiction criminal courts for all criminal offences for persons subject to military law.*

30 *Courts that try, 'any criminal charge' or 'civil offences' must be independent in terms of article 28 (1) of the Constitution which military courts are not. Military courts are manned by military personnel, inclusive of the judges, the prosecutors and at times, defence counsel. The military courts are not independent of the Executive. They belong to the Executive. The charges are*
35 *brought by the Army the institution to which they belong.*

I entirely agree with the above analysis of the law. I find as did the Court of Appeal that the Court Martial established under the UPDF Act is not an independent and impartial Court within the meaning of *Article 28* of the Constitution.

5 There cannot be a fair trial within the meaning of *Article 28(1)* before a Court that is not independent and impartial. The General Court Martial is therefore not a competent Court within the meaning of Article 28.

Indeed as Mulenga JSC put it in the *Attorney General vs Uganda Law Society Constitutional Appeal No. 1 of 2006* "the more accurate statement would be that there
10 can be no trial at all where the Court is not competent". I agree entirely with the above statement of the law.

However, the inevitable conclusion from the above statement would be that, the Court Martial established under *Section 197* of the UPDF Act is not competent to try any person in view of the clear provisions of *Article 28* of the Constitution described
15 above. This is so because *Article 44(2)* prohibits any derogation from the enjoyment of the right to a fair hearing. Had it not been for *Article 44 (c)*, resort would have been made to *Article 43(2) (c)* that permits derogation from the enjoyment of human rights and freedoms enshrined in the Constitution, within the parameters set out in that Article. It provides that:- any derogation must not go beyond what is
20 acceptable and demonstrably justifiable in a free and democratic society or what is provided in the Constitution.

That being the case, the question that I am required to answer here is:- whether General Court Martial maybe a competent Court and yet falls short of the requirement of *Article 28* of the Constitution? My own understanding of the
25 Constitution, the substantive law and precedents on this subject leads me to the conclusion that the General Court Martial established under *Article 197* of the UPDF Act is not a Court in the strict sense of the term under Article 28. It is not a Court of Judicature established under Chapter Eight of the Constitution. Rather it is a Quasi-Judicial Tribunal or body established by Parliament pursuant to *Article 210*, the
30 object of which is to regulate the UPDF. It is an administrative tribunal with Quasi-

5 Judicial powers some of which appear to be parallel to the powers of Courts of Judicature.

"Quasi" is a Latin word. It means 'as if it were'. See:- Osborn's Concise Law Dictionary 6th Edition, Sweet and Maxwell 1976. The same dictionary describes 'quasi Judicial' as:-

10 "Executive powers or functions which involve discretion and the making of a decision in a judicial manner"

Black's Law Dictionary 6th Edition 1990 page1245 defines "Quasi" and "Quasi Judicial" as follows:-

Quasi :-

15 *Lat. As if; almost as' it were; analogous to. This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are intrinsic and material differences between them. Cannon v. Miller, 22 Wash.2d 227, 155 P.2d 500. 503. 507. A term used to mark a resemblance, and supposes a difference between two*
20 *objects. It is exclusively a term of classification. It implies that conception to which it serves as index is connected with conception with which comparison is instituted by strong superficial analogy or I resemblance. Moreover it negatives idea of identity, but points out that the conceptions are sufficiently similar I for one to be classed as the equal of the other. South Discount Foods. Inc. v. Retail Clerks Union Local 1052. Com. Pl., 14 Ohio Misc. 188.235 N.E.2d L13, 147. It is often prefixed to English words. implying mere appearance or want of reality or having some resemblance to given thing.*

Quasi judicial.

30 *A term applied to the action, discretion, etc, of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusion from them, as a basis for their official action, and to exercise discretion of judicial nature.*

35 As I proceed to conclude the determination of this issue, let me reflect on some of the principles of Constitutional Interpretation. I am required to apply notably the following:-

- 5
- In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See:- *Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998.(SCU)*
- 10
- The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See:- *P.K Ssemogerere and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 1 of 2002 and The Attorney General of Tanzania vs Rev. Christopher Mtikila [2010.].EA 13.*
- 15
- The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation. See: *Okello Okello John Livingstone and 6 others Versus the Attorney General and Another, Constitutional Court Constitutional Petition No.4 of 2005.*
- 20
- In searching for the purpose of the Act, it is legitimate to seek to identify the mischief sought to be remedied by the legislation. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We are obliged to understand the provisions within the context of the grid, if any, of the related provisions and of the Constitution as a whole, including the underlying values of the Constitution that must be promoted and protected. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*
- 25
- In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of
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- 35
- 40

5 law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. See:- *Apollo Mboya Vs Attorney General and others* (Supra).

- 10 • The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in *Article 8A(1)*.

15 See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*"

20 In this regard therefore *Articles 28* must be read together with and in relation to *Article 210*. The power to laws regulating UPDF under *Article 210*, include the power to establish the General Court Martial as it's a disciplinary body. As a *quasi-judicial* body, charged with dispensing of military justice under military law.

25 The nature and the composition of Court Martial. The appointment terms and conditions of service of the members of that Court are clearly not the same as those in respect of Courts of Judicature. That is why the term "*quasi*" must by implication apply to it.

The jurisdiction of the General Court Martial is limited. It is only applicable within the confines of the UPDF Act as clearly set out under *Section 197(2)*.

30 As clearly articulated by Madrama JA in his Judgment in this petition, the jurisdiction of the General Court Martial is restricted, applicable only to '*persons subject to military law who commit a service offence*' under that Act.

I will revert to the definition of the above two terms later "*persons subject to military law and 'service offence'*". Invariably therefore the General Court Martial has no

5 jurisdiction over persons who are not subject to military law. In the same vain the General Court Martial has no jurisdiction to try any offences other than those set out in the UPDF Act as “*service offences*” under that Act.

Having set out the jurisdiction of the General Court Martial I have to determine whether persons subject to military law in relation to service of offences are entitled
10 to be tried by an impartial and independent Court or tribunal in accordance with the provisions of *Article 28* of the Constitution.

After a careful consideration of the law, I have come to the conclusion that the provisions of *Article 28* of the Constitution are not applicable to persons subject to military law as defined under the UPDF Act, while being tried for a service offence
15 under same Act. I am alive to the holding of the Court of Appeal in 2nd Lt. Ambrose Ogwang (*supra*) wherein it was stated that:-

“*The UPDF Act could not override the Constitution. Similarly the right of any person charged with a criminal offence to be tried by an independent Court is Sacrosanct under Article 28(1) of the Constitution. Such a right cannot be*
20 *overridden by the UPDF Act.*”

I am further aware that under Article 20(1) of the Constitution fundamental rights and freedoms of the individual are inherent and not granted by the state. Further that, the rights and freedoms of the individuals and groups
25 enshrined in the Constitution must be respected, upheld and promoted by all organs and agencies of Government and by all persons. See Article 20(2).

Nonetheless, there is still rider. The rider is found in the doctrine of “*voluntary assumption of risk*” (*Volenti non fit iniuria*).

In this Country all persons recruited into the Armed forces do so voluntarily. Minors
30 are by law prohibited from joining the Armed forces. Each individual voluntarily

5 seeks to enlist, it must be presumed, is well aware of the risks such enlistment entails. He or she contracts to voluntarily limit some of his or her fundamental rights and freedoms to the extent that he/she is exposed to the risk of being a member of the Armed forces. Just like sportsmen and women voluntarily assume risk to life and/or injury so does a member of the Armed forces. It is literary putting one's life
10 on the line.

In some Countries contracts are signed to that effect. In others the consent to risk is implied. Civilians or persons not otherwise subject to military law may by contract or otherwise voluntarily waive their rights and bring themselves into the ambit of military law. When they do they become subject to the applicable military law in the
15 same way as members of the armed forces.

In this regard therefore, persons subject to military law must be only those persons who have voluntarily agreed to subject themselves to that law. This by implication excludes those who have not. The persons subject to military law only subject themselves to the jurisdiction of the General Court Martial in respect only of service
20 offences set out in the UPDF Act.

The term 'Service offence' in my view therefore must relate only to those offences that are "purely military in nature" or offences under military law which are not offences under ordinary criminal law. This distinction contained in Article 4 of the
25 *1957 European Convention on Extradition. The United Nations Model Treaty on Extradition (Article 3) and in 1940 Montevideo Treaty on International Law Article 20* of which refers to "*essentially military offences, exclusive of those governed by the common laws.*"

See:- Military jurisdiction and International Law Military Courts and gross human rights violations. (Volume 1) International Commission of jurist study by Federico
30 Andreu-Guzman.

5 The classification set out above would exclude the offences triable by civil Courts of
judicature, such as the Penal Code Act, the Firearms Act, the Anti terrorism Act and
others from the jurisdiction of the UPDF Act in general and the General Court
Martial in particular. It also excludes offences committed by persons subject to
military law during peace time and or outside exclusive military operational zones. I
10 would consider service offences to be those set out under part VI of the UPDF Act in
as far as they are related to persons subject to military law.

Section 2 of the UPDF Act which 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. extends the jurisdiction of the Gen-Court Martial to include
15 offences outside the UPDF Act. This is not only *ultra vires* the Act but brings it under
the ambit of G.C.M, civilians who are protected under Article 28 of the Constitution.
I find so because the assumption of risk by an individual in the military is only
limited to military discipline under military law. Military law is only set out in the
UPDF Act. It excludes laws set out in other legislation such as the Penal Code Act and
20 other such enactment enumerated above.

In his treatise “Reflections from the Bench. The differences between military Courts-
Marital and Civilian Courts” June 2019. Lt. Colonel Andrew R. North observes as
follows:-

25 “In the civilian world, laws are designed to prevent undesirable behavior,
ensure public safety and resolve disputes peaceful. In the military, the
emphasis is more on discipline. As the founder of the Judge Advocate’s corps,
General George Washington wrote” Discipline is the soul of an Army. It makes
small numbers formidable, procures success to the weak and esteem to all.”

30

In this regard every person enrolled in the UPDF is required to take an Oath of Allegiance and an Oath of Secrecy set out in the 5th and 6th Schedule of that Act.

The Oath of Allegiance by officers is set out in the 5th Schedule of the UPDF Act as follows:-

Oath of Allegiance

I _____ swear by almighty God do solemnly and sincerely declare and affirm that I will be faithful to and bear true allegiance to the President and the Republic of Uganda and that I will, as in duty bound, honestly and faithfully defend him/her and the Constitution of the Republic of Uganda against all enemies, and I will observe and obey all lawful orders of the officers set over me. I promise to teach and uphold in all officers and militants that may from time be placed under my command good discipline, bravery and trust in the Country, so help me God.

The UPDF Oath is set out in First schedule of the Oaths Act [CAP 19] as follows:-

I, _____, swear that I will bear true and faithful allegiance to the President, Supreme Commander-in-Chief of the Uganda Peoples' Defence Forces, and that I will well, truly and faithfully serve the Government of the Republic of Uganda as by law established and that I will as in duty bound serve in the Uganda Peoples' Defence Forces and go wherever ordered by air, land or sea and that I will observe and obey all commands of the Government of the Republic of Uganda as by law established and of any officer set over me even to the peril of my life. (So help me God.)

From the a foregoing it is self evident that, members of the UPDF cannot constitute an independent and impartial Court with the terms of Article 28 of the Constitution.

They are persons under command. They cannot exercise independence of Judgment as required under Article 28 of the Constitution.

5 Members of UPDF are bound by their oaths the violation of which attracts penal sanctions. This places them in a class apart from civilians, by law. Invariably civilians cannot be subjected to military law and discipline in respect of which they have not taken oath.

10 Further, members of the Military Court Martial and other Military Courts established under the UPDF Act do not take the judicial Oath, but rather they take UPDF Oaths cited above. Persons appointed to administer justice in accordance with Article 28 of the Constitution must take a judicial Oath which is set out in the 4th Schedule to the Constitution as follows:-

15 *Judicial Oath.*

20 I, _____, swear in the name of the Almighty God/solemnly affirm that I will well and truly exercise the judicial functions entrusted to me and will do right to all manner of people in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the laws and usage of the Republic of Uganda without fear or favour, affection or ill will. [So help me God].

25 The disparity between the UPDF Oaths and the Judicial Oath is glaring, to say the least. It appears clearly to me that, one cannot take both the UPDF Oath and Judicial Oath, as they inconsistent with each other. See:- *Hon. Jim Muhwezi and 3 Others Vs Attorney General and Another Constitutional Petition No. 10 of 2008* in respect of a judicial officer taking another oath of office. Members of the Court Martial are first and foremost military officers subject to military law and discipline. They are appointed on that basis and are bound by the UPDF Oaths.

30 In view of the above observation and the reasons I have endeavored to set out earlier in this Judgment, I find that:-Attempting to include "any other law" under the jurisdiction of the Court Martial which is limited to the UPDF Act would be unconstitutional. In this regard Section 179 of the UPD Act stipulates as follows:-

35 **"179. Service trial of civil offences**
(1) A person subject to military law, who does or omits to do an act-

5 *(a) in Uganda, which constitutes an offence under the Penal Code Act or any other enactment (emphasis added).*

I find that the above Section of UPDF Act unconstitutional as it extends that it the jurisdiction of the General Court Martial to try offences often than those set out in
10 the UPDF Act for the reasons I have already set out above.

Section 119(1) (g), h(i), h(ii) of the UPDF Act attempts to bring civilians or persons not subject to military law under jurisdiction of the General Court Martial. The above subsection stipulates as follows:-

“119 (1) ...

15 *(g) every person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of a service offence; and*

(h) every person found in unlawful possession of-

20 *(i) arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or*
(ii) other classified stores as prescribed.

The above provisions extend the jurisdiction of the General Court Martial to include
25 power to try persons who have not voluntarily brought themselves under the ambit of military law.

I would agree with Obura Jcc that Section 119(i) (g) above is not unconstitutional. Where an individual aids and abets a person subject to military law to commit a military offence, such person would by his own consideration have brought himself
30 under the ambit of the UPDF Act. I also agree with Justice Obura JCC that, for such person to be tried by General Court Martial there must be a principle offender who is subject to military law named in the charge sheet as such. The civilian can only be charged as an accomplice together with the principle offender.

5 Having stated that, I would go on then find that Section 119(ii) above is unconstitutional for the reasons I have already set out in this Judgment.

The respondent herein has a duty of establishing that the limitation imposed on the enjoyment of the right to a fair hearing before an impartial and independent tribunal is justified in under Article 43(2) (c) of the Constitution. No attempt was made to do. All that the Attorney General could do was to offer a general denial. This has not been helpful in the least.

Be that as it may, I will attempt to provide an over view of the recent global trend in jurisprudence relating to this subject. At pages 160-161 Andrew-Guzman (supra) puts is as follows:-

15 *“In many countries, such as Canada and the United Kingdom, reforms have been introduced to ensure that judicial guarantees are afforded to military personnel facing trial in military courts. In other countries, such as Ireland, similar reforms are on the way. The Irish authorities have embarked on a comprehensive reform of the system of military criminal jurisdiction and have announced that one of the purposes of the reform is to incorporate the provisions of the European Convention on Human Rights. A more radical position has been taken by the High Court of South Africa which, in March 2001, ordered application of the Code of Military Justice to be suspended.*

25 *The High Court took the view prima facie that military criminal jurisdiction was incompatible with the principle of equality before the law and the right to judicial protection guaranteed in the Constitution. In the opinion of the High Court, “[t]he military is not immunized from the democratic change. Maintaining discipline in the defence force does not justify the infringement of the rights of soldiers, by enforcing such military discipline through an unconstitutional prosecuting structure”*

35 *There is a growing trend towards abolition of the use of military courts for the trial of civilians. In several countries a ban on such practices has been incorporated into the constitution. In some countries, such as*

5 *Mexico the ban is long-established. Article 96 (4) of the Greek*
Constitution of 1975 states that military courts cannot try private
individuals. The Honduran Constitution of 1982 states that “No one shall
be judged other than by a judge and competent tribunal adhering to the
10 *formalities established by law. [...] Under no circumstances shall military*
tribunals extend their jurisdiction to include persons who are not on
active service in the Armed Forces” Over the last ten years, this trend has
grown even stronger. For example, it is worth highlighting the bans
incorporated into the constitutions of Colombia, Haiti, Guatemala and
Nicaragua. The Paraguayan Constitution only authorizes military courts
15 *to try civilians in the event of an international armed conflict.*

Let me add if I may that, ordinarily members of the military in this Country are tried by civilian Courts for non service offences. In *Uganda vs Hussein Hassan Agade & 12 others* , High Court (International Crime Division) Criminal Session Case No. 0001 of 2010 non Ugandan terrorists were tried and convicted on number offences under the Anti-Terrorism Act by a civilian Court. Over 60 innocent people had been killed while watching world Football Cup finals peacefully in a playground. They were not tried by the Court Marital.

Parliament has under International Criminal Act 2010 extended the jurisdiction of the High Court to include power to try international offences and crimes against humanity. The Judiciary established the War Crimes Division of the High Court in 2008 and it is functional.

Both moves created a legal framework for persons charged with offences related to war crimes, terrorism genocide and crimes against humanity to be expeditiously tried in Uganda in accordance with international standards. This is incompliance with Article 28 of the Constitution (supra). This removes any excuse, if it ever existed of trying civilians under the UPDF Act.

In view of the above, one would have to question why in *Uganda vs Thomas Kweyoro High Court Criminal Case No. 10 of 2011* the proceedings were instituted in civilian Courts while the petitioner herein is before the Court Martial. Kweyoro is facing 93 criminal charges in respect of war crimes and crimes against humanity emanating from his role as a top LRA Commander for over 20 years. I have not been able to find the rational why Kweyoro is being tried in a civilian Court while the petitioner faces the Army General Court Martial. The respondent has not attempted to furnish this

5 Court with any reason why this is so. If there is, then such a reason is unjustified and unconstitutional.

For this reason and the other reasons set out earlier in this Judgment I would allow this petition.

10 I would make the following orders and declarations:-

1) The General Court Martial established under the Section 197 of the UPDF Act is a competent *quasi judicial* military Court established under the UPDF Act whose jurisdiction is limited to the enforcement of military discipline.

15 2) The General Court Martial's jurisdiction is only limited to trying service offences specified under the UPDF Act, only in respect of persons subject to military law.

3) Military law under the UPDF Act must be construed to exclude laws that are the preserve of Civil Courts of judicature established under Chapter Eight of the Constitution.

20 4) Persons subject to military law under UPDF Act must exclude all those persons who have not voluntarily placed themselves under the jurisdiction of that Act excerpt as provided for under Section 119(1)(g).

5) Section 119(1)(h) and 179(1)(a) of the UPDF Act are unconstitutional as they are inconsistent with Article 28(1) of the Constitution.

25 6) Section 119(1) (g) of the UPDF Act is not unconstitutional. Provided the person not otherwise subject to military law is tried as an accomplice together with a person who is subject to military law as the principle offender on the same charge sheet.

5 7) The petitioner is not a person subject to military law and his trial under the UPDF Act is unconstitutional. The charges brought against him under the UPDF Act are unconstitutional null and void and of no effect.

8) Section 197 of UPDF Act is NOT unconstitutional.

9) I would answer issue 3 in the affirmative, to the extent set out in this
10 Judgment.

10) I would order his immediate release and discharge from the General Court Martial. His bail bond if any is ordered to be refunded.

11) The petition having substantially succeeded, I would award costs to the
15 petitioner.

12) I would further order that this matter be referred to the High Court to investigate and determine the appropriate redress to the petitioner in damages under Article 137 (4) b of the Constitution.

20 By majority decision Kakuru JCC, Obura JCC and Kasule Ag. JCC with Madrama JCC and Musota JCC dissenting, this petition succeeds.

We hereby issue orders and declarations as set out in the Judgment of Obura JCC.

25 We make the following consequential orders:-

(a) All those persons not subjected to military law and are currently being tried before any military Court, we order that their cases be transferred to Civil Courts under the direction of the Director of Public Prosecutions within 14 (fourteen) days from date hereof.

30 (b) All those persons not subject to military law who are currently serving sentences imposed by the authority of military Courts contrary to the Constitution as set out in this Judgment, should have their case files

5 transferred to the High Court Criminal Division for re-trial or to be dealt with as that Court may direct within 14 (fourteen) days of this Judgment.

10 (c) For clarity effected person will remain in lawful custody or on bail until their cases are transferred and mentioned before Civil Courts for further management.

15 (d) This Judgment does not discharge or exonerate any person from any criminal responsibility and as such fresh charges maybe brought by the Director of Public Prosecution before Civil Courts.

(e) We order that a copy of this Judgment be served upon The Hon. The Attorney General.

20 We so order.

Dated at Kampala this^{1st}.....day of^{July}..... 2021.

25
Kenneth Kakuru
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

5

THE REPUBLIC OF UGANDA,

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 45 OF 2016

(CORAM: KAKURU, OBURA, MUSOTA, MADRAMA, KASULE, JJA)

HON. MICHAEL KABAZIGURUKA}PETITIONER

10

VERSUS

ATTORNEY GENERAL}RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA, JCC

15

The Petitioner Hon. Michael Andrew Kabaziguruka (hereinafter referred to as the Petitioner) brought this petition under the provisions of Articles 137 (1) (3) of the Constitution of the Republic of Uganda 1995 for declarations:

20

(a) That section 197 of the Uganda Peoples Defence Forces Act (the UPDF Act), 2005 is inconsistent with Articles 28 (1), 126 (1), 29 (2) of the Constitution to the extent that it purports to create a court of law without constitutional authority.

25

(b) That section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28 (1) and 44 (c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the court-martial of any, including non-disciplinary offences and of every person.

(c) That the General Court-Martial and other Military Courts established under Part VIII of the UPDF Act are not courts of law within the meaning

5 The facts in support of the petition are that on 8th June, 2016, the Petitioner was arrested and detained at the Special Investigative Unit (SIU) Kireka of the Uganda Police where he spent the night and on the following day, 9th June, 2016 was placed under house arrest by officers of the Uganda police up to 28th of June 2016 when he was charged/arraigned before the General Court-
10 Martial for offences relating to national security contrary to sections 130 (1) (f) of the UPDF Act and that of treachery contrary to section 129 (a) of the same Act. He was remanded at Kigo Government prison together with others charged with the same offences and who included serving members of the UPDF as well as civilians like the Petitioner. The Petitioner is objecting to
15 being tried by the General Court-Martial which he claims is not clothed with the jurisdiction to try him because it is not a competent court established under constitutional authority. The General Court-Martial has insisted that it is a court of law with the power to try the Petitioner and other civilians with the offences charged and the Petitioner is affected and aggrieved by the said
20 arraignment.

The Petitioner stayed on remand for several months until he was granted bail by the High Court on 20th October 2016. He contends that his being tried by the General Court-Martial will be in violation of Article 28 (1) of the Constitution of the Republic of Uganda. He maintains that the Court-Martial
25 has no legal authority under the law to try him. He contends that section 197 of the UPDF Act establishes the General Court-Martial contrary to Article 210 of the Constitution of the Republic of Uganda. He further contends that the UPDF Act purports to establish the General Court-Martial with powers to try capital and none disciplinary offences and is inconsistent with or in
30 contravention of Articles 28 (1) (2) and Articles 210 of the Constitution of the Republic of Uganda. Similarly, the Petitioner contends that the act of charging him before the General Court-Martial with the offences of treachery contrary to section 129 (a) and offences related to security contrary to section 130 (1) (f) of the UPDF Act, is inconsistent with and in contravention of

5 Lastly the respondent contends that the petition discloses no question as to
interpretation of the Constitution as the impugned acts stated in the petition
are neither inconsistent nor in contravention of any Articles of the
Constitution. The Respondent prays that the petition be dismissed with costs
since it does not disclose any act in contravention of any provision of the
10 Constitution.

The answer to the petition is supported by the affidavit of Brigadier
Ramadhan Kyamulesire that confirms on oath the facts and averments in
answer to the petition.

Resolution of the Petition

15 At the hearing of the petition on 6th August, 2020, the Petitioner was
represented by learned Counsel Mr. Medard Segona Lubega appearing
jointly with the learned Counsel Mr. Kwemara Kafuzi who also held brief for
learned Counsel Mr. Kiza Rwakafuzi who could not appear as he was unwell.
The respondent on the other hand was represented by learned Counsel Mr.
20 George Kalemera, Commissioner Litigation, Attorney General's Chambers.

Learned Counsel for both parties applied for and were granted leave by the
court to proceed to address the court by way of written submissions. The
Petitioner was required to file written submissions and serve the respondent
by 14th August 2020. The respondent was then to file and serve a written
25 reply by 28th of August 2020. The Petitioner thereafter would file a rejoinder,
if any, by 4th September, 2020 and judgment was to be delivered on notice.

By 4th September, 2020, none of the parties had filed any written submissions
as directed by the court. I accordingly proceeded to consider the petition
together with the judicial precedents on the issues raised in the petition.

- 5 contravention of the constitution is null and void to the extent of its inconsistency.
- (ii) In determining the constitutionality of legislation, its purpose and effect must be taken into consideration.
 - (iii) The entire constitution has to be read together as an integral whole with no
- 10 particular provision destroying another but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness

The Petitioners petition essentially deals with the powers of Court Martial under the Uganda People's Defence Forces Act, 2005. The Act was enacted by Parliament under Article 210 (b) and presumably also under Article 129

15 (1) (d) of the Constitution of the Republic of Uganda. The Petitioner in that regard has challenged the powers of the General Court-Martial under section 197 and also impliedly sections 2 and 179 of the UPDF Act. Constitutionally derived powers and its limits depend on the wording of the Constitution and as stated by Amissah JP of the Court of Appeal of Botswana in **Dow v Attorney General (of Botswana) [1992] LRC (Const.) 623** at page 632

20 when he held that:

The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the Constitution; no person can make any such claim. The

25 Constitution contains not only the design and disposition of the powers of the state which is being established but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the people's future.

It is also a principle of interpretation of Constitutions that several provisions

30 of the Constitution have to be read in harmony and not in conflict with each other as held by Odoki CJ in **National Council for Higher Education v Anifa Kawooya Bangirana Constitutional Appeal No 4 of 2011** at page 49 of his judgment that:

5 "discipline "and "professionalism" is important in considering the role of the military courts.

Further, the Constitutional Court as well as the Supreme Court sitting as an appellate court in appeals emanating from the Constitutional Court, have on diverse occasions considered the powers of the General Court-Martial and
10 other military courts as well as some of the issues raised in this petition. These decisions have to be set out in a coherent manner to establish what the law is, as interpreted by the courts, before a conclusion can be reached in this petition itself. It is also necessary that in considering the establishment of the Uganda People's Defence Forces with particular emphasis on the
15 establishment of the military courts, regard ought to be had to the entire statutory scheme or intention of Legislature in the enactment creating the force which should be read as an entire whole before reaching a conclusion on the purpose and jurisdiction of military courts. A distinction has to be made between interpretation of the Constitution and interpretation of the
20 statute creating the UPDF.

In this petition, the petition seeks for declaration that section 197 of the UPDF Act, 2005, is inconsistent with Articles 28 (1), 126 (1), 29 (2) of the Constitution to the extent that it purports to create a court of law without constitutional authority.

25 The question of the jurisdiction of the courts or tribunals under the UPDF Act has been the subject matter of several decisions of the Constitutional Court, Court of Appeal and the Supreme Court in;

1. Constitutional Petitions Nos 02 of 2002 & 08 of 2002; Uganda Law Society and Jackson Karugaba v the Attorney General [2009] UGSC

30 **1**

2. Attorney General v Joseph Tumushabe, Constitutional Appeal No 3 of 2005

5 The 1st declaration sought in the petition in paragraph 14 thereof is that:

1. Section 197 of the UPDF Act, 2006 is inconsistent with Articles 28 (1), 126 (1), 129 (2) of the Constitution and to the extent that it purports to create a court of law without constitutional authority.

The 2nd declaration sought by the Petitioner is that:

- 10 2. Section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28 (1) and 44 (c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the Court-Martial over any, including non – disciplinary offences and over
- 15 every person.

The first and second declarations sought in this petition have already been the subject of two judicial decisions; one of the Supreme Court sitting on appeal as the Constitutional Appeal Court and another of the Court of Appeal sitting on an appeal in a criminal appeal matter. I discuss the two decisions

20 herein below.

Before I do that, the third declaration sought by the Petitioner is that:

3. The General Court-Martial and other military courts established under Part VIII of the UPDF Act are not courts of law within the meaning of Articles 126 (1), 129 (1), 210 and 257 of the Constitution of the Republic
- 25 of Uganda.

As noted above, the other declarations sought deal with the actual proceedings before the General Court-Martial and can only be consequential declarations after considering the law in the three declarations whose resolution can determine whether the General Court Martial has jurisdiction

30 to try the Petitioner. I would in the circumstances analyse three judicial

- 5 1. Is the Field Court Martial a competent court established under the authority of the Uganda Constitution?
2. Does the Constitution of Uganda apply to Field Court Martial?
3. Did the Kotido trial accord to the accused persons the protection provided by Articles 28 (3) and 44 of the Constitution?
- 10 4. Did the execution of the soldiers in the Kotido trial violate Articles 22 (1) of the Constitution?
5. Are there any reliefs available to the parties to this petition or the deceased persons?

In dealing with the particular issue of the Field Court Martial, Twinomujuni
15 JCC considered the status of military courts generally and held that in the case of **Attorney General v Joseph Tumushabe, Constitutional Appeal No 3 of 2005**, the Supreme Court of Uganda answered the question and decided that court-martials, including the Field Court Martials, which form part of the military court system of courts are established under Article 129 of the
20 Constitution. Secondly, except in a few specified instances, the Constitution of the Republic of Uganda applies to all military courts in Uganda. It therefore followed that the trial in the Field Court Martial was bound to respect and apply the provisions of the Constitution.

The above holding captures the issue of whether a military tribunal or court
25 is a subordinate court to the courts of Judicature set out under Article 129 (1) of the Constitution of the Republic of Uganda, particularly Article 129 (1) (d) which is the only other provisions that deals with creation of Courts other than the Supreme Court, the Court of Appeal and the High Court.

In **Uganda Law Society and Jackson Karugaba v the Attorney General**
30 (supra) the Constitutional Court then dealt with the rights to a fair hearing and held that military courts are part of the judicial system of Uganda and are governed by Article 128 of the Constitution which deals with the independence of the judiciary. The Constitutional Court further held that Article 128 has to be construed in relation to the military courts to give it

5 *inter alia* set out issues numbers 3 – 6 which are pertinent to the instant petition before this court. These issues were:

3. Whether sections 119 (1) (g) & (8) of the UPDF Act is inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution.
- 10 4. Whether the joint trials of civilians and members of Defence Forces in the military court for offences under the UPDF Act is inconsistent with Articles 28 (1), 126 (1) and 210 of the Constitution.
5. Whether the trial of the accused persons before the General Court-Martial on a charge of terrorism contravenes Articles 22 (1), 28 (1) and 126 (1) of the Constitution.
- 15 6. Whether the trial of the accused persons for the offences of terrorism and unlawful possession of firearms before the General Court-Martial is inconsistent with the provisions of Articles 28 (1), 120 (1) and (3) (b) & (c), 126 (1) and 210 of the Constitution.

The Supreme Court noted that the Constitutional Court had answered issues
20 numbers 5 and 6 in the affirmative. What is material, is that the appeal against the Constitutional Court decision was on the ground that the Constitutional Court erred in law and fact in holding:

- 25 1. That the concurrent proceedings in the High Court Criminal Case No 955 of 2005 and Court Case No UPDF/GCM/075/2005 in the General Court-Martial against the accused contravened Articles 28 (1) and 44 (c) of the Constitution;
2. That the General Court-Martial has no jurisdiction to try the charges of terrorism and unlawful possession of firearms; and
- 30 3. That the trial of the 23 accused persons before the General Court-Martial on charges of terrorism and unlawful possession of firearms contravened Articles 22 (1), 28 (1), 120 (1) & (3) (b) (c), 126 (1) and 210 of the Constitution.

5 petition before this court. Mulenga JSC held at pages 8 – 10 of his judgment that:

10 As I said earlier in this judgment, the finding by the majority was that the impugned concurrent proceedings against the accused persons offended the Constitution in two ways. First, it was held that because the General Court Martial had no jurisdiction over the charges before it, the proceedings contravened Articles s 28(1) and 44(c) because, to use the words of three of the learned Justices ***“there can be no fair trial within the meaning of Articles 28(1) of the Constitution where the court is not competent.”*** It seems to me, however, that the more accurate statement would be that there can be no trial at all where the court is not
15 competent. A trial by an incompetent court is by that fact alone a nullity *ab initio*. Secondly, it was held that the concurrent proceedings in separate courts on charges arising out of the same facts exposed the accused persons to the risk of double jeopardy, since they could be convicted and sentenced by both courts.

20 The jurisdiction of the General Court Martial is conferred by the statute that creates it, namely the UPDF Act, which provides in section 197 (2) –

“The General Court Martial shall have unlimited original jurisdiction under this Act and shall hear and determine all appeals referred to it from decisions of Divisional Courts Martial and Unit Disciplinary Committees.” (Emphasis is added)

25 That statute creates many offences, over which the General Court Martial has indisputable jurisdiction. They are collectively referred to as service offences. The charges against the accused persons before the General Court Martial, however, were not offences under the UPDF Act but were the offence of ***“Terrorism*** contrary to section 7(1) (b) and (2) (j) of the Anti-Terrorism Act 14 of 2002”; and in the
30 alternative the offence of ***“Unlawful Possession of Firearms*** contrary to section 3(1), and (2) of the Firearms Act Cap 299. In support of the contention that the General Court Martial had jurisdiction over the two offences, the appellant seeks to invoke the statutory definition of “service offence”. Section 2 of the UPDF Act defines service offence as –

35 ***“an offence under this Act or any other Act for the time being in force committed by a person while subject to military law.”***

5 limited jurisdiction bodies. However, what is significant and of constitutional importance, in our view, is section 179 of the UPDF Act. It states,

'Service trial of civil offences

(1) A person subject to military law, who does or omits to do an act –

10

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 a punishment as prescribed in subsection (2).

15

(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.'

20

40. The effect of this provision is to turn all criminal offences under the law of this country into service offences for persons' subject to military law. Secondly, the effect is profoundly transformative of military courts from being limited jurisdiction quasi – judicial bodies into general jurisdiction criminal courts for all criminal offenses for persons' subject to military law.

25

The court went ahead to deal with the issue in detail. However, in light of the decision of the Supreme Court per Mulenga JSC **Attorney General v Uganda Law Society; [2009] UGSC 2**, it is doubtful whether the matter had not been resolved in terms of a narrower definition of a service offence. An analysis of the Supreme Court decision will lead to the conclusion that the Court of Appeal again stated that the definition of a "service offence" was too wide and that it is unlawful after it had been dealt with and clarified by the Supreme Court. The Court of Appeal however considered both sections 2 and 179 of the UPDF Act while the Supreme Court had only cited section 2 which defines a "service offence" and not section 179 of the UPDF Act.

30

5 119. Persons subject to military law

(1) The following persons shall be subject to military law –

(a) every officer and militant of the regular force;

(b) every officer and militant of the Reserve Forces and any prescribed force when he or she is –

10 (i) undergoing real or training whether in uniform or not;

(ii) in uniform;

(iii) on duty;

(iv) on continuing full-time military service;

(v) on active service;

15 (vii) serving with any unit of a Regular Force; or

(viii) present, whether in uniform or not, at any drill or training of the unit of the Defence Forces;

20 (c) subject to such exceptions, adaptations, and modifications as the Council may by regulations, prescribed, a person who under any arrangement is attached or seconded as an officer or a militant to any Service or force of the Defence Forces;

(d) every person, not otherwise subject to military law, who is serving in the position of an officer or a militant of any force raised and maintained outside Uganda and commanded by an officer of the Defence Forces;

25 (e) every person, not otherwise subject to military law, who voluntarily accompanies any unit or other element of the Defence Forces which is on service in any place;

(f) every person, not otherwise subject to military law, while serving with the Defence Forces under an engagement by which he or she has agreed to be subject to military law;

30 (g) every person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of the service offence; and

5 or a militant of higher rank, in which case he or she shall be treated in accordance with the rank prescribed in his or her engagement.

(7) For the purposes of this act, the "commanding officer" in relation to any person mentioned in subsection (2), (3), (4) or (5) means the commanding officer of the unit or other element of the Defence Forces that the person accompanies, or in
10 whose custody he or she is, or in which that person is serving, as the case may be.

(8) Every person who commits a service offence while subject to military law may be liable to be charged, dealt with and tried for that offence notwithstanding that he or she has ceased to be subject to military law since the commission of the offence.

15 (9) Every person who, since he or she committed a service offence has ceased to be subject to military law shall, for the purposes of trial, be considered to have the status and rank which he or she held immediately before he or she ceased to be subject to military law.

(10) Subject to subsections (11) and (12), a person who commits a service offence,
20 may only be tried within the Service in which he or she was commissioned or enrolled.

(11) A person who is attached or seconded to a Service other than the Service in which he or she was commissioned or enrolled, or embarked on a vessel or aircraft of the Service other than the Service in which he or she was commissioned or
25 enrolled, may be tried either within the other Service or within the Service in which he or she was commissioned or enrolled depending on the circumstances and nature of the offence.

(12) A person serving in the circumstances specified in paragraph (d) of subsection (1) who, while so serving commits a service offence, may be tried within the Service or Force in which he is or her commanding officer is serving.
30

(13) For the purposes of this section, but subject to such limitations as may be prescribed, a person accompanies a unit of the Defence Forces which is on service if he or she –

35 (a) participates with that unit in the carrying out of any of its movements, manoeuvres, duties in a disaster or warlike operations;

5 Act and the person committing the offence is a person subject to military law as elaborately defined. Such an offender may then face criminal proceedings before the military courts. In terms of Article 28 (12) of the Constitution, a specific and separate offence is expressly created by section 179 of the UPDF Act. Particularly, sections 179 – 184 of the UPDF Act deal with the general
10 offences created under the UPDF Act and not jurisdiction. This is further deduced from the head note of section 179 which clearly provides as follows “Service trial of civil offences”. It provides for the trial of a person subject to military law who commit offences under other enactments other than the UPDF Act. Section 179 of the UPDF Act provides as follows:

15 179. Service trial of civil offences

(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;

20 (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 a punishment as prescribed in subsection (2).

25 (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.

My reading of the statute and particularly section 179 of the UPDF Act leads to the conclusion that it creates a separate offence as well as enabling the trial of persons’ subject to military law for offences under other enactments
30 other than the UPDF Act. All the elements of a penal provision prescribed by Article 28 (12) of the Constitution are present under section 179 of the UPDF Act. First of all, the provision defines the offence and secondly, it prescribes the penalty for it. In terms of definition, it provides that anybody who is

5 relevant enactment i.e. the Penal Code Act or any other enactment that is troublesome. It presupposes that it is the military court which will try the person for the offence under the Penal Code Act or the other enactment. That is the dilemma that can be discerned from the decisions of the courts I have reviewed.

10 I will leave the question as it is and as determined by the various courts unless otherwise clarified by the Supreme Court sitting as an appellate court in a constitutional appeal matter. For purposes of this petition, the decisions reviewed do not bar the military courts from trying a person subject to military law for a service offence on the basis of the commission of an offence
15 under another enactment such as the Penal Code Act. It is possible in light of precedents for a further trial in a military court to be based on a conviction for that offence in a civil court. It follows that the military court may upon conviction of the person for a service offence under section 179 of the UPDF Act impose the penalty of dismissal with disgrace from the Defence Forces
20 or any other less punishment prescribed by the UPDF Act. In that scenario it would be sufficient to produce a verdict of the civil court convicting or finding a person guilty for an offence under the Penal Code Act or any other enactment.

The courts have dealt with the dual jurisdiction in terms of proceedings in
25 civil courts as well as in military courts for offences under other enactments such as the Penal Code Act and held that the military courts should only try the service offence by persons' subject to military law as specified by the UPDF Act (See **Uganda Law Society and Jackson Karugaba v Attorney General** (supra)). However, the jurisdiction of the Field Martial Court will turn
30 on the wording of the specific provisions of the UPDF Act though the question of its jurisdiction has already been considered and resolved by the Constitutional Court and the Supreme Court sitting on appeal from decisions

5 distinguish four classes of case. The first is that with which we are now concerned,
namely, cases where this Court finds itself confronted with one or more decisions
of its own or of a Court of co-ordinate jurisdiction which cover the question before
it, and there is no conflicting decision of this Court or of a Court of co-ordinate
10 jurisdiction. The second is where there is such a conflicting decision. The third is
where this Court comes to the conclusion that a previous decision, although not
expressly overruled, cannot stand with a subsequent decision of the House of
Lords. The fourth (a special case) is where this Court comes to the conclusion that
a previous decision was given per incuriam. In the second and third classes of case
15 it is beyond question that the previous decision is open to examination. In the
second class, the Court is unquestionably entitled to choose between the two
conflicting decisions. In the third class of case the Court is merely giving effect to
what it considers to have been a decision of the House of Lords by which it is
bound. The fourth class requires more detailed examination and we will refer to it
again later in this judgment. ...

20 At page 300 on the 4th case scenario, Lord Greene MR held that:

But where the Court is satisfied that an earlier decision was given in ignorance of
the terms of a statute or a rule having the force of a statute the position is very
different. It cannot, in our opinion, be right to say that in such a case the Court is
entitled to disregard the statutory provision and is bound to follow a decision of
25 its own given when that provision was not present to its mind. Cases of this
description are examples of decisions given per incuriam. We do not think that it
would be right to say that there may not be other cases of decisions given per
incuriam in which this Court might properly consider itself entitled not to follow an
earlier decision of its own.

30 ...On a careful examination of the whole matter we have come to the clear
conclusion that this Court is bound to follow previous decisions of its own as well
as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two
of them apparent only) are those already mentioned which for convenience we
here summarise: (i) The Court is entitled and bound to decide which of two
35 conflicting decisions of its own it will follow. (ii) The Court is bound to refuse to
follow a decision of its own which, though not expressly overruled, cannot in its
opinion stand with a decision of the House of Lords. (iii) The Court is not bound to

5 Constitution. They further held that they were obliged to uphold the
Constitution rather than give effect to a provision of law that is inconsistent
with the Constitution. They ordered a retrial of the appellant before the High
Court of Uganda which, they held, is the court with the jurisdiction to try
offences with which the appellant was charged. The appellant had been
10 charged with the offence of robbery contrary to sections 285 and 286 (1) of
the Penal Code Act as well as the offence of murder contrary to section 188
and 189 of the Penal Code Act.

I cannot say that the Court of Appeal wholly departed from the decision of
the Supreme Court in **Constitutional Appeal No 1 of 2006 Attorney
15 General v Uganda Law Society** (supra). The Court of Appeal felt bound by
the provisions of the Constitution which is the sworn duty of all judicial
officers to uphold. The decision of the Court of Appeal rhymes with the
decision of the Supreme Court to a limited extent in that it does not exclude
the jurisdiction of military courts to try offences created under the UPDF Act.
20 It only excludes the UPDF military courts from trying offences under the Penal
Code Act and any other enactment as described in section 179 of the UPDF
Act.

I must say that the Constitutional Court is not bound by the decisions of the
Court of Appeal sitting in ordinary civil or criminal appeals but such a
25 decision may be persuasive. The Constitutional Court is only bound to follow
the decisions of the Supreme Court sitting on appeal in constitutional
matters having exercised jurisdiction under Article 137 of the Constitution of
the Republic of Uganda, which is a special and original jurisdiction to
determine any question as to the interpretation of the Constitution. The
30 question of the constitutionality of section 179 of the UPDF Act is therefore
open for consideration in this petition in the absence of a decision of the
Supreme Court sitting on appeal from a decision of the Constitutional Court.

5 independent and impartial tribunals established by law. Inherent in that assertion of the inconsistency of section 197 of the UPDF Act is the question of whether the court-martials are independent or impartial tribunals.

Secondly, Article 129 (1) creates courts of judicature and under Article 129 (2) of the Constitution it is provided that the Supreme Court, Court of Appeal
10 and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court.

This does not include the Constitutional Court which is specifically created under Article 137 (1) of the Constitution of the Republic of Uganda, the Tax Appeals Tribunal created under Article 152 (3) of the Constitution or even
15 Court-Martials which are created under Article 210 of the Constitution of the Republic of Uganda as I shall demonstrate hereunder. The governing words of Article 210 (b) of the Constitution of the Republic of Uganda in relation to military courts is the word "discipline" and Articles 210 provides as follows:

210. Parliament to regulate the Uganda People's Defence Forces.

20 Parliament shall make laws regulating the Uganda People's Defence Forces and, in particular, providing for –

- (a) the organs and structures of the Uganda People's Defence Forces;
- (b) recruitment, appointment, promotion, discipline and removal of members of the Uganda People's Defence Forces and ensuring that members of the Uganda
25 People's Defence Forces are recruited from every district of Uganda;
- (c) terms and conditions of service of members of the Uganda People's Defence Forces; and
- (d) the deployment of troops outside Uganda.

The mandate of Parliament is specifically provided for by Articles 210 (b) and
30 includes making a law that would regulate the Uganda People's Defence Forces in the matter of discipline and removal of members of Uganda People's Defence Forces. The creation of Court-Martials falls squarely under Articles 210 (b) of the Constitution of the Republic of Uganda and specifically

5 **An Act to provide for the regulation of the Uganda People’s Defence Forces in accordance with article 210 of the Constitution, to repeal and replace the Armed Forces Pensions Act and the Uganda People’s Defence Forces Act, and for other related matters.**

10 Clearly the authority of Parliament to enact the UPDF Act 2005 was derived from Article 210 of the Constitution of the Republic of Uganda in creating the court-martials. Further, the word “court” is defined by Article 257 (d) of the Constitution of the Republic of Uganda as meaning:

15 (d) “court” means a court of judicature established by or under the authority of this Constitution

 Military Courts or Tribunals are not courts of judicature which courts of judicature are created by Parliament under Article 129 of the Constitution. In **Uganda Law Society and Jackson Karugaba v the Attorney General** (supra) it was held that members of military courts are not judicial officers. I must add that they are members of a military tribunal.

 Similarly, the Petitioner seeks a declaration that the General Court-Martial and other military courts are not courts of law under Articles 126, 129 and 210 as well as Article 257 of the Constitution of the Republic of Uganda. As noted above Article 257 defines “courts of judicature” and not “courts of law”. Moreover, it has separately defined the High Court, the Court of Appeal and the Supreme Court. It further defines “subordinate court” to mean a court subordinate to the High Court (see Articles 257 (cc) of the Constitution of the Republic of Uganda). It however does not define tribunals or courts with special jurisdiction such as the Tax Appeals Tribunal which is created under Article 152 (3) of the Constitution of the Republic of Uganda, the Land Tribunals created under Article 243 of the Constitution of the Republic of Uganda. Similarly, Article 235A of the Constitution of the Republic of Uganda,

5 Court of Appeal. The Court of Appeal further held that the right to appeal
against a decision of the Court-Martial Appeal Court created under
Regulation 20 of the **Uganda People’s Defence Forces (Court-Martial
Appeal Court) Regulations; Statutory Instrument 307 – 7** was created
ultra vires the powers of the Minister under the UPDF Act to make
10 regulations. The court noted that in the circumstances, it is only Parliament
which has authority to make the Court of Appeal an appellate court for
purposes of appeals from the decision of the Court-Martial Appeal Court.

It follows that the current state of the law is that military courts are special
tribunals meant to try persons’ subject to military law whose decisions are
15 appealable up to the General Court Martial from Division Court Martials and
from the General Court Martial to the Court-Martial Appeal Court with no
further right of appeal unless Parliament enacts a law enabling further
appeals.

Secondly, sentences of death have to be confirmed by the Supreme Court
20 under 6 of the **Law Revision (Penalties in Criminal Matters) Miscellaneous
(Amendment) Act, 2019** before any execution thereof may be carried out.
For that purpose, the decision of the Court Martial Appeal Court confirming
a sentence of death shall be forwarded to the Supreme Court for
confirmation or reduction of sentence hearing.

25 Thirdly, court-martials only try “service offences” committed by persons’
subject to military law which offences are created and defined under the
UPDF Act as interpreted by the Supreme Court in the lead judgment of
Mulenga JSC in **Constitutional Appeal No 1 of 2006, Attorney General
versus Uganda Law Society [2009] UGSC 2**. “Service offences” can only be
30 committed while subject to military law under circumstances for instance
arising when military personnel are engaged in operations such as
insurgency or a war or manoeuvres, placement or movements defined by
section 119 of the UPDF Act which I have set out above.

5 Part V of the UPDF Act provides for the Code of Conduct for Defence Forces and persons subject to military law. Secondly, Part VI deals with operational offences and offences relating to security between sections 120 – 131. Similarly, sections 132 – 178 specifically deal with other kinds of offences. Finally, section 179 deals with the *service trial* of civil offences. In the context
10 of the UPDF Act, the expression "civil offence" means an offence under any other enactment other than the UPDF Act triable by a civil court. Section 2 of the UPDF Act defines "a civil court" to mean a court of ordinary criminal jurisdiction in Uganda. On the other hand, "court-martial" means a Field Court Martial, the General Court-Martial or Court-Martial Appeal Court.
15 Section 179 of the UPDF Act has been construed by the Constitutional Court. It follows that the offences under the UPDF Act are the offences between sections 120 – 179 in strict compliance with Articles 28 (12) of the Constitution of the Republic of Uganda.

In any case section 179 of the UPDF Act not only creates a service offence
20 but also controversially allows the military court to try the person for committing any offence under the Penal Code Act or any other enactment. This seems to be restricted to service offences as defined under the UPDF Act only. A service offence under the UPDF Act, as created by section 179, is committed by a person subject to military law who commits an offence under
25 the Penal Code Act or any other enactment. Section 179 of the UPDF Act just provides that anybody who commits an offence under any other enactment commits a service offence and may be liable to the same punishment prescribed for that offence.

This does not give the Court-Martials jurisdiction to try offences under other
30 enactments generally; but gives them the right to try persons' subject to military law who have committed offences under any other enactment other than offences under the UPDF Act. By extension a person subject to military law can be tried for any offence under the laws of Uganda by the military

5 do not fall within the functions of the UPDF under Article 209 of the
Constitution which provides that:

209. Functions of the defence forces.

The functions of the Uganda Peoples' Defence Forces are—

(a) to preserve and defend the sovereignty and territorial integrity of Uganda;

10 (b) to cooperate with the civilian authority in emergency situations and in cases of
natural disasters;

(c) to foster harmony and understanding between the defence forces and civilians;
and

(d) to engage in productive activities for the development of Uganda.

15 Article 209 (a) is pertinent in that the function to preserve and defend the
sovereignty and territorial integrity of Uganda has been vested in the Uganda
Peoples Defence Forces. This includes the need to prevent the commission
of offences that can threaten national security and to enforce military law.
The creation of military courts must therefore be examined in light of the
20 functions of the Military under Article 209 of the Constitution.

With due respect to the Hon Justices of the Court of Appeal, nullification of
section 179 of the UPDF Act by stating that it is inconsistent with Article 28
(1) of the Constitution in **2nd Lt Ambrose Ogwang v Uganda** (supra) leaves
a lot to be desired because the military courts are the primary courts
25 concerned with the discipline and professionalization of the Defence Forces
as well as with security, sovereignty and territorial integrity of Uganda which
is in the public interest. Generally, speaking, Article 43 of the Constitution
provides that in the enjoyment of the rights and freedoms prescribed in the
bill of rights, no person shall prejudice the fundamental or other human
30 rights and freedoms of others or the public interest. The commission of a
service offence violates the Public Interest. Structurally, the Constitution
envisages and places a duty on the Uganda People's Defence forces to

5 rights in the protection of personal liberty under Article 23, the right to a fair hearing under Article 28 of the Constitution. In my judgment, the question of whether there has been any derogation of any fundamental rights and freedoms of any person undergoing a criminal trial before the military courts, is appealable. Such a finding cannot be based on the structure of the Military
10 Courts or how they are appointed or constituted. Military Courts are established by Parliament under Article 210 of the Constitution. The General Court Martial *inter alia* is created by section 197 of the UPDF Act. Section 197 (1) of the UPDF Act gives the composition of the General Court-Martial as comprising of the category of military officers and men mentioned therein
15 all of whom shall be appointed by the High Command for a period of one year. Secondly, section 197 (2) provides that the General Court-Martial shall have unlimited original jurisdiction under the UPDF Act and shall hear and determine all appeals referred to it from decisions of Divisional Courts Martial and Unit Disciplinary Committees.

20 Whatever the composition of a military court under section 194, 197, 198 and 199 of the UPDF Act, they are required by Article 221 of the Constitution to observe fundamental rights and freedoms inclusive of the rights enshrined in Article 28 (1) of the Constitution.

To find that the creation of military courts is a derogation of the right to
25 appear before an independent and impartial tribunal, should in my judgment, be a finding in a matter that is not structural but considered on a case-by-case basis and based for instance on objection to any particular panel convened to try a case. Similarly, the judiciary has no jurisdiction to question parliamentary wisdom except to determine whether a provision of
30 any law is inconsistent with a provision or provisions of the Constitution. Article 28 (1) of the Constitution applies to military tribunals when read together with Article 221 of the Constitution and the creation and composition of a military court under the UPDF Act does not per se infringe

5 decision in **2nd Lt Ambrose Ogwang v Uganda** (supra) is pending appeal to
the Supreme Court. If the decision in **Pte Muhumuza v Uganda** (supra)
stands the test of time, then the decision in **2nd Lt Ambrose Ogwang v**
Uganda (supra) has been rendered of no effect for want of jurisdiction. In
any case we have jurisdiction as the Constitutional Court upon a petition filed
10 to consider the matter afresh as a question as to interpretation of the
Constitution and a decision in this court can only be overturned by the
Supreme Court sitting as an appellate court in constitutional matters. The
Constitutional Court can determine it as an original court for determination
of questions as to interpretation of the Constitution under article 137 (1) of
15 the Constitution.

In the Public Service system, a person is interdicted when he or she is
undergoing a criminal trial and thereafter may face disciplinary proceedings
before the Public Service Commission after his or her conviction or acquittal.
The Public Service Commission exercises disciplinary control over civil
20 servants under Article 166 (1) (b) of the Constitution of the Republic of
Uganda.

In the final result, the Petitioners petition has majorly been overtaken by
events and all the controversies relating to interpretation of the Constitution
as presented to the court have been interpreted though issues remained for
25 clarity and the rights of the Petitioner should be enforced in light of the
various decisions I have cited above.

I further decline to issue the declarations sought in this petition in light of
the persuasive decision of the Supreme Court in **Namugerwa Hadijah v**
Attorney General; Supreme Court Civil Appeal No 04 of 2012. Most of
30 the matters sought to be interpreted as questions as to interpretation of the
Constitution have already been determined by the Constitutional Court and
the Supreme Court and more clarity may be required from the Supreme
Court as I have explained above. Save for the clarity that I have tried to set

5 maximum penalty of death is not unconstitutional by itself. The offences are created in the wisdom of Parliament.

I have further considered the ruling Annexure "B" attached to the affidavit of the petitioner objecting to the jurisdiction of the court. The court found that the applicants were defined as persons' subject to military law. Secondly, the
10 General Court Martial also relied on the decision of the Supreme Court in **Namugerwa Hadijah v Attorney General; Supreme Court Civil Appeal No 04 of 2012** in which the court considered section 119 (1) (g) of the UPDF Act.

I have had the benefit of reading the judgment of Tumwesigye JSC in **Namugerwa Hadijah v Attorney General; Supreme Court Civil Appeal
15 No. 04 of 2012** with the concurrence of 4 other Justices. Firstly, the Supreme Court was sitting in an appeal as a second appellate court hearing an appeal from the decision on the Court of Appeal in an ordinary Civil Appeal. The quorum of the Supreme Court was a panel of 5 Justices of the Supreme Court unlike in constitutional appeals where the quorum is a minimum of a panel
20 of 7 Justices of the Supreme Court.

The background to the appeal was that the appellant applied to the High Court for a writ of habeas corpus for the release of her brother Mr. Ssali Mohamed from Kigo Government prison where he had been remanded. The appellant's brother had been detained on the orders of the General Court
25 Martial. The ground of the Appellant's application to the High Court was that her brother was a civilian and the General Court Martial had no jurisdiction to try him for the offences he was charged with. The appellant's brother had been charged in Count 1 with Aggravated Robbery contrary to Section 285 and 286 (2) of the Penal Code Act and in the 2nd and 3rd Counts with unlawful
30 possession of a firearm and unlawful possession of ammunitions contrary to sections 3 (1) (2)(a) and (b) and 25 3(1) (3) and (4) of the Firearms Act respectively.

5 General Court Martial had jurisdiction to try civilians for offences outside the UPDF Act.

In **Namugerwa Hadijah v Attorney General** (supra), the Supreme Court considered section 119 (1) of the UPDF Act and particularly paragraphs (g) and (h) thereof that:

10 (g) every person, not otherwise military, who aids and abets a person subject to military law in the commission of a service offence; and

(h) Every person found in unlawful possession of –

(i) arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or

15 (ii) other classified stores as prescribed.

From the above quoted law the court found that a civilian found in unlawful possession of the above described category of firearms or classified stores is subject to military law. The Supreme Court further considered the definition of persons “subject to military law” under section 2 of the UPDF Act as well as sections 179 and 197 of the UPDF Act which sections I have
20 considered above in this judgment. The Supreme Court held that persons’ subject to military law would include civilians under section 119 (1) (g) and (h) of the UPDF Act. Tumwesigye, JSC held that:

25 in my view, any civilian who is subject to military law can commit a service offence whether under the UPDF Act or any other Act.

...


I am unable to see any exemption of civilians from the application of Section 179 of the Act once they become subject to military law under Section 119 (l) (g) and (h) of the Act. Ordinarily civilians who are not involved in fighting wars should be
30 tried by civilian courts, not military courts. Therefore, Section 119(l)(g) and (h) of the UPDF Act is rather unusual. However, the constitutionality of this Section was upheld by the Constitutional Court in **Uganda Law Society vs. Attorney General**

5 Military Courts. Secondly, he is a person subject to military law as held in **Namugerwa Hadijah v Attorney General** (supra).

In the premises, I find that the petition has no merit and is hereby dismissed with no order as to costs.

Dated at Kampala the 1st day of July 2020

10



Christopher Madrama

Justice of Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 45 OF 2016

HON. MICHAEL KABAZIGURUKA ::::::::::::::: PETITIONER

VERSUS

ATTORNEY GENERAL ::::::::::::::: RESPONDENTS

CORAM: HON. JUSTICE KENNETH KAKURU, JA/JCC

HON. JUSTICE HELLEN OBURA, JA/JCC

HON. JUSTICE STEPHEN MUSOTA, JA/JCC

HON. JUSTICE CHRISTOPHER MADRAMA JA/JCC

HON. JUSTICE REMMY KASULE, Ag. JA/JCC

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA/JCC

I have had the benefit of reading in draft the judgment by my brother Justice Christopher Madrama, JA/JCC.

He has ably set out the background to the petition and has made an exhaustive analysis of the issues for determination by the court. I agree with him that the petitioner's petition has majorly been overtaken by events and all the controversies relating to interpretation of the constitution as presented to court, have been interpreted by the Supreme Court and the Constitutional Court in **Attorney General Vs Joseph Tumushabe, Constitutional Appeal No. 3 of 2005**, **Uganda Law Society and Jackson Karugaba Vs Attorney General [2009] UGSC 1**, and **Namugerwa Hadijah vs Attorney General SC. Civil Appeal No. 04 of 2012**

Those precedents, which have been extensively discussed in Madrama JCC/JA's draft, are sufficient to dispose of this petition.

In the final result, I agree that this petition has no merit and should be dismissed with no order as to costs.

Dated this 1st day of July 2020



Stephen Musota
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Kakuru, Obura, Musota, Madrama, JJCC and Kasule, Ag, JCC)

CONSTITUTIONAL PETITION NO. 45 OF 2016

HON. MICHAEL KABAZIGURUKA:.....PETITIONER

VERSUS

ATTORNEY GENERAL:.....RESPONDENT

JUDGMENT OF JUSTICE REMMY KASULE, Ag, JA/JCC

Pursuant to Article 137(1) and (3), the petitioner moved this Court to interpret the Constitution by issuing a set of declarations. The respondent opposed the petition. Five issues were agreed upon for determination, namely:

- 1. Whether the General Court Martial established under section 197 of the Uganda Peoples Defence Forces (UPDF) is a competent Court within the meaning of Articles 28(1), 126(1), 129 (2) and (3) of the Constitution of the Republic of Uganda.**
- 2. Whether section 197 of the UPDF Act, 2006 is inconsistent with and in contravention of Articles 28(1), 126 (1), 129 (2) and (3) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under the laws of Uganda, thereby conferring jurisdiction**

into the Court martial over any criminal offence including non-disciplinary offences and over every person.

3. Whether the act of charging/arraigning the petitioner before the General Court Martial holden at Makindye was inconsistent with and in contravention with Article 28 (1) of the Constitution of the Republic of Uganda.

4. What are the remedies available to the parties.

I am satisfied from the pleadings, the submissions made for the respective parties and the Court case precedents availed that the above stated issues can only be resolved through interpretation of the Constitution. I will therefore proceed to resolve the issues.

Issue 1.

Parliament through **Section 197** of the **UPDF Act** set up the General Court Martial and provided for its composition and jurisdiction. Parliament acted pursuant to **Article 210** of the Constitution whereby Parliament is vested with power to enact laws to regulate the UPDF providing for:

“210.

(a) The organs and structures of the Uganda People’s Defence Forces

(b) Recruitment, appointment, promotion, discipline and removal of members of the Uganda People’s Defence Forces.....”

It has to be appreciated that the powers the Constitution vests in Parliament under **Article 210** is for Parliament to make laws for regulating the UPDF and in particular as regards recruitment, appointment and discipline “*of members of the Uganda Peoples Defence Forces*”.

It follows therefore that as regards discipline, Parliament can only set up Courts for handling issues of discipline as regards only members of the UPDF.

Resolution of whether **section 179** of the **UPDF Act** is consistent with **Article 210 (b)** of the Constitution becomes necessary.

Section 179 purports to vest jurisdiction in the General Court Martial (and other Military Courts) to try a person subject to military law, who, while in Uganda, does or omits to do an act which constitutes an offence under the Penal Code Act or any other enactment.

It does not necessarily follow that a person subject to military law, is invariably a member of the UPDF. This is because **section 119(1)(g)(h)(i)** and **(ii)** of the **UPDF Act** provides that every person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of a service offence, and/or every one found in unlawful possession of arms, ammunition or equipment, being the monopoly of Defence Forces or other prescribed classified stores, may be tried before the General Court Martial, regardless of whether or not he/she is a member of the UPDF. All that is necessary to be done to subject a none UPDF member to be

subjected to trial before the General Court Martial, or any other military Court, is for the prosecutor of the General Court Martial to allege in the charge sheet that one, who is a civilian and not a member of the UPDF, aided or abetted a person subject to military law in the commission of a service offence, and the categories of service offences are all those offences in the Penal Code Act or any other enactments in Uganda. In effect every crime is capable of being a service offence and every civilian can be alleged to have aided or abetted one subject to military law in the commission of any crime.

The practical effect of all this is that by operation of sections **119 (1)(g)(h)(i) and (ii)** and **179** of the **UPDF Act**, the General Court Martial and any other military Courts under the said Act, are purported to be vested with jurisdiction to try anyone in Uganda, whether a member of UPDF or not for any crime under the Penal Code Act or any other enactment. All that is required for this to happen is to allege that one, who is a civilian aided or abetted one subject to military law to commit that crime. This is grossly unconstitutional since **Article 210 (b)** restricts the General Court Martial and any other military Court to exercise jurisdiction as to discipline over only members of the UPDF.

Institution of Criminal proceedings against a civilian falls under the Constitutional mandate of the Director of Public Prosecutions (DPP), who must be qualified in law to the level of being appointed a Judge of the High Court according to **Article 120** of the Constitution.

The Director of Public Prosecutions ensures that a fair trial is subjected to an accused person by directing necessary investigations to be done by police in a suspected crime before taking a decision to place charges against any one. The DPP also ensures that criminal proceedings against any accused are instituted in the Court with competent jurisdiction and for this purpose the DPP is vested with powers of taking over or discontinuing any prosecution of criminal proceedings. The DPP also ensures that prosecution of an accused is done in accordance with the basic rights and freedoms that ensure a fair trial.

In carrying out the Constitutional duties, the DPP is not subject to direction or control by any authority and has to have regard to the public interest, the interest of the administration of Justice and the need to prevent abuse of legal process.

The DPP, by law, does not prosecute cases before the General Court Martial and other military Courts.

By the General Court Martial extending its jurisdiction to try civilians who are not members of the UPDF in respect of all offences under the Penal Code Act and other enactments, subjects ordinary civilians to criminal prosecutions that have no safeguards of a fair trial and proper administration of justice, the ensuring of which is a constitutional duty of the DPP. This is inconsistent and in contravention of the intent, purpose and overall spirit of **Articles 28(1), 126(1), and 210(b)** of the Constitution.

The issues raised in this petition call for determination whether the military Courts set up and carrying out their judicial duties under the UPDF Act have the inbuilt conditions for guaranteeing the right to an independent and impartial tribunal to those civilians that they try.

The purpose of military Courts, including the General Court Martial, is to try serving members of the armed forces for violating military law, that is the body of rules regulating the conduct of members of the Armed Forces. The major objective is to ensure discipline and good order in the Armed Forces. The military offences were also very specific and well defined and in no way did they include all offences under the Penal Code and other enactments in Uganda. See: **Sections 12,13,67,68,77 and 89** of the now repealed **Armed Forces Act, Cap. 295 Volume VIII Laws of Uganda**. It is those serving in the respective forces of the army that were the subject of jurisdiction by the military Courts. To ensure ability, independence and impartiality the Judge advocates to the military Courts were under that repealed Act being appointed by the Chief Justice of Uganda in consultation with the Attorney General of Uganda.

As of now, the law as to military Courts has changed with now the **Uganda Peoples Defence Forces Act, 2005**, being the law governing the army in Uganda.

A critical examination of this UPDF Act shows, that while the Act purports to increase the jurisdiction of military Courts to try civilians for virtually all criminal cases on the statute books in Uganda, the

same Act, however, does not provide for adequate safe guards to guarantee military Courts the institutional independence from the Executive and the chain of command of the military hierarchy. Further, the Judge advocates and the members of the military Courts do not have adequate security of tenure, and are not availed financial security by the said Act to ensure their independence and impartiality from the Executive and military hierarchy.

Article 28 (1) of the Constitution entitles one to a fair, speedy and public hearing before an independent and impartial Court or tribunal in the determination of civil rights and obligations or any criminal charge in which such a one may be involved.

Under **Article 126** of the Constitution, Judicial power is derived from the people and shall be exercised by the Courts established under the Constitution in the name of the people and in conformity with law and with the values, norms and power, aspiration of the people. In the exercise of this Judicial power, the Courts shall be independent and shall not be subject to the control, or direction of any person or authority and no person or authority shall interfere with the Courts or Judicial officers in the exercise of their judicial functions according to **Article 128** of the Constitution.

A military Court under the UPDF Act ought to comply with **Articles 28(1), 126 and 128** of the Constitution.

The right to an independent and impartial tribunal encompasses the right to a fair trial and this is embodied in **Article 28(1)** of the Constitution. At the International level, it is **Article 10** of the

Universal Declaration of Human Rights, Article 14 of the **International Covenant on Civil and Political Rights (ICCPR)** and **Article 26** of the **African Charter on Human and Peoples Rights**. The principles of fairness, openness, justice, independence and due process must be strictly observed and applied: See: **CIVIL LIBERTIES ORGANISATION & OTHERS VS NIGERIA [2001] AH RLR 75 (ACHPR 2001)**.

The Right for a tribunal carrying out judicial work to be independent ensures that justice is rendered impartially and on the basis of law. Thus those holding Judicial office in that tribunal have to uphold the Rule of law as well as the rights and freedoms of those before the tribunal without fear or favour and without interference from anyone or authority. Military Courts including the General Court Martial under the UPDF Act, must apply these principles. See: **UGANDA LAW SOCIETY & JACKSON KARUGABA Vs ATTORNEY GENERAL: CONSTITUTIONAL PETITIONS Nos 2 of 2002 and 8 of 2002**.

Section 197 of the UPDF Act provides for the composition of the General Court Martial, the members being all military personnel, appointed by the army High command.

Below the General Court Martial is the unit Disciplinary Committee of each unit of Defence Forces to try any non-capital offence. See: **Section 195** of the UPDF Act. Then there is the Division Court Martial under **section 194** of the UPDF Act.

The Court Martial Appeal Court set up under **section 199** of the UPDF Act entertains appeals from the General Court Martial. Under

section 200 of the same Act, there is the Field Court Martial that operates where it is impracticable for the offender to be tried by a Unit Disciplinary Committee or Division Court Martial.

Except for the Field Court Martial, all other military Courts under the Act have membership appointed by the High command who also convene or authorize the convening of the Courts. A Division commander may convene a Unit Disciplinary Committee. The High Command, under **section 202** of the UPDF Act, appoints the staff of Court who include the secretary, the Judge advocate or paralegal and the prosecutor.

The legal position under the UPDF Act is therefore that the High Command of the Armed Forces appoints the members, the Judge/advocate, the staff and also convenes the Courts. The High command also deploys the members of the respective military Courts to other assignments and duties as serving members of the UPDF.

The above state of the law under the current UPDF Act undermines the independence and impartiality of the military Courts set up under the Act. They are not constitutionally independent from the Executive and the military hierarchy of the armed forces represented by the High Command. The possibility that the members of the Courts will render justice in such a way as will ensure pleasing and complying with the High Command wishes, who are the one to appoint, promote and even deploy those members in the military Courts and also elsewhere in the military, where they are serving members, cannot be ruled out.

It is also most likely that both the members and the staff of the military Courts will carry out their judicial work with the intention to please the High Command for purposes of seeking promotion and other favours, since it is the High command that appoints, deploys and even pays them, both as members of the Courts and also as serving members in the Army.

The Conditions under the UPDF Act are therefore such that that the military Courts cannot be said to be independent and impartial from the executive represented by the High command. In **R V GENEREUX [1992] 1 S.C.R. 259**, the Supreme Court of Canada, dealing with a situation where the appointing authority of the military Court was also the appointing authority of the prosecutor to the Court, held that this state of affairs undermined the independence and impartiality of the Court. The Court held that an independent and impartial Judicial officer ought to carry out this role.

It is also to be appreciated that under the UPDF Act, the members of the military Court, the Judge/advocates and other staff hardly enjoy any security of tenure and/or financial security in the respective capacities they carry out Judicial work in the military Courts.

Article 144 of the Constitution provides for the tenure of office of Judicial officers. **Article 15** defines who a “Judicial Officer” is. While military Courts are not Courts of Judicature under **Article 257(d)** of the Constitution, it is a great deficiency in the UPDF Act that there are no meaningful provisions in that Act to provide for security of tenure and financial security to members and staff of the military

Courts as to period of service as a member of the military Court separate from that as a serving member of the UPDF. Indeed for the Unit Disciplinary Committee, the Act provides no tenure at all. The lack of a guaranteed security of tenure, as is the case with Judicial officers in Courts of Judicature, renders the members of the military Courts to deliver Judicial decisions that will tend to influence the High Command favourably consider to their appointments and promotions as serving members of the UPDF.

The UPDF Act is silent about the tenure of the Judge/advocate to the appropriate military Courts, as indeed it is also silent as to how, just in case it becomes necessary, a member or staff of the military Court, can be removed from office, before the term of office expires.

The security of tenure of members of the military Courts they enjoy as military officers serving in the army does not ensure their independence as Judges within the military and indeed undermines the same, because it makes them to be always answerable to the High Command of the army and thus the Executive. See: **ER FIDELL: MILITARY JUDGES AND MILITARY JUSTICE: THE PATH TO JUDICIAL INDEPENDENCE [1990] 74 JUDICATURE 18-19.** See also: **Principle 11 Basic Principles on the Independence of the Judiciary.**

With regard to financial security, the UPDF Act makes no provision for remuneration of members of the military Courts, so that their financial security is ensured. Instead, the members of the military Courts are remunerated as serving army officers and this means that

they are evaluated on that basis, for their performance, a situation that undermines their independence as Judicial officers of the military Courts.

The sum total of all the above aspects of the state of affairs of the set up of military Courts under the UPDF Act is that military Courts under the UPDF Act are not impartial in fact as well as in appearance.

Military law requires that military Courts ought to be independent and impartial in carrying out their Judicial work as military Courts.

See: **GUNES V TURKEY: APPLICATION No. 31893/96: Judgment delivered 25. 09. 2001 by the European Court.**

The beginning of the preamble to the Constitution of Uganda is to the effect that: -

“WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterized by political and constitutional instability;....”

It is a fact of Uganda’s history, both past and recent, that the political and constitutional instability that is the subject of “**Recalling**” has been due to the Army and those others, armed at the material time, overthrowing the Constitution and relying on military power to govern by suppressing the civil authorities. While the positive role of the military in the Country’s affairs of ensuring peace and safety in the Country ought to be recognized, appreciated encouraged and protected, this role must always have its origin and be carried out in strict compliance with the Constitution. This must be so, so that

every citizen of Uganda, whatever the status, or standing in the Country, does not repeat the evil of the past history of this Country whereby the army acted contrary to discipline, terrorized the citizenry by violating the people's basic rights and freedoms.

The military must enforce military discipline to those serving under the military establishment and must do so in strict compliance with the Constitution. In all other situations of governance, the military must subject itself to the civil authorities and not subject civilians to the Military Judicial system that is not independent and impartial.

As to civilians, not members of the military, it is a violation of the Constitution to vest the military Courts with Jurisdiction to try them in respect of all criminal offences under the Penal Code Act and other enactments.

Accordingly, my resolution of issues 1,2 and 3 is that the General Court Martial, is not a competent Court, to exercise jurisdiction against a civilian citizen, not a member of the Uganda Peoples Defence Forces, in respect of criminal offences under the Penal Code Act or any other enactment. By purporting to exercise such jurisdiction, the General Court Martial is contravening **Articles 28(1), 126(1)(2) and (3)** of the Constitution of the Republic of Uganda.

I also hold that the **section 2 of UPDF Act** that defines a “**service offence**” and section **119(1) (g)** that subjects to military law “**every person, not otherwise subject to military law, who aids or abets a person subject to military law in the commission of a service**”

offence;” to be contrary to **Article 210(b)** of the Constitution that confines military Courts, including the General Court Martial to exercise discipline only upon **“members of the Uganda Peoples’ Defence Forces”**.

A civilian who is alleged to aid or abet a person subject to military law does not become a serving member of the Uganda Peoples’ Defence Forces to be tried by a military Court. It is the civilian Courts that have jurisdiction over such a person. Accordingly Articles **28(1),44(c) and 210(b)** of the Constitution are being violated by **sections 2 and 119(1) (g)** of the UPDF Act.

As to issue 4, the petitioner, at the material time, was a civilian, a politician being a member of Parliament of Nakawa Municipality Kampala City in the 10th Parliament of Uganda. He was a member of a political party in opposition and served as a shadow minister for Kampala City.

On 8th June, 2016, the petitioner was arrested by police, subsequently placed under house arrest and on 28th June, 2016 he was arraigned before the General Court Martial at Makindye and charged with 22 others on two counts, count 1 being offences relating to security contrary to **section 130(1)** and count II being Treachery contrary to **section 129(a)** of the **UPDF Act**. 21 of those charged with the petitioner were members of the UPDF. The petitioner and one Lutwama Musa were the only civilians to the charges.

The particulars of the offence were that the petitioner and the others between February and June 2016 in Wakiso, Kampala and Luweero

Districts, with intent to prejudice the security of the Defence forces operating with the Defence Forces, contrived a plot to overthrow the Uganda Government by force of arms. The particulars of count II were that the petitioner and others charged with him, with the same intent and in the same plans and during the same period as in count 1, committed acts of treachery of infiltrating the Defence Forces and engaging themselves in war-like activities against the Uganda Government.

It is not stated in the charge sheet in which ways the petitioner aided or abetted the offences so as to be subjected to the military law under **section 119(1)(g)** of the **UPDF Act**.

In terms of the **Penal Code Act**, the petitioner, if he were to be charged before a civilian Court of Judicature, would be charged of Treason contrary to **section 23** of the **Penal Code Act, Cap 120**.

The Petitioner, a civilian, is thus being charged of a criminal offence, the trial of which is within the jurisdiction of the Civil Courts of Judicature under **Chapter 8 Articles 126-139, 149** and **151** of the Constitution. No reason has been availed to this Court as to why the petitioner, a civilian and a political civil leader was not charged and tried before the civil Courts of Judicature.

It is mandatory upon this Constitutional Court to defend the constitutionally guaranteed rights and freedoms of the citizenry and all those in Uganda particularly where those rights and freedoms are being undermined by parliamentary legislations. See: **Human Rights**

**Network Uganda and 4 others Vs The Attorney General:
Constitutional Petition No. 56 of 2013.**

It is my conclusion that the operation of **section 119(g)** and **h(i)** and **(ii)** of the **UPDF Act** as to persons subject to military law and **section 179: Service Trial of Civil offences**, amounts to the violation of the non derogable right to fair hearing and as such both sections are contrary to **Articles 28(1)** and **44(c)** of the Constitution.

I take the stand above on the basis of Supreme **Court Constitutional Appeal No. 1 of 2016: Attorney General vs Uganda Law Society [2009] UG S2 (20th January, 2009)**, where Mulenga JSC, (RIP) with the concurrence of the rest of the Court, held that there is no trial where the Court is not competent. While the General Court Martial is a Court lawfully created under **Section 197** of the **UPDF Act**, I have earlier on in this Judgment, while resolving issues 1,2 and 3, set out the reasons why this Court under the terms and conditions it operates in cannot carry out a fair trial in compliance with **Articles 28(1)** and **44(c)** of the Constitution.

Further, the Supreme Court, (Mulenga, JSC) (RIP), in the same case of **Attorney General vs Uganda Law Society (supra)**, stressed the import and jurisdictional basis of **Article 210(b) of the Constitution** when he held that for an offence under an Act other than the UPDF Act to be within the jurisdiction of the General Court Martial, it must have been committed by a person subject to military law. The decision of the Court of Appeal in **2nd Lt. Ambrose Ogwang Vs Uganda: Court of Appeal Criminal Appeal No. 107 of 2013 [2018]**

UGSA (8th November, 2018), though not a decision of the Constitutional Court, but one of the Court of Appeal in a Criminal Appeal, is also an appropriate persuasive decision. The Court disapproved the turning of offences under the Penal Code Act and other enactments, other than the UPDF Act, into service offences triable by the General Court Martial and thus making every civilian subject to military law.

Article 28(12) of the Constitution provides that except for contempt of Court, no person is to be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed. This Article requires that a military service offence be defined as such stressing the necessity of military service.

By the wholesale turning all offences under the Penal Code Act and those under any other enactments into military offences which **sections 2 and 179 of the UPDF Act** purport to do, and, through **section 119 (1)(g), h(i) and (ii)** of the same Act, making a very civilian subject to military law, the UPDF Act is violating **Article 28(12)** of the Constitution. The offences under the Penal Code Act and other enactments and the penalties for the same were defined and penalties prescribed as civilian and not military ones in nature as the UPDF Act is purporting to do now.

For the above reasons, I resolve issue 4 in the terms that the act of charging and/or arraigning the petitioner before the General Court Martial at Makindye is inconsistent with and in contravention of **Articles 28(1), (12) and 44(c)** of the Constitution.

I, in the main allow this petition. I make the following declarations.

1. The General Court Martial is lawfully created under **section 197** of the **UPDF Act**, as a structure of the Army to handle disciplinary offences of those subject to military law by virtue of being or having been members of the Army. The said Court however, given the terms and conditions under which it operates, has no guaranteed independence and impartiality in carrying out its judicial work as a military Court.
2. **Section 179** of the **UPDF Act**, contravenes **Articles 28(1), 126 (1), 129 (2) and (3) and 210(b)** of the Constitution by purporting to make all criminal offences under the **Penal Code Act** and other enactments to be military service offences triable by military Courts and over any civilian.
3. **Section 2** of the **UPDF Act** is contrary to **Articles 28(1) (12) and 44(c)** of the Constitution for making a service offence mean any offence under the Penal Code Act and/or any other enacted law in Uganda, thereby making every criminal offence a military service offence and every civilian liable to being prosecuted before a military Court for any one of such offences on the mere allegation that such a civilian aided or abetted a military person to commit the alleged offence.
4. The General Court Martial had no powers under the Constitution to charge/arraign or let alone subject to trial the petitioner as doing so is to act contrary to **Articles 28(1) (12) and 210 (b)** of the Constitution.

5. The petitioner was unlawfully charged and/or arraigned before the General Court Martial at Makindye in **Criminal Case No. UPDF/GCM/011/2016 on 28th June, 2016**. The said criminal proceedings are hereby quashed as regards the petitioner, Hon. Michael Kabaziguruka.

As to costs, the petitioner having been substantially successful in his petition is awarded the costs of this petition.

Dated at Kampala this.....^{1st}.....day of.....^{July}.....2021.



Remmy Kasule

Ag, Justice of Appeal/Constitutional Court.

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Kakuru, Obura, Musota, Madrama & Kasule, JJCC)

CONSTITUTIONAL PETITION NO. 45 OF 2016

10 **HON. MICHAEL KABAZIGURUKA}.....: PETITIONER**

VERSUS

ATTORNEY GENERAL.....:RESPONDENT

JUDGMENT OF HELLEN OBURA, JA/JCC

15 I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Christopher Madrama in the above Constitutional Petition. He has set out the declarations sought by this petition and its background as well as the principles for constitutional interpretation so there is no need for me to repeat them here.

Agreed Issues

20 The five agreed issues for determination by this Court are;

1. *Whether the General Court Martial established under Section 197 of the Uganda Peoples Defence Forces Act is a competent court within the meaning of Articles 28(1), 126(1), 129(2) and (3) of the Constitution of the Republic of Uganda.*

25 2. *Whether section 197 of the UPDF Act, 2006 is inconsistent with and in contravention of Articles 28(1), 126(1), 129(2) and (3) and 210 of the Constitution of the Republic of Uganda to the extent that it purports to create a court of law without Constitutional authority.*

5

3. *Whether Section 2 of the UPDF Act is inconsistent with and in contravention of Articles 28(1) and 44(c) of the Constitution of the Republic of Uganda to the extent that it defines a service offence to mean any offence under all the laws of Uganda, thereby conferring jurisdiction unto the Court Martial over any criminal offence including non-disciplinary offences and over every person.*

10

4. *Whether the act of charging/arraigning the Petitioner before the General Court Martial holden at Makindye is inconsistent with and in contravention of Article 28(1) of the Constitution of the Republic of Uganda.*

15

5. *What remedies are available to the parties?*

Submission for the Petitioner

In their written submission, counsel for the petitioner argued issues 1, 2 and 3 together for reason that they are interlinked. They pointed out that Article 28 of the Constitution requires all persons to be tried by a competent court established by law. It must also be a fair and impartial court or tribunal. They contended for the petitioner that the General Court Martial (hereinafter called the GCM) established under section 197 of the UPDF Act which was enacted pursuant to the provisions of Article 210 of the Constitution was created outside the powers assigned to Parliament by and under the Constitution. Further, that Article 210 of the Constitution provides the parameters within which Parliament was to legislate while enacting the UPDF Act and the purpose for which the said Act was to be enacted. They argued that anything beyond those parameters is *ultra vires*.

Counsel submitted that Parliament expanded its mandate under Article 210 to create a court outside the constitutional framework thus making it *ultra vires*, null and void to the extent of that inconsistency. This argument was supported by the decision of this Court in **Constitutional Petition No. 2 of 2002 and No. 8 of 2002: Uganda Law Society & Jackson Karugaba vs Attorney General** as per GM Okello JA/JCC, SG Engwau JA/JCC and C.K. Byamugisha JA/JCC at pages 225-230 of the petitioner's bundle of authorities.

5 Counsel also relied on the decision of the Court of Appeal in **2nd Lt. Ambrose Ogwang vs Uganda; Criminal Appeal No. 107 of 2013.**

Counsel argued that Article 28 (1) guarantees the right of every person charged with a criminal offence to appear before an independent and impartial tribunal established by law, which law must be in conformity with the Constitution lest it be void as in the case of
10 the UPDF Act which they contend is void to the extent of section 197 thereof purporting to establish a court outside the constitutional framework. In conclusion of their submission on issue 1, counsel submitted that courts-martial are not courts as established by law, a cardinal requirement under Article 28 of the Constitution.

As to whether the courts-martial, in particular the GCM can accord a fair hearing to the
15 petitioner as required by Article 28 of the Constitution, counsel submitted that this is not possible owing to the set-up of the court. First, it has personnel that are not qualified in law as compared to civil courts because they are appointed by the Executive as opposed to civil courts whose skills and professional qualifications are provided for. Secondly, the personnel of the GCM are an appendage of the Executive which is the prosecuting arm of
20 Government. The personnel of the GCM are serving military officers answerable to the Commander in Chief who is the President and head of the complaining Executive arm of Government. They serve at his pleasure with no security of tenure. Accordingly, counsel argued, the chain of command continues to run through the entire administration of the "court system". Counsel then contended that such cannot confer fairness to a person
25 appearing before the GCM as it offends all principles of the independence of the Judiciary envisaged under **Article 128 of the Constitution of the Republic of Uganda** and are therefore an affront to, and compromises all tenets of a fair hearing and trial.

Counsel referred this Court to a decision by the inter-American Court to of Human Rights which discussed the interplay of the jurisdiction of a trial court and the right to a fair hearing
30 in the case of **Castillo Petruzzi et al. case vs Peru, Judgment of May 30, 1999**, and held that;

5 "128..... transferring jurisdiction from civilian courts to military courts, thus allowing military courts
to try civilians accused of treason, means that the competent, independent and impartial tribunals
previously established by law is precluded from hearing these cases. In effect, military tribunals
are not the tribunals previously established by law for civilians. Having no military functions or
duties, civilians cannot engage in behaviors that violate military duties. When a military court
10 takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing
by a competent, independent and impartial tribunal previously established by law and, a fortiori,
his rights due to the process are violated. That right to due process, in turn, is intimately linked
to the very right of access to the courts.

15 129. A basic principle of the independence of the Judiciary is that every person has the right to
be heard by regular courts, following procedures previously established by law. States are not to
create "tribunal that do not use the duly established procedures of the legal process.... To
displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

Counsel pointed out that excerpts of the decision of the court have been reproduced in a
report titled; "**Human Rights in the Administration of Justice. A manual on Human**
20 **Rights for Judges, Prosecutors and Lawyers, PROFESSIONAL TRAINING SERIES**
No. 9 published by Office of the High Commissioner for Human Rights in Cooperation with
the International Bar Association which is at page 74 of the petitioner's bundle of
authorities.

It was further submitted for the petitioner that the doctrine of separation of powers is a
25 cardinal guarantee of a fair hearing in so far as trials are concerned. It is the design of our
constitution that the power to prosecute is reserved for the executive under laws made by
Parliament, the legislative arm of the state. On the other hand, hearing of cases is a strict
preserve of the judicial arm of the state. The intention is that the country trains and retains
certain professionals specialized in the administration of justice.

30 It was argued that any prosecution away from this specialized arm is a deviation from the
aspirations of the people as envisaged under Article 126 of the Constitution of the Republic
of Uganda. The people of Uganda intended that the three arms of the state strictly keep
within their constitutional bounds to avoid anarchy. This is the foundation of our

5 democracy. Counsel contended that allowing the army to take over judicial work is a vote of no confidence in the judicial arm of Government and no stretch of our constitutional jurisprudence can permit that. The decision in **2nd Lt. Ambrose Ogwang vs Uganda (supra)** was relied on to support this contention.

10 As regards the definition of ‘service offence’ in section 2 of the UPDF Act, counsel submitted that this is another offending provision that has equally been abused by the Executive. Furthermore, that this definition gives the GCM the false confidence of illegally assuming jurisdiction not conferred by law. Counsel pointed out that in determining the constitutionality of legislation, the purpose and effect of the same must be taken into account to offer useful guidance. They urged this Court to take into account the effect of
15 the wide definition of the section in deciding the constitutionality of the law. The decision of this Court in **Constitutional Petition No. 56 of 2013, Human Rights Network Uganda and 4 others vs Attorney General** was cited to bolster this position.

It was argued that the purpose and effect of section 2 of the UPDF Act clearly places it outside the parameters of the Constitution as it was designed to confer unintended
20 jurisdiction in abuse of the Constitution. Further, that the effect has been to achieve the same as it has turned out to be mischievous. Counsel stressed that this petition touches a fundamental right that is non-derogable under the Constitution. A right to determine guilt and the effect of whose defence or otherwise touches the right to life in addition to liberty. The court is duty bound to defend the same in its cardinal obligation of defending the
25 Constitution as well as its jurisdictional province from unlawful and wanton encroachment.

Counsel concluded on this point that section 2 of the UPDF Act which defines a “service offence” to include all offences under the laws of Uganda for the time being has been used to falsely confer jurisdiction onto military courts including petty penal offences.

30 Counsel for the petitioner also submitted on the constitutional role of the Office of the Director Public Prosecutions. They noted that the design of the Constitution is intended to achieve a purpose which is about orderliness and to avoid abuse of process. Further, that

5 the Office of the Director Public Prosecutions is a constitutional office which is intended to
be a sieve for penal prosecutions. It is a specialized criminal prosecution office that is
intended to take professional and fair decisions before arraignment. It cannot take over or
even direct the military prosecutions. Certain standards are attached to that office to
guarantee and safeguard rights. It is an independent office unlike the military which is
10 subject to direction. It was then contended that the interference with that office through
military prosecution destroys the root of our constitutional democracy and offends the right
to a fair hearing which does not begin with court but the decision-making process on
whether and how to prosecute.

For the reasons above, counsel urged this Court to find for the petitioner on issues 1, 2
15 and 3.

Submission for the Respondent

Counsel for the respondent prayed to respond to issues 1, 2 and 3 together as they all
relate to the constitutionality of the operations of the GCM from its establishment to its
operations of the charging or arraigning of the Petitioner before the court. They responded
20 to issue 3 on the constitutionality of section 2 of the UPDF Act separately.

On the petitioner's contention under issue 1, counsel referred to the decision of this Court
in **Davis Wesely Tusingwire vs Attorney General, Constitutional Petition No.**
02/2013; where it was held at page 6 paragraph 7 that:

25 *"In interpreting the Constitution, the rule of harmony or completeness requires that Constitutional
provisions should not be looked at in isolation. Rather, the Constitution should be looked at as a
whole with no provision destroying another but supporting each other. This is the rule of harmony,
the rule of completeness and exhaustiveness and the rule of paramountcy of the Constitution".*

Counsel also referred to paragraph 5 of the answer to the petition and paragraph 5 of the
affidavit in support of the answer to the petition deposed by Brig. Ramadhan Kyamulesire,
30 and contended that it has been long established in courts of law that the GCM is a court

5 of competent jurisdiction as provided by Article 210 (a) of the Constitution and Section 197 of the UPDF act 2005.

Counsel quoted articles 126 (1) and 129 (1) of the 1995 Constitution and contended that it is apparent that all courts of law in Uganda derive their constitutional mandate from the people and must be established by the Constitution. It was their view that this is inclusive
10 of the GCM. They then argued that following the powers derived from Article 126 (1) and 129 (1) of the Constitution, the Parliament of Uganda passed the UPDF Act which comprised of *Section 197* that established the GCM with unlimited original jurisdiction to hear and determine all appeals referred to it from the decision of Division Courts Martial and Unit Disciplinary Committees.

15 The respondent submitted that this issue was conclusively dealt with by the Supreme Court in the case of ***Attorney General vs Joseph Mushabe, SCCA No. 3 of 2005***, where Mulenga JSC observed at page 17 that;

20 *"While Parliament established the Courts Martial as organs of UPDF, the authority to vest them with judicial power must be construed as derived from this constitutional principle, for only "courts established under this Constitution" have mandate to exercise judicial power. Therefore, although courts martial are specialized system to administer justice in accordance with military law, they are part of the system of courts that are, or are deemed to be established under the Constitution to administer justice in the name of the people".*

25 It was further submitted that it is clear and apparent that the establishment of the GCM was as a result of both constitutional and statutory mandate as provided by our laws and it could not in any way be deemed to be unconstitutional. Counsel contended that the petitioner has not produced any evidence to illustrate that the creation of the GCM was carried out without any constitutional authority. On the contrary, it was established strictly
30 in accordance with the 1995 Constitution and the UPDF Act.

Counsel referred to the case of ***Caroline Turyatamba and 4 others vs Attorney General C.P 15/2006***; where this Court held, inter-alia; that the right to be heard is a fundamental

5 basic right. It is one of the cornerstones of the whole concept of a fair and impartial trial. The Principle of "hear the other side" or in Latin "Audi Alteram Partem" is fundamental and far reaching. It was then submitted that the respondent acknowledges that the right to be heard is a cardinal and basic human right as enshrined in the bill of rights of the Constitution. However, the respondent contends in paragraph 4 of the affidavit in support
10 of the answer to the petition deposed by Brigadier Ramadhan Kyamulesire that the petitioner was charged before the GCM in accordance with the law and it was premature for him to allege that his trial which was being undertaken before the GCM would be a violation of his right to a fair hearing.

According to the respondent, the petitioner was prematurely alleging that his right to be
15 heard had been breached by his trial before the GCM yet the trial had not been concluded for an evaluation of the trial process to be done in accordance with Article 28(1) and 44(c) of the 1995 Constitution. Counsel prayed that the allegation be dismissed for having been brought prematurely before this Court.

On issue 2, it was contended for the respondent that the averment in paragraph 7 of the
20 answer to the petition and paragraph 7 of the affidavit in support of the answer to the petition deposed by Brig. Ramadhan Kyamulesire illustrated that the act of charging and arraigning the petitioner before the GCM and further remanding him to Kigo Government Prison is strictly in accordance with the 1995 Constitution. Counsel quoted Articles 28 (1) and 44 (c) of the Constitution and submitted that that this issue was conclusively dealt with
25 by the Court of Appeal in *Lt. Ambrose Ogwang vs Uganda (supra)*. Further that a definitive finding was arrived at and a declaration made that Section 179 of the UPDF Act was unconstitutional due to the fact that it conferred jurisdiction on the GCM over criminal matters which should be adjudicated upon by an independent court. However, counsel added that this issue does not in any way arise in this petition given that the petitioner was
30 being charged with two counts, namely;

- (i) Offences relating to security contrary to **Section 130 (1) (f) of the UPDF Act** and

5 (ii) Treachery contrary to **Section 129 (a) of the UPDF Act.**

Counsel submitted that these are clearly offences under the UPDF Act and this mandate was bestowed on the GCM by the 1995 Constitution and by Parliament in accordance with the will of the people. They concluded that this Court does not need to consider the constitutionality of section 179 of the UPDF Act as it has already been conclusively
10 adjudicated upon and findings made on the same. However, the respondent prays that the Court finds that the offences with which the petitioner was being charged by the GCM are well within their mandate to do so and there is no constitutional contravention in doing so.

As regards the remedies available to the parties, counsel submitted that a petitioner who
15 brings a petition under Article 137 for a declaration that a law, act or omission is inconsistent with the Constitution bears the burden of proving his allegations. Counsel prayed that this Court finds that the respondent has sufficiently illustrated to the Court that the petitioner has not produced any evidence to support his averments in the petition and the same should be dismissed with costs.

20 This Court was urged to take judicial notice of Section 106 of the Evidence Act that puts the burden of proving a fact in civil proceedings when the fact is especially within the knowledge of any person, upon that very person. Rule 12 (1) of the Constitutional Court (Petitions and References) Rules which states that all evidence at the trial in favour of or against the petition shall be by way of affidavits filed in court was also referred to as well
25 as the decision in the Kenyan case of *Mwanji Stephen Muleithi vs Daniel Arap Moi, Constitutional Petition No. 625 of 2009* at page 17. Counsel then prayed that this Court dismisses this petition with costs to the respondent.

Resolution of Issues

I will consider issues 1, 2 and 3 together as argued by counsel for the petitioner so as to
30 avoid repetition. As I do so, I will start by reproducing each of the Articles of the

5 Constitution which are alleged to have been contravened. They are Articles 28 (1), 44 (c), 126 (1), 129 (1) & (3) and 210.

28. Right to a fair hearing.

10 (1) *In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*

44. Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms—

15 (c) *the right to fair hearing;*

126. Exercise of judicial power.

(1) *Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.*

20 **129. The courts of judicature.**

(2) *The Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court.*

(3) *Subject to the provisions of this Constitution, Parliament may make provision for the jurisdiction and procedure of the courts.*

25 **210. Parliament to regulate the Uganda Peoples' Defence Forces.**

Parliament shall make laws regulating the Uganda Peoples' Defence Forces and, in particular, providing for—

(a) *the organs and structures of the Uganda Peoples' Defence Forces;*

5 (b) *recruitment, appointment, promotion, **discipline and removal of members of the Uganda Peoples' Defence Forces** and ensuring that members of the Uganda Peoples' Defence Forces are recruited from every district of Uganda;*

(c) *terms and conditions of service of members of the Uganda Peoples' Defence Forces; and*

10 (d) *the deployment of troops outside Uganda.”(Emphasis added).*

I will be reproducing the relevant provisions of the UPDF Act that relate to the military courts as and when I am considering them.

The long title of the UPDF Act states thus;

15 *“An Act to provide for the regulation of the Uganda Peoples' Defence Forces in accordance with article 210 of the Constitution, to repeal and replace the Armed Forces Pensions Act and the Uganda Peoples' Defence Forces Act, and for other related matters.”*

I must emphasise that Article 210 (b), among other things, singles out discipline and removal of members of the UPDF as one of the things to be regulated by the laws Parliament was mandated to make. To that end, Part VIII of the UPDF Act on Military
20 Courts was included therein. It provides for different categories of the Military Courts, namely;

1. Trial by Authority which is done by; a Commanding Officer or Officer Commanding if an accused person is a junior officer or a militant. It is done by a Superior Authority if the accused is a senior military officer. It is a summary trial of offences specified
25 under the 8th Schedule to the UPDF Act (Sections 191, 192 and 193 of the UPDF Act).
2. Division Court Martial for each Division or equivalent formation of the Defence forces. It has unlimited original jurisdiction under the UPDF Act and consists of a chairperson who is not below the rank of Major; two senior officers; two junior
30 officers; a Political Commissar; and one non-commissioned officer, all of whom are

5 appointed by the High Command for a period of one year (Section 194 of the UPDF Act).

3. Unit Disciplinary Committee for each unit of the Defence Forces. It consists of a Chairperson who is not below the rank of captain; the Administration Officer of the unit; the Political Commissar of the unit; the Regiment Sergeant Major or Company
10 Sergeant Major of the Unit; two junior officers; and one Private. The quorum of a Unit Disciplinary Committee is five members including the Chairperson and it has powers to try any person for any non-capital offence under the UPDF Act just as it has powers to impose any sentence authorized by law (Section 195 of the Act).

4. General Court Martial which consists of two senior officers; two junior officers; a
15 Political Commissar; and one non-commissioned officer, all of whom are appointed by the High Command for a period of one year. The General Court Martial has unlimited original jurisdiction under the UPDF Act and hears and determines all appeals referred to it from decisions of Division Courts Martial and Unit Disciplinary
20 Committees. It also has revisionary powers in respect of any finding, sentence or order made or imposed by any Summary Trial Authority or Unit Disciplinary Committee, which is exercised in accordance with the provisions of Part XIII of the UPDF Act. The General Court Martial may sit at any place.

5. Court Martial Appeal Court for the Defence Forces which hears and determines all
25 appeals referred to it under the Act from decisions of the General Court Martial. It consists of a Chairperson who is an advocate qualified for appointment as a judge of the High Court of Uganda; two senior officers of the Defence Forces; and two advocates, who are members of the Defence Forces. It has a registrar who is a legally qualified person appointed by the High Command. Its quorum when
30 considering an appeal against a judgment involving a sentence of death is five members; and in any other case, it is three members including the Chairperson.

6. Another category is the Field Court Martial which consists of the Field Commander of the operation as the Chairperson and eight other members appointed in writing by the deploying authority before departure. It only operates in circumstances

5 where it is impracticable for the offender to be tried by a Unit Disciplinary
Committee or Division Court Martial (section 200).

Section 198 of the Act provides that all members of the Division Courts Martial and the
General Court Martial shall be eligible for re-appointment. Further that the High
Command shall appoint such number of reserve members as it may decide to sit on the
10 court, any of whom may be called upon to sit as a member of the court for the purpose
of constituting a full court or realizing quorum. When the court is trying an accused person
for a capital offence, all members of the court shall be present and, in any other case,
the quorum shall be five members.

Offences under the UPDF Act as set out in Part VI thereof from sections 120-178 are
15 categorized as; operational offences and offences relating to security, mutiny,
insubordination, disgraceful conduct, desertion and absence without leave, offences
relating to vessels, aircraft and vehicles, offences relating to other property, offences
relating to the process of law, arrests, service custody and military courts and
miscellaneous offences.

20 The general provisions are under sections 179-184. Section 179 provides for service trial
of civil offences. It provides as follows;

"179. Service trial of civil offences

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

25 *(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 a punishment as prescribed in
subsection (2)*

30 *(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*

5 *penalty, impose the penalty of dismissal with disgrace from the Defence Forces or any less punishment prescribed by this Act."*

Other offences are provided for under sections 180 and 184 of the UPDF Act. In my well-considered view, and for the reasons that I will discuss later in this judgment, those offences under Part VI of the UPDF Act, without the inclusion of section 179 which
10 imports offences under the Penal Code Act or any other enactment into the Act, would be the proper offences to be tried by the military courts for purposes of enforcing discipline within the military.

Section 179 is in consonance with section 2 of the UPDF Act which gives a wider definition of service offence to include offences under any other enactment in force. It
15 defines a service offence as follows;

"service offence" means an offence under this Act or any other Act for the time being in force, committed by a person while subject to military law."

The definition of "service offence" under section 2 permits military courts, including the GCM whose competence and constitutionality is being challenged by this petition, to try
20 offences under any other Act for the time being in force, committed by a person while subject to military law.

Section 119 gives a very wide definition of persons subject to military law. They include civilians who otherwise are not subject to military law but who who aid or abet a person subject to military law in the commission of a service offence; and every person found in
25 unlawful possession of arms, ammunition or equipment ordinarily being the monopoly of the Defence Forces; or other classified stores as prescribed.

Section 204 of the UPDF Act provides that;

"Nothing in this Act shall affect the jurisdiction of any civil court to try a person for an offence triable by that court."

30 I am alive to the previous decision of this Court on the status of the GCM in **Joseph Tumushabe vs Attorney General, Constitutional Petition No. 6 of 2004** where it was

5 held that it is subordinate to the High Court. That decision was confirmed by the Supreme Court on appeal vide **Attorney General vs Joseph Tumushabe, Constitutional Appeal No. 3 of 2005** where Mulenga JSC (RIP) who wrote the leading judgment with which the other Hon. Justices on the Coram concurred, held that the GCM is a subordinate court within the meaning of Article 129 (1) (d) of the Constitution. While
10 considering the proposition that a person awaiting trial in the GCM is in respect of bail, governed only by provisions of the UPDF Act and not by the constitutional provisions and in particular Article 23 (6) thereof, the Supreme Court as per Mulenga, JSC held as follows;

15 *“But more significantly, I should stress that the Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the constitution. The Constitution also commands the Government, its agencies and all persons without exception, to uphold those rights. The General Court Martial is not exempted from the constitutional command to comply with the provisions of Chapter 4 or of Article 23 (6) in particular, nor is a person on trial before military court deprived of the right to*
20 *reclaim his /her liberty through the order of habeas corpus or application for mandatory bails in appropriate circumstances.” [Emphasis added].*

That decision put much emphasis on the fact that the Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the Constitution and points out that the GCM is not
25 exempted from the constitutional command to comply with the provisions of Chapter 4.

While commenting on the three arguments advanced at this Court in that petition in support of the assertion that Article 23 (6) does not apply to military courts Mulenga JSC also stated as follows;

30 *“The statement in the forgoing excerpt from the minority judgment that the General Court Martial or any court martial is not a court of judicature established by or under the authority of the constitution, is a stark contradiction of, and difficult to reconcile with the general observation the learned Justice of Appeal made on courts martial earlier in her minority judgment she said-*

5

“They are for all intents and purposes courts of law and they administer justice like civil courts. They are set up to deal with a specific institution- the military. They are designated to deal with the internal affair of the military. They have concurrent jurisdiction with civil courts. Their jurisdiction is essentially penal and disciplinary. In this country the courts martial were set up by the Uganda People’s Defence Forces act (Cap 307)”.

10

And subsequently she concluded-

“The point I have tried to make is to show that military and civil courts are both courts of law. They are parallel to each other and converge at the Court of Appeal level. The difference is that they deal with different fact situations”.

15

*Although I do not agree that military courts are parallel to the civilian courts, I find these earlier statements by the learned justice substantially correct. Her point of departure appears to be when the learned Justice of Appeal noted, first, that prior to the 1995 Constitution there were only two courts of judicature which were saved by Article 265 (now 266) and , secondly, that the courts martial were established by the UPDF Act enacted in 1992, before the Constitution came into force. From that she deduced that the courts martial were not established by or under the authority of the Constitution. Although she rightly noted that the UPDF Act (Cap 305) which set up these courts was saved by Article 273 (now 274) of the Constitution, she does not appear to have appreciated the import of the article where it provides that the existing law so saved **“shall be construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it in conformity with this Constitution.”***

20

25

In order to bring the 1992 UPDF Act in such conformity, it is necessary to construe the provisions establishing the courts martial there-under as if they were enacted by Parliament under the authority of the Constitution. In the same way, the 1970 Magistrates Court Act is brought in such conformity by construing its provisions under the authority of the Constitution.

30

That construction is necessary because of two fundamental provisions of the constitution. First, the constitution provides in Article 126 (1)

“Judicial power is derived from the people and shall be exercised by the courts established under this constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people”.

5 This principle embraces all judicial power exercised by civilian and military courts. While
Parliament established the courts martial as organs of UPDF, the authority to vest them with
judicial power must be construed as derived from this constitutional principle, for only "courts
10 established under this Constitution" have mandate to exercise judicial power. Therefore,
although courts martial are a specialised system to administer justices in accordance with military
law, they are part of the system of courts that are, or are deemed to be, established under the
15 Constitution to administer justice in the name of the people. In my view, they are not parallel but
complimentary to the civilian court, hence the convergence at the Court of Appeal."

After discussing Article 129 (1) of the Constitution and other Articles that relate to the
establishment and jurisdiction of courts, the learned Justice of the Supreme Court then
15 held thus;

*"It follows that the General Court Martial (from which, appeals lie to Court Martial Appeal
Court), is both a subordinate court within the meaning of Article 129 (1) (d), and lower than the
High Court in the appellate hierarchy."*

A later attempt by this Court to overturn that decision in ***Uganda Law Society vs
20 Attorney General, Constitutional Petition No. 18 of 2005*** was unanimously rejected
by the Supreme Court on appeal (See ***Attorney General vs Uganda Law Society,
Supreme Court Constitutional Appeal No. 1 of 2006***). This is a settled position which,
in my view, is also not relevant to the issues in this petition.

Although this Court in the case of ***Attorney General vs Joseph Tumushabe (supra)***
25 considered the main issue framed as; "*whether Article 23 (6) (c) of the Constitution
applies to proceedings before the GCM*", on appeal, the Supreme Court as per Mulenga
JSC, observed that the substantial question in that petition was "*whether the failure to
release the detainees on bail after the constitutional time limit for remand in custody was
unconstitutional*". He however, noted that the digression from the main issue was caused
30 by the inappropriate framing of issues which led to unnecessary disentanglement of sub-
issues that was reflected in the leading judgment of Twinomujuni, JA. (See ***Attorney
General vs Joseph Tumushabe, (supra)*** as per Mulenga JSC at page 8).

I have perused the judgment of this Court in the above matter and that of the Supreme

5 Court on appeal and I am of the view that the issues in that case are distinguishable
from the ones under consideration in this petition. The context in which the status of the
GCM was discussed and conclusion made was in relation to bail. However, the holding
of the Supreme Court that the GCM is not exempted from the constitutional command
to comply with the provisions of Chapter 4 of the Constitution is pertinent in determining
10 the competence of the GCM as a court within the meaning of Articles 28(1), 126(1),
129(2) and (3) of the Constitution which is an issue in this petition.

I have also had the opportunity to review other judgments of this Court and that of the
Supreme Court on some issues which touched on the jurisdiction of the GCM to try
offences under the Penal Code Act and any other enactment in force thereby making it
15 relevant to the issues in this petition concerning sections 2 and 197 of the UPDF Act.

In ***Attorney General vs Uganda Law Society (supra)***, there were 3 grounds of appeal.
The first ground of appeal under which some observations which may be relevant to this
petition were made was formulated as follows;

20 *"That the concurrent proceedings in High Court Criminal Case No.955/2005 and Court Case
No..UPDF/Gen/075/2005 in the General Court Martial against the accused contravened
Articles 28(1) and 44(c) of the Constitution;"*

While considering that first issue, Mulenga JSC (RIP) who wrote the leading judgment
observed and held at pages 9-10 as follows;

25 *"The jurisdiction of the General Court Martial is conferred by the statute that creates it, namely
the UPDF Act, which provides in section 197 (2) –*

***"The General Court Martial shall have unlimited original jurisdiction under this
Act and shall hear and determine all appeals referred to it from decisions of
Divisional Courts Martial and Unit Disciplinary Committees." (Emphasis is
added)***

30 *That statute creates many offences, over which the General Court Martial has indisputable
jurisdiction. They are collectively referred to as service offences. The charges against the
accused persons before the General Court Martial, however, were not offences under the*

5 UPDF Act but were the offence of "Terrorism contrary to section 7(1) (b) and (2) (j) of the Anti-Terrorism Act 14 of 2002"; and in the alternative the offence of "Unlawful Possession of Firearms contrary to section 3(1), and (2) of the Firearms Act Cap 299. In support of the contention that the General Court Martial had jurisdiction over the two offences, the appellant seeks to invoke the statutory definition of "service offence". Section 2 of the UPDF Act defines
10 service offence as –

"an offence under this Act or any other Act for the time being in force committed by a person while subject to military law."

I agree that the appellant's contention is untenable. For an offence under an Act other than the UPDF Act to be within the jurisdiction of the General Court Martial, it must have been
15 committed by a person subject to military law. In the instant case it was not alleged, let alone shown, that the accused persons committed either of the two offences while they were subject to military law. Without that link neither of the two offences can be called a service offence within the meaning of the said definition.

Furthermore, the statute that created the main offence with which the accused persons were
20 charged before the General Court Martial expressly conferred jurisdiction over it in the High Court alone to the exclusion of any other court. Section 6 of the Ant-Terrorism Act provides –

"The offence of terrorism and any other offence punishable by more than ten years imprisonment under this Act are triable only by the High Court and bail in respect of those offences may be granted only by the High Court."

25 It follows that the proceedings before the General Court Martial were inherently unconstitutional irrespective of the proceedings in the High Court.

What I find relevant to this petition is the holding that the UPDF Act creates many offences, over which the GCM has indisputable jurisdiction. They are collectively referred to as service offences. My understanding of this phrase is that the Hon. Justice
30 of the Supreme Court did not have any problem with the definition of "service offences" under the UPDF Act. He then categorically asserted that the GCM has indisputable jurisdiction over them. I will revert back to this later as I make further analysis of the issues under consideration in this petition.

Another authority I have reviewed is **Uganda Law Society & Jackson Karugaba vs**

5 **Attorney (Supra)** where the brief agreed facts were inter-alia; that Private Abdalla Mohamed and Corporal James Omedio were indicted by a Field Court Martial (FCM) for the murder of an Irish Priest called Rev. Fr. Declan O'Toole and two others. On the same day, they were tried, convicted, sentenced to death and immediately executed by firing squad.

10 There were six agreed issues which this Court considered, namely;

1. *“Whether the trial and conviction of Corporal Omedio and Private Abdalla were conducted in violation of Article 28 (1) (right to a fair hearing, speedy hearing before an independent and impartial tribunal) and 44 (c) of the Constitution;*
- 15 2. *Whether the trial of Corporal Omedio and Private Abdalla were conducted in violation of Article 28 (3) (f) (right to be afforded assistance of an interpreter if the accused cannot understand the language at the trial) and 44 (c) of the Constitution;*
- 20 3. *Whether the trial of Corporal Omedio and Private Abdalla were conducted in violation of Article 28 (3) (c) (right to be given adequate time and facilities for the preparation of his or her defence and (g) (right to be afforded facilities to examine witnesses and to obtain attendance of other witnesses) and 44 (c) of the Constitution;*
- 25 4. *Whether the trial of Corporal Omedio and Private Abdalla were conducted in violation of Article 28 (3) (d) (right to be permitted to be represented by a lawyer of one’s choice and (e) (right in capital offences, to legal representation at the expense of the State) and 44 (c) of the Constitution;*
5. *Whether the execution of Corporal Omedio and Private Abdalla in violation of Article 22 (1) (right not to be deprived of life except in execution of sentence passed in a fair trial by court of competent jurisdiction and conviction and sentence have been confirmed by the highest appellate Court);*
6. *Reliefs:*
 - 30 i) *Costs,*
 - ii) *Reliefs to the deceased.”*

That petition centred on the competence of the trial of the two soldiers before the Field

5 Court Martial in terms of the constitutional commands under Article 28 of the constitution. All the five Justices that formed the Coram in that case came to a unanimous decision that the execution of the two soldiers at the orders of a Field Court Martial was illegal, unlawful and unconstitutional. This decision was arrived at following the finding and holding that the accused persons in that trial were entitled, as of right, to appeal through
10 the military court system up to the Supreme Court. However, they were not accorded opportunity to exercise that right since they were indicted, tried, convicted, sentenced to death and executed on the same day.

Although that petition specifically challenged the constitutionality of the trial of the accused persons before a Field Court Martial, Twinomujuni JA, who wrote the leading
15 judgment with which the other Justices concurred, made a general observation on pages 8-9 of the judgment while discussing the independence and impartiality of Field Court Martial in view of Article 28 (1) of the Constitution which I will later refer to in this judgment.

Now specifically turning to the 3 issues under consideration in this petition, it is pertinent
20 to note that apart from the Court Martial Appeal Court whose composition by law includes at least 3 advocates one of whom is its chairperson, there is no statutory provision requiring the rest of the categories of the military courts including the GCM to have lawyers or advocates as members. The panels therefore consist of military officers who are not necessarily lawyers. Also important to note is the fact that members of the
25 military courts are appointed by the High Command.

This state of affairs therefore presents two key issues, namely;

- 1). Whether the personnel of military courts sitting to try criminal offences other than disciplinary service offences can properly appreciate and apply the cardinal principles that underpin criminal trials.
- 30 2). Whether the personnel of military courts can impartially and independently dispense justice to the accused persons charged with criminal offences arraigned

5 before them thus meeting the standard of fairness enshrined under Article 28 (1) of the Constitution.

The second issue was in a way answered by Twinomujuni JA/JCC in the observation in ***Uganda Law Society & Jackson Karugaba vs Attorney (Supra)*** which I alluded to earlier. I find that observation very pertinent and relevant to this petition and so I will
10 quote it here in extenso. It is as follows;

"INDEPENDENCE AND IMPARTIALITY OF FIELD COURTS MARTIAL.

Article 28(1) of the Constitution demands that a person charged of an offence must have the right to a fair, speedy hearing before an independent and impartial tribunal. I shall here first deal with the independence and impartiality of Field Courts Martial. It has been contended that a
15 military court cannot be independent and impartial because they are appointed by the President as Commander-in-Chief and he appoints soldiers under his command and are duty bound by their oath of office and the nature of the military Code of Conduct and chain of command to obey him. It was submitted that in this case, he appointed the chairman and members of the court all of whom were soldiers who had to obey his commands and could not adjudicate independently
20 and impartially. It was further argued that the chairman of the court who was the commanding officer of the division in issue here was the Chief Administrator of the division and therefore, an interested party in the findings of the tribunal and therefore, as its Chairman, he was bound to influence it to arrive at a result desired by him.

The Military Courts Martial are part of the judicial system of Uganda as I discussed above. They
25 are therefore governed by article 128 of the Constitution which provides as follows:-

"128 Independence of the judiciary.

In the exercise of judicial power, the courts shall be independent and shall not be subject to the control of direction of any person or authority.

- 30 1. ***No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.***
2. ***All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.***

- 5
3. **A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.**
 4. **The administrative expenses of the judiciary, including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the judiciary, shall be charged on the Consolidated Fund.**

10

 5. **The judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.**
 6. **The salary, allowances, privileges and retirement benefits and other conciliations of service of a judicial officer or other person exercising judicial power shall not be varied to his or her disadvantage.**

15

 7. **The office of the Chief Justice, Deputy Chief Justice, Principal Judge, a Justice of the Supreme Court, a Justice of Appeal or a Judge of the High Court shall not be abolished when there is a substantive holder of that office."**

20

In order for this to be applicable to the military courts, the article would have to be modified in such a way as to give the courts independence and impartiality without compromising their military nature. The army would have a parallel judiciary with legally trained soldiers to professionally man the courts. In order to be impartial, the court must have security of tenure and other privileges enjoyed by the other judicial officers in the Uganda judiciary. It should be noted that the definition of judicial officer contained in article 151 does not exclude persons exercising judicial power in military courts. The article provides:-

25

"151 Interpretation.

In this Chapter, unless the context otherwise requires, "judicial officer" means-

- a. **a judge or any person who presides over a court or tribunal howsoever described;**
 - b. **the Chief Registrar or a registrar of a court;**
 - c. **such other person holding any office connected with a court as may be prescribed by law."**
- 30

My conclusion here is that military courts must be manned by soldier. Being appointed by the President to perform judicial functions is not of itself such a big deal as long as they are

5 *professionally trained to perform such duties and they are accorded protections and privileges as all other judicial officers in civilian courts to enable them to perform their judicial function independently and impartially. In my humble opinion, it is not possible for Uganda Military Courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate.” [Emphasis added].*

10 I cannot agree more with this observation that is based on critical analysis of the provisions of the UPDF Act vis a viz the provisions of Articles 28 (1), 128 and 151 of the Constitution.

In a bid to answer these questions I looked at the different oaths that military men and officers take as they assume office. The Oath of Allegiance that military officers and
15 militants take as they assume duty is found in the 5th Schedule to the UPDF Act. It is as follows;

“THE REPUBLIC OF UGANDA

OATH OF ALLEGIANCE

20 “I,, Swear by the almighty God/do solemnly and sincerely declare and affirm that I will be faithful to and bear true allegiance to the President and the Republic of Uganda and that I will, as in duty bound, honestly and faithfully defend him/her and the Constitution of the Republic of Uganda against all enemies, and I will observe and obey all lawful orders of the officers set over me. I promise to teach and uphold in all officers and militants that may from time to time be placed under my command good discipline,
25 bravery and trust in the Country, so help me God.

SIGNED this.....day of

.....
OFFICER/MILITANT”

I also looked at the UPDF Oaths as set out in the First Schedule to the Oaths Act Cap
30 19. It is as follows:

“I,swear that I will bear true and faithful allegiance to the President, Supreme Commander-in-Chief of the Uganda People's Defence Forces, and I will

5 *well, truly and faithfully serve the Government of the Republic of Uganda as by law established and that I will as in duty bound serve in the Uganda People's Defence Forces and go wherever ordered by air, land or sea and that I will observe and obey all commands of the Government of the Republic of Uganda as by law established and of any officer set over me even to the peril of my life (So help me God.)"*

10 It is clear from the above Oath of Allegiance that military men and officers rightfully swear that they will bear true allegiance to the President of the Republic of Uganda and to observe and obey all lawful orders of the officers set over them. Similarly, by the UPDF Oath, they rightfully swear to bear true and faithful allegiance to the President who is the Supreme Commander in Chief of the UPDF and to observe and obey all commands of
15 the Government of the Republic of Uganda as by law established and of any officer set over them even to the peril of their life.

For the purposes of performing their military duties and handling disciplinary offences as specified under Part VI of the UPDF Act, without the inclusion of section 179 I would find absolutely no problem with those oaths because the officers and men must surely
20 bear true allegiance to the President who is the Supreme Commander in Chief and observe and obey all commands. However, I find some great discomfort when I look at these oaths in light of the fact that some of these officers and men are the ones that preside over military courts which try offences under the Penal Code Act and other enactments. I am aware that before the Chairman and members of the military courts
25 and the Judge Advocate assume their respective duties in the military court they take additional oaths as provided for under regulation 33 of the Uganda Peoples' Defence Forces (Rules of Procedure) Regulations SI 307-1 and as set out in the Sixth Schedule thereto, Part II thereof (hereinafter called the courts-martials oath). I will have considered this oath which is taken by the Chairman and members of the military courts in
30 comparison to the Judicial Oath set out in the First schedule to the Oaths Act.

The oaths taken by the Chairman and members and that of the Judge Advocate are as follows;

5 "Oaths at courts-martial.

Chairman and members.

10 *I swear by Almighty God that I will well and truly try the accused/accused persons before the court according to the evidence and that I will duly administer justice according to the Uganda Peoples' Defence Forces Act, without partiality, favour or affection, and I further swear that I will not on any account at any time whatsoever disclose or discover the vote or opinion of the chairman or any member of this court-martial, unless thereunto required in due course of law. [Emphasis added].*

Judge Advocate.

15 *I swear by Almighty God that I will to the best of my ability carry out the duties of judge advocate in accordance with the Uganda Peoples' Defence Forces Act, and the regulations made under it and without partiality, favour or affection, and I further swear that I will not on any account at any time whatsoever disclose or discover the vote or opinion on any matter of the chairman or any member of this court-martial, unless thereunto required in the course of law." [Emphasis added].*

20 On the other hand, the Judicial Oath is as follows;

"I, _____, swear in the name of the Almighty God/solemnly affirm that I will well and truly exercise the judicial functions entrusted to me and will do right to all manner of people in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the laws and usage of the Republic of Uganda without fear or favour, affection or ill will. (So help me God.)"

25 It is noteworthy that unlike in the Judicial Oath, the Chairman and members of the military courts swear to administer justice not according to the Constitution but according to the UPDF Act. Notably, this is the Act under whose Fifth Schedule the chairman and members, being members of the UPDF, do swear to observe and obey all commands from any officers set over them. To my mind, the vow to truly try the accused person or persons before the court according to the evidence without partiality, favour or affection is subject to the commands the Chairman and members may receive from any officers set over them. In effect, the military courts-martial oath is completely diluted by the

5 Oath of Allegiance.

In **2nd Lt. Ambrose Ogwang vs Uganda (supra)**, the Court of Appeal while considering the independence and impartiality of the Division Court Martial in terms of Article 28 (1) of the Constitution observed as follows;

10 *"No doubt the Division Court Martial is established by law, the Uganda People Defence Forces Act, 2005. The question is whether it is independent. Independent in the above article 28 (1) can only be understood in the general constitutional architecture of separation of powers. In particular article 128 (1) of the Constitution that provides,*

'(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.'

15 *This requires that a court must be independent of the authority that brings the charges or trial. The judges of an independent court cannot be under the administrative control of the authority that brings the charges. In order to secure the independence of the courts the courts are placed under a different arm of the state known as the Judiciary with security of tenure and insulation from control of the Executive which originate*
20 *criminal charges with the exception of private prosecutions which are brought by private individuals.*

Military Courts, appointed by the High Command, are basically organs of the army intended to ensure operational efficiency and discipline of officers and militants of the Uganda Peoples Defence Forces. That is the purpose and thrust of military justice or at reason service offences
25 *are created under the Uganda Peoples Defence Forces Act under Part VI of the Act over which Military Courts exercise jurisdiction.*

Military courts are quasi-judicial bodies that must observe certain principles of law but have limited jurisdiction, similar to police disciplinary courts and other limited jurisdiction bodies. However, what is significant and of constitutional importance, in our view, is section 179 of the
30 *UPDF Act. It states:-*

'Service trial of civil offences

(1) A person subject to military law, who does or omits to do an act-

5

(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 a punishment as prescribed in subsection (2).*

10

(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.

15

The effect of this provision is to turn all criminal offences under the law of this country into service offences for persons subject to military law. Secondly the effect is profoundly transformative of military courts from being limited jurisdiction quasi-judicial bodies into general jurisdiction criminal courts for all criminal offences for persons subject to military law.

20

Courts that try, 'any criminal charge' or 'civil offences' must be independent in terms of article 28 (1) of the Constitution which military courts are not. Military courts are manned by military personnel, inclusive of the judges, the prosecutors and at times, defence counsel. The military courts are not independent of the Executive. They belong to the Executive. The charges are brought by the Army the institution to which they belong."

25 Although this is a decision of the Court of Appeal in a criminal appeal, I find the reasoning and conclusion very pertinent in determining this petition. I therefore wholly adopt it in this petition.

30 In that same regard, I have also found very instructive a passage from International Commission of Jurist publication entitled; ***Military Jurisdiction and International Law (Military Courts and Gross Human Rights Violations (Volume 1))*** by Federico Andreu-Guzman to the effect that;

"Many staunch defenders of military jurisdiction have traditionally brushed off any criticisms of it by claiming that the arguments used against it are anti-militarist. The question is not whether or not the existence of armies is justified. The crux of the matter is whether military justice can satisfy the requirements laid down in general principles and international standards that courts

5 should be independent and impartial and guarantee due process as well as compliance with the State's international obligations with regard to human rights.

The reality is that, on the whole, as far as ensuring that justice is dispensed independently and impartially is concerned, military courts do not adhere to general principles and international standards and their procedures are in breach of due process. In many countries, so-called
10 'military justice' is organizationally and operationally dependent on the executive. Military judges are often military personnel on active service who are subordinate to their respective commanders and subject to the principle of hierarchical obedience. The actions of 'military justice' are all too often responsible for numerous injustices and denying human rights."

From this analysis based on the above cited provisions of the law and the authorities, I
15 would answer the 1st question I posed above about the independence and impartiality of the military courts using the words of Twinomujuni, JA/JCC in ***Uganda Law Society & Jackson Karugaba vs Attorney (Supra)*** that it is not possible for Uganda Military Courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate.

20 On the 2nd question about competence, my answer would also be in the negative in view of the composition of the Division Court Martial, Unit Disciplinary Committee, General Court Martial and the Field Court Martial. As I mentioned earlier, there is no requirement under the UPDF Act that these courts are presided over by persons who have legal training. It is therefore inconceivable how they would try serious offences under the
25 Penal Code Act and other enactments without breaching the fundamental principles that underpin criminal trials.

My understanding of Article 210 of the Constitution and the long title of the UPDF Act gives me the impression that the UPDF Act can be likened to other Acts of Parliament that provide for regulation of forces and professions. They include, but are not limited to;

30 1. The Police Act as Amended (Cap 303) which established the Police Council with one of its functions being exercise of disciplinary control over all police officers through the police court. Section 50 of Cap 303 provides for three categories of

5 police disciplinary courts, namely; the police appeals court, regional police courts and subordinate police courts. Cap 303 elaborately provides for composition of each of the categories of the police disciplinary court just as the UPDF Act does for the military courts.

- 10 2. The Advocates Act Cap 267 (as Amended) which established the Law Council whose functions include exercising, through the medium of the Disciplinary Committee, disciplinary control over advocates and their clerks. It also provides for the composition of the Disciplinary Committee of the Law Council.
- 15 3. The Medical and Dental Practitioners Act Cap 272 which established the Medical and Dental Practitioners Council one of whose functions is to exercise disciplinary control over medical and dental practitioners.
4. The Accountants Act which established a Disciplinary Committee with a mandate to handle matters relating to the discipline of accountants.
5. Architects Registration Act which established a Disciplinary Committee to handle matters relating to the discipline of architects.

20 The respective laws that established these specialised disciplinary courts, tribunals, committees or councils restricted their functions to handling of disciplinary matters that are peculiar to their disciplines/professions. The membership of these specialised bodies are therefore drawn from members of the profession who know the rules of their trade. They need not be lawyers or judges because they handle purely disciplinary and other matters
25 that relate to their profession.

I am of the firm view that the Constituent Assembly which made the Constitution had in mind that kind of arrangement when they gave Parliament the mandate to make laws regulating the discipline of the UPDF among other things. I do not think they intended that the disciplinary court established under the laws made by Parliament would have such
30 wide mandates as to hear all offences under the Penal Code Act and any other enactment in force.

By so saying, I am by no means undermining or downplaying the key role the military plays

5 in our national security and the need for strict enforcement of discipline in its rank and file.
I am very much aware of our history of undisciplined military men who terrorized the
citizens of this nation and caused the death of many just as I am also aware of the gross
abuse of excessive powers of military tribunals which was used to resolve political issues
through trumped up charges, mock trials, condemnation of the innocent and their public
10 execution during the dark days of this country.

Both history left this country with scars that cannot be forgotten and so they must be
guarded against. It is the duty of this Court to enforce provisions of the Constitution and
ensure that the fundamental rights and freedoms enshrined therein are enhanced and
protected. I am convinced that military courts can effectively handle matters to do with
15 discipline of persons subject to military law and reserve other criminal offences under the
Penal Code Act and other enactments for the civil courts to handle without compromising
our national security.

For the above reasons, I would answer issues 1, 2 and 3 as follows;

- 20 1. That the General Court Martial established under Section 197 of the UPDF Act
is a competent quasi-judicial body with jurisdiction limited to trying military
disciplinary offences specified under Part VI of the UPDF Act and is therefore
not inconsistent with or in contravention of Articles 28(1), 126(1), 129(2) and (3)
and 210 of the Constitution of the Republic of Uganda.
- 25 2. Sections 2 and 179 of the UPDF Act that make every criminal offence a service
offence and subjects all persons to military law rendering every person to be
triable by military courts, which courts are neither independent nor impartial,
are both inconsistent with and in contravention of Articles 28 (1) and 44 (c) of
the Constitution and are null and void to that extent.

5 Before I take leave of these issues, I had earlier indicated that I would revert back to the holding of Mulenga JSC in **Attorney General vs Uganda Law Society (supra)**, that; “the UPDF Act creates many offences, over which the GCM has indisputable jurisdiction. They are collectively referred to as service offences.” I wish to respectfully observe that the provisions of the UPDF Act and the different oaths taken by officers and men in the military
10 as they assume office and those taken by the Chairman and members of the military courts in comparison with the judicial oath which I have analysed above were not considered in that judgment. I respectfully pray that when an opportunity to look into this matter again presents itself to the Supreme Court a more in depth analysis of Article 210 of the Constitution and provisions of the UPDF Act that relate to military courts be done to throw
15 more light on this matter.

Issue 4 is; **“whether the act of charging/arraigning the Petitioner before the GCM holden at Makindye is inconsistent with and in contravention of Article 28(1) of the Constitution of the Republic of Uganda.”**

Counsel for the petitioner submitted that if this Court resolves issues 1, 2, and 3 above in
20 favour of the petitioner as prayed, it would be axiomatic that the petitioner’s arraignment before the GCM, a body not legally constituted offends the provisions of the Constitution cited. Counsel relied on the decision of this Court in **Constitutional Petition No. 56 of 2013, Human Rights Network Uganda and 4 others vs the Attorney General** where Cheborion Barishaki JA/JCC cited with approval the decision in **Trop vs Dulles 356 US**
25 **(1956)** at pages 4-5, as per Earl Warren CJ who emphasized the need for the Court to defend the Constitution, in particular when it comes to the defence of the individual right threatened by a congressional legislation that must be weighed against the constitutional demands and standards.

Counsel submitted further that the petitioner, in his affidavit, highlighted the ordeal he went
30 through to access justice including his plea to have the matter referred to this Court which was denied by the GCM. A copy of the ruling of the GCM was attached to the affidavit to prove this point. Counsel contended that there are so many cases that have been decided

5 by the GCM without jurisdiction including the case of ***Lt Ambrose Ogwang vs Attorney General*** (supra) which ought to have opened the eyes of the army leadership to avoid further violation of the rights. They argued that the army is subject to civil authority and that civil authority includes this Court.

10 Further, that following the decision of the Court of Appeal in ***Lt Ambrose Ogwang vs Attorney General*** (supra), the army should have desisted forthwith, from entertaining any cases that are not disciplinary in nature and only against violation of their military code by its members. Counsel emphasized that the army cannot arraign any person, not even its officers with respect to any penal law transgression other than that of the military code of discipline.

15 Counsel buttressed their argument with the decision in ***Media Rights Agenda (on behalf of Miran Malaolu) Vs Nigeria, Communication NO. 224/98***, where the African Commission on Human and Peoples' Rights observed that;

20 *"In many African countries, Military Courts and special Tribunals exist alongside regular institutions. The purpose of Military Courts is to determine offences of a purely military nature committed by the military Personnel, while exercising this function, Military Courts are required to respect fair trial standards".*

The Commission held further that;

"Military Courts should not, in any circumstances whatsoever, have jurisdiction over civilians, similarly, special Tribunals should not try offences that fall within the jurisdiction of regular courts".

25 In reply counsel for the respondent submitted that the petitioner was charged before the GCM in accordance with the law and it was premature for him to allege that his trial which was being undertaken before the GCM would be a violation of his right to a fair hearing yet the trial had not yet been concluded. It was their contention that since the trial had not yet been concluded, the trial process could not be evaluated in terms of Article 28 (1) and
30 44 (c) of the Constitution to see if the commands therein are complied with. Counsel prayed that the petitioner's allegation be dismissed for having been brought prematurely before this Court.

- 5 The petitioner was charged and arraigned jointly with some members of the armed forces and civilian before the GCM of the offences relating to security and treachery contrary to sections 130 (1) (f) and 129 (a) of the UPDF Act respectively.

Section 129 (a) provides;

"1. **Treachery**

- 10 A person subject to military law who, for any purpose prejudicial to the security or interests of Uganda—

(a) infiltrates the Defence Forces or is an agent of a foreign power or of any force engaging in war or war-like activities against the Government;

commits the offence of treachery and is, on conviction, liable to suffer death."

- 15 Section 130 (1) (f) provides thus;

"**Section 130 Offences relating to security**

(1) A person subject to military law who—

(f) does or omits to do anything with intent to prejudice the security of the Defence Forces or forces co-operating with the Defence Forces,

- 20 commits an offence and is, on conviction, liable to suffer death."

The question of constitutionality of section 119 (1) (g) of the UPDF that defines persons subject to military law to include civilians who commit offences specified in that provision has already been interpreted by this Court and the Supreme Court.

- In ***Uganda Law Society vs Attorney General*** (supra) where this Court considered a similar issue, Mukasa Kikonyogo DCJ who wrote the leading judgment with which two other Justices in the Coram concurred held as follows at pages 11-12;

30 *"As a general rule civilians should not be tried by military courts, where the civil courts have competent jurisdiction to try them. However, in my view for the reasons stated above, joint trials of civilians and persons who commit service offences are justified in circumstances envisaged under Section 119(1) (g) of the UPDF Act. They can be competently handled by courts martial so long as the principles of the rules of natural justice and the rules of evidence and procedure*

5 were strictly observed. To use the words of Justice Mulenga, in **Attorney General Vs Major General David Tinyefuza (supra)**, “**military laws are designed with special interest of National Security**”. It is therefore, justifiable to subject any person to military law who aids or abets or is in unlawful possession of firearms or ammunitions which are the monopoly of the Army. The aforesaid evaluation has taken care of both issues 3 and 4 as they overlap.

10 In conclusion, I find that the joint trial of civilians and members of the UPDF in military courts of offences under the UPDF Act, therefore, is not inconsistent with **Articles 28(1), 126(1) and 210 of the Constitution**. In the premises the answer to both issues Nos. 3 and 4 is in the negative.”

Byamugisha JA (as she then was) in her judgment in concurrence on this issue held at page 65, as follows;

15 “The Constitution ordained civil courts with jurisdiction for the protection of human and civil rights for both civilians and members of the Defence Forces who are charged with criminal offences. The jurisdiction of military courts should not be invoked, except for the purpose of maintaining or enforcing discipline in the forces. **Therefore proceedings may be brought against a member of the Defence Forces or a civilian for a service offence if, but only if, those proceedings**

20 **can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline**. I think the military as a disciplined and professional force ought to refrain from causing unnecessary excitement and stampede in some sections of society by appearing to act or acting as if it is a law unto itself. The law and procedures under which military courts operate ought to be adhered to. They should refrain from encroaching on jurisdiction that

25 ought to be exercised exclusively by civil courts. As a result members of the Defence Forces should not lose the protection to which they are entitled by the practice and procedures of civil courts, especially the right to trial by assessors.” [Emphasis added].

On appeal to the Supreme Court vide **Attorney General vs Uganda Law Society (supra)**, Mulenga JSC while discussing jurisdiction of the GCM to try offences of terrorism and unlawful possession of firearms that were in issue in that case held;

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“In support of the contention that the General Court Martial had jurisdiction over the two offences, the appellant seeks to invoke the statutory definition of “service offence”. Section 2 of the UPDF Act defines service offence as –

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“an offence under this Act or any other Act for the time being in force committed by a person while subject to military law.”

10

I agree that the appellant's contention is untenable. For an offence under an Act other than the UPDF Act to be within the jurisdiction of the General Court Martial, it must have been committed by a person subject to military law. In the instant case it was not alleged, let alone shown, that the accused persons committed either of the two offences while they were subject to military law. Without that link neither of the two offences can be called a service offence within the meaning of the said definition. [Emphasis added].

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20

I would liken trial of civilians by military courts to trial of non-advocates by the Disciplinary Committee of the Law Council. The Advocates Act as amended by the Advocates (Amendment) Act, No. 27 of 2002 defines the word “advocate” for purpose of disciplinary proceedings under the Act to include; *“any person who carries out work of a nature normally performed by an advocate or who is entitled or who purports to act as, or pretends to be, an advocate.”* Section 64 of the Advocates Act (as amended) makes it an offence for an unqualified person to hold himself or herself out as qualified as an advocate. Those who hold out would bring themselves under the jurisdiction of the Disciplinary Committee for the purpose of disciplinary action. By that analogy, in my view, civilians who meddle into military affairs which may have far reaching effect on the national security should be called to account before the disciplinary body of the military.

25

Be that as it may, in view of my analysis and conclusion on issues 1, 2 and 3, and in light of the above authorities, in terms of section 119 (1) (g), I would put a rider to the effect that civilians may be tried jointly with soldiers before military courts, if and only if, the charge sheet clearly states that they have aided and abetted commission of the disciplinary offences specified under Part VI of the UPDF Act, without the inclusion of section 179.

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For the specific case of the petitioner, I have seen a copy of the charge sheet attached to his affidavit in support of the petition. As mentioned earlier, the petitioner was charged jointly with some members of the armed forces and civilian before the GCM of the offences relating to security and treachery contrary to sections 130 (1) (f) and 129 (a) of the UPDF

- 5 Act respectively. The particulars are that some 22 people named therein, the appellant and others still at large, between the months of February and June 2016, in diverse places in Wakiso, Kampala and Luwero Districts of Uganda, with intent to prejudice the security of the Defence Forces did contrive to plot to overthrow the Government of Uganda by force of arms.
- 10 In the ruling on the preliminary objection by the petitioner and 3 others over jurisdiction of the GCM to try them, members of the GCM agreed with the submission of counsel for one of the applicants that the persons who were allegedly aided and abetted in the commission of the offence were never disclosed in the particulars of the offence. They held as follows;
- 15 *"We agree they were not, suffice however is to say that the charge sheet indicated the co-accused as militants with their relative ranks and service numbers. This court is bound to take judicial notice of the co-accuseds' service numbers and ranks as valid and a monopoly of the defence Forces and infer that the said co-accused are subject to military law. Accordingly any act that is deemed an act aiding or abetting any of them to commit a service offence makes the aider and abatter, like the applicants, subject to military law (sic)."*
- 20 My view is that the holding of the GCM that the gaps in the charge sheet could be filled by inference is wrong. I find that the charge sheet lamped the petitioner together with the other co-accused without specifying his role in the commission of the offence as guided by this Court and the Supreme Court while interpreting section 119 (1) (g) of the UPDF Act in the case of **Attorney General vs Uganda Law Society (supra)**.
- 25 For reason of failure to specify the role of the petitioner in the commission of the offence to bring it under the ambit of section 119 (1) (g) and (h), I would resolve issue 4 by holding that the act of charging/arraigning the Petitioner before the GCM holden at Makindye was unlawful and inconsistent with and in contravention of Article 28 (1) of the Constitution of the Republic of Uganda.

30 5. What remedies are available to the parties?

On remedies, I would find that the petition has succeeded on 3 issues and partly on issue 4 as discussed above. Consequently, I would propose the following declarations;

- 5 1. That the General Court Martial established under Section 197 of the UPDF Act is a competent quasi-judicial body with jurisdiction limited to trying military disciplinary offences specified under Part VI of the UPDF Act and is therefore not inconsistent with or in contravention of Articles 28(1), 126(1), 129(2) and (3) and 210 of the Constitution of the Republic of Uganda.
- 10 2. Sections 2 and 179 of the UPDF Act that make every criminal offence a service offence and subjects all persons to military law rendering every person to be triable by military courts, which courts are neither independent nor impartial, are both inconsistent with and in contravention of Articles 28 (1) and 44 (c) of the Constitution and are null and void to that extent.
- 15 3. That civilians may be tried jointly with soldiers before military courts, if and only if, the charge sheet clearly states that they have aided and abetted commission of the disciplinary offences specified under Part VI of the UPDF Act, without the inclusion of section 179.
- 20 4. That the act of charging/arraigning the Petitioner before the GCM holden at Makindye was unlawful and inconsistent with and in contravention of Article 28 (1) of the Constitution of the Republic of Uganda.

In the premises, I would propose the following orders:

- a) This matter be referred to the High Court to determine the damages to be awarded under Article 137 (4) (b)
- 25 b) Since the 4th Issue succeeded partially, I would award 80% of the costs to the petitioner.

5 Dated at Kampala this..... day of..... 2021.

1st July



Hellen Obura

JUSTICE OF APPEAL/CONSTITUTIONAL COURT