THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. MR. JUSTICE S.G. ENGWAU, JA
HON. MR. JUSTICE A. TWINOMUJUNI, JA
HON. LADY JUSTICE C.N.B. KITUMBA, JA
HON. MR. JUSTICE S.B.K. KAVUMA, JA

CONSTITUTIONAL PETITIONS NOS.02 OF 2002
AND 08 OF 2002

1. **UGANDA LAW SOCIETY**
2. **JACKSON KARUGABA ……..PETITIONERS**

V E R S U S

THE ATTORNEY GENERAL……..RESPONDENT

JUDGMENT OF TWINOMUJUNI, JA.

[1] INTRODUCTION:

On 25th March 2002, two soldiers of the Uganda Peoples Defence Forces, were indicted, tried and executed on the same day for the murder of three civilians in Kotido District in North Eastern Uganda. The petitioners filed these two petitions seeking declarations that the entire process was unconstitutional. The petition is

supported by the affidavits of one Jackson Karugaba and a number of lawyers who are members of Uganda Law Society. The Attorney General filed an answer to the petitions which is also supported by affidavits sworn by various members of the Field Court Martial that tried the two soldiers and some advocates from the office of the respondent. The trial of the petitions was considerably delayed due to reasons which will shortly appear in the following background to the petition which were agreed at the joint Scheduling Conference in October 2007 before the Registrar of this Court.

On 11th October 2007, the petitioners and the respondent appeared before the Registrar of this Court and signed the following joint scheduling memorandum which contains a summary background of this petition and the issues to be determined by the court:-

"JOINT SCHEDULING MEMORANDUM"

Agreed Summary of Facts:

1. **On 25th March, 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.**

2. **On the same day, the two soldiers were tried, convicted, sentenced to death and immediately executed by firing squad.**

3. **The Field Court Martial that handled the trial was appointed by H.E. Yoweri Kaguta Museveni in his capacity as Chairman of the High Command. It comprised of the following:**

   i) Col. Sula Semakula - Chairman
   ii) Lt. Col. J.B. Mulindwa
   iii) Lt. Col. Patrick Kiyingi
   iv) Major Innocent Oula
   v) Major Emmanuel Kanyesigye
   vi) Captain Awas Kapel
   vii) Captain Gabriel Wamala

viii) Sgt. Kusasira

ix) Pte Kiiza Hassan

4. The following were the support staff of the FCM

a) Captain Asingura - Legal Officer

b) Lt. Eriab Mubangizi - Prosecutor

c) Captain Otuma - Secretary

5. Col. Sula Semakula the head of the FCM was the Division Commander-in-charge of the area where the alleged crime took place.

<u>Agreed Summary of status of the consolidated petitions</u>

The petitions were consolidated by order of the court.

Following the consolidation, the petitioners filed Misc. Application No.7 of 2003 seeking interim orders to stay the application of S. 92(1) (a) of the Uganda People's Defence Forces Act (Cap.307). The application was roundly dismissed by the Court on 31st March 2003 with the Court finding that there was no prima facie case and in effect prematurely disposing of the main petitions.

The petitioners then filed Constitutional Appeal No.4 of 2003 in the Supreme Court. Pending the determination of the appeal, the petitioners prayed for and were granted an interim order of stay of proceedings in the Constitutional Court. The appeal came up for hearing in the Supreme Court, where the matter was withdrawn, hence the return to the Constitutional Court for a full hearing on the merits.

<u>Points of disagreement</u>

The respondent contends that the constitutionality of the Field Court Martial was pronounced upon in Constitutional Application No.7 of 2003 (arising from the instant petitions). The appeal against the said ruling to the Supreme Court having been withdrawn, nothing further remains to be determined in these petitions.

The petitioners' response is that the Court is at liberty to depart from its earlier decision and must necessarily do so upon a full hearing of the petitions.

Agreed Issues:

1. **Whether the trial and conviction of Corporal Omedio and Private Abdalla were conducted in violation of Article 28(1) (right to a fair, speedy hearing before an independent and impartial tribunal) and 44(c) of the Constitution;**
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;**

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;**

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 ones 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 was 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: i) costs, ii) reliefs to the deceased."

At the trial, Mr. Oscar Kihika represented the first petitioner, and Mr. Philip Karugaba and Mr. Laudicilous Rwakafuzi appeared for the second petitioner. The Attorney General of Uganda was represented by Ms Nabakooza, a Senior State Attorney and Mr. Serubiri, a Senior State Attorney. Mr. Oscar Kihika argued issue No.2, Mr. Rwakafuzi presented the petitioners case on issues No.3 and 4 and Mr. Karugaba argued issues Nos 1, 5 and 6 as appear in the joint scheduling memorandum above. In this judgment, I shall only give a summary of the petitioners case as I understood it from the three counsel.

[2] **THE CASE FOR THE PETITIONERS**

The case for the petitioners is that the soldiers who were executed never received a fair trial as stipulated by articles 28 and 44 of the Constitution. It was submitted that under those articles, the soldiers were entitled to a fair, speedy hearing before an independent and impartial tribunal. The gist of the arguments is that the trial was too speedy that it was not possible to give the accused the safeguards they were entitled too. The trial took less than three hours. The accused were not given time or facilities to enable them prepare for their trial. They were not allowed to be represented by counsel of their choice or any lawyer at all. That they were not accorded services of an interpreter and were not allowed to call witnesses or to cross examine them. That all this were in breach of clear constitutional provisions contained in article 28 of the Constitution and the African Charter on Human and Peoples Rights. It was also argued that the Field Court Martial which tried the soldiers was neither independent nor impartial because its chairman was the commanding officer who was involved in investigations and the rest of the members of the Court were his junior officers who could not be expected to think independently from their commander. Counsel cited many authorities of decided cases and authors to support their submissions that the whole trial was unconstitutional and a nullity. Although the trial was completed and the sentence executed six years ago, we were invited to hold that the trial was a nullity in accordance with article 2 of the Constitutional.

The second ground for the impeachment of the military trial was that it contravened the provisions of article 22(1) of the Constitution. That article states:

> **"22 PROTECTION OF RIGHT TO LIFE**
>
> **(1) No person shall be deprived of life intentionally, except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."**

The trial and sentencing process was attacked by counsel because:-

(a) There was no fair trial [as outlined above].
(b) The court was incompetent because there existed no conditions to warrant convening of a Field Court Martial.
(c) The conviction and sentence was not confirmed by the highest appellate court, which is the Supreme Court of Uganda.

Counsel again cited local and international authorities in support of their submissions that the trial contravened article 22(1) of the Constitution. They also relied on two articles by MAKUBUYA A.N. and HENRY ONORIA which appeared in the East African Journal of Peace and Human Rights Vol. 6/2000 and Vol. 9/2003 respectively in which the learned authors discussed the right to life under article 22(1) of the Constitution. There was also an attempt by some counsel to impeach the quality of the evidence which was adduced and the procedure adopted to admit such evidence. However, since this court is not considering an appeal from the decision of the Field Court Martial, I would rather confine myself to consideration of issues of a constitutional nature which is the legitimate jurisdiction of the Constitutional Court.

[3] **THE CASE FOR THE RESPONDENT:**

In reply, Ms Nabakooza in a spirited response denied that the trial of the two soldiers had contravened article 28 of the Constitution. She referred us to the affidavit evidence of Col. Semakula, Lt. Col. Innocent Oula and Cpl. Moses Wandera who deponed that the trial was carried out in a fair manner, that the soldiers were accorded all the rights that a civil court accords to the accused persons and that certain provisional requirements under articles 28 and 22 of the Constitution do not apply to Field Court Martial, a special court designed to handle emergencies at the war front. She further submitted that the accused opted to speak in Kiswahili which request was granted. They were given opportunity to cross-examine all witnesses, and they were permitted to call witnesses in their defence which they did. As to whether their right to legal representation was granted, they did not ask to be represented by a lawyer and in any case a Field Court Martial being a special court, lawyers were not required. The court was convened to administer instant justice and that is what it did.

On whether the trial violated the provisions of article 22 of the Constitution, Ms Nabakooza had the following to say in reply:-

(a) The UPDF Act provided trial by the field Court Martial where trial by a Unit Disciplinary Committee or the Divisional Court Martial are not possible or practical. Therefore there is no right of appeal against the decision of the Field Court Martial.

(b) The Field Court Martial is a special court that should not be bogged down by the procedures under article 22(1) of the Constitution which itself in Articles 37(5) and 121(6) recognises the special nature of Field Court Martial. The framers of the Constitution never intended that article 22(1) would apply to the Field Court Martial proceedings.

Ms Nabakooza invited us to hold that the execution of the two soldiers did not violate article 22 of the Constitution of Uganda and to dismiss the petition with costs to the respondent.

[4] **RESOLUTION OF ISSUES:**

The issues for determination in this petition were agreed upon in a joint scheduling conference which took place at this court before the Registrar on 16th October 2007. Those issues have been reproduced verbatim in the first part of this judgment. In resolving the issues, I proposed to deal broadly with and to supply answers to the following questions:-

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?
4) Did the execution of the soldiers in the Kotido trial violate article 22(1) of the Constitution?
5) Are there any reliefs available to the parties to this petition or the deceased persons?

(A) LEGAL STATUS OF MILITARY COURTS

I propose to deal with the first two questions above together because they are closely related.

In the course of my eleven years service as a justice of the Constitutional Court, I have heard very senior representatives of the Attorney General argue that the Constitution does not apply to the Uganda Peoples Defence Force as it applies to other authorities and persons in Uganda. They particularly like to argue that the Constitution does not apply to the military courts martial because the Courts are not Courts of Judicature within the meaning of article 129 of the Constitution. They argue that these are special institutions that were never intended to be bound by stringent rules and procedures laid down in the Constitution. I have always held that this argument is fallacious. The majority of Justices of this Court have always maintained that the Constitution applies to all authorities and persons throughout Uganda. I was, therefore, shocked to hear the same arguments being advanced in this

petition by counsel for the respondent. Yet article 2 of the Constitution states simply and unambiguously as follows:-

> Article 2 **"SUPREMACY OF THE CONSTITUTION**
>
> **(1) This Constitution is the Supreme law of Uganda and shall have binding force on <u>all authorities and persons throughout Uganda.</u>**
>
> **(2) <u>If any law or custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency be void</u>" [Emphasis mine]**

Recently, in the case of **<u>Attorney General vs Joseph Tumushabe, Constitutional Appeal No.3 of 2005,</u>** the same arguments were raised in the Supreme Court of Uganda by the Attorney General of Uganda. In that case, the main issue was whether the bail provisions of article 23(6) of the Constitution applied to proceedings in military courts. In a unanimous decision of the Court per Mulenga, JSC, it was stated:-

> **"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 a military court deprived of the right to reclaim his/her liberty through the order of habeas corpus or application for mandatory bail in appropriate circumstances.**
>
> **I should also comment on three other arguments advanced in support of the assertion that article 23(6) does not apply to military courts. Namely that-**

- **Courts Martial are not Courts of Judicature established by or under authority of the 1995 Constitution;**
- **Parliament establishes Courts Martial as organs of the UPDF, with special bail provisions applicable to persons on trial in them; and**
- **The military courts and the civilian courts operate in two distinct and parallel systems, though they converge at the Court of Appeal"**

The learned Justice of the Supreme Court then considered at length the opinions of the majority versus that of the minority Justices of Appeal who dealt with the matter in the Constitutional Court and then concluded as follows:-

> **" 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 law and with the values, norms and aspirations of the people.'***
>
> **This principle embraces all judicial power exercised by civilian and military courts. While Parliament established the Court Martials 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 Martials are a specialised 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. In my view, they are not parallel but complementary to the civilian courts, hence the convergence at the Court of Appeal level."**

From the foregoing, it is quite clear that the Supreme Court itself supplied the answers to the two questions we are considering here. It decided that:

(a) Court Martial Courts, including Field Court Martial, which form part of Military Courts Martial system, are courts established under article 129 of the Constitution.

(b) Except in a few specified instances, the Constitution of the Republic of Uganda applies to all Military Courts in Uganda.

It also follows from the foregoing that during the trial in the Field Court Martial at Kotido, the Court was constitutionally bound to respect and apply the provisions of Chapter IV of the Constitution.

(B) THE RIGHT TO A FAIR HEARING.

The next question is whether the Field Court Martial which handled the Kotido trial accorded the accused person a fair hearing in accordance with article 28 of the Constitution. The Constitution of Uganda does not have a concise definition of the phrase "the right to a fair hearing." It is in fact not safe to purport to give an all inclusive definition of the phrase because human rights jurists all over the world have written on the subject giving wide ranging and deep analysis of the phrase so much so that it is impossible to give a short definition of it. However, under article 28 of the 1995 Constitution of Uganda, the framers of the Constitution condensed the meaning of **Right to a fair hearing as follows:-**

"28 Right to a fair hearing.

(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.

(2) ……..

(3) Every person who is charged with a criminal offence shall-

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(b) be informed immediately, in a language that the person understands, of the nature of the offence;

(c) be given adequate time and facilities for the preparation of his or her defence;

(d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;

(e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;

(f) be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial;

(g) be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

(4) ……

(5) Except with his or her consent, the trial of any person shall not take place in the absence of that person unless the person so conducts himself or herself as to render the continuance of the proceedings in the presence of that person impracticable and the court makes an order for the person to be removed and the trial to proceed in the absence of that person.

(6) A person tried for any criminal offence, or any person authorised by him or her, shall, after the judgment in respect of that offence, be entitled to a copy of the proceedings upon payment of a fee prescribed by law.

(7) No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence.

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

(9) A person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court

in the course of appeal or review proceedings relating to the conviction or acquittal.

(10) No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence.

(11) Where a person is being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person.

(12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law."

Article 128 is a package. Each and everyone of the above constitute what the right to a fair hearing means. It was never intended that this would be an exhaustive definition of the right to fair hearing. Article 45 of the Constitution provides:-

"45 <u>Human Rights and freedom additional to other rights.</u>

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned."

This clearly means that there are many other aspects of the right to a fair hearing that were not covered in article 28 of the Constitution. However, in resolving the issues in this petition, I shall restrict myself to specific aspects of the right to a fair hearing which it was contended were not accorded to the accused person in the Kotido Field Martial trial. In that regard, the contentious provisions are:-

(a) The right to a fair, speedy hearing before an independent tribunal [articles 28(1) and 44 (c) of the Constitution].

(b) The right to be afforded assistance of an interpreter if the accused cannot understand the language at the trial [articles 28(3) (f) and 44(c) of the Constitution].

(c) The right to be given adequate time and facilities for preparation of his or her defence and the right to be afforded facilitates to examine and obtain attendance of other witnesses [articles 29(3)(c), (g) and 44(c) of the Constitution]

(d) The right to be represented by a lawyer of ones choice and in capital offences, the right to legal representation at the expense of the State [Articles 28(3)(d) and 44(c) of the Constitution]

In seeking answers for this question, I must bear in mind the constitutional command contained in article two of the Constitution [supra] which enjoins this Court to declare any law or custom void if it is found to be inconsistent with or to contravene any provisions of the Constitution. I do deeply appreciate the fact that military courts are special courts and that in certain aspects, they need special provisions, especially the Field Court Martial, to enable them operate effectively and efficiently.

The UPDF is currently being operated under laws and practices which still contain colonial relics in total disregard of the Uganda Constitution. No attention was paid to this problem when drafting the 1995 Constitution. This Court has no powers to bend the Constitution in order to accommodate special needs [whether legitimate or not] of the army. It is only Parliament that has the power to amend the laws including the Constitution, to accommodate such special concerns of the army. So far, it has not done so. I must, therefore, stick to only such interpretation of the law that is consistent with the Constitution as it stands now.

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 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 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 are therefore governed by article 128 of the Constitution which provides as follows:-

"128 <u>Independence of the judiciary.</u>

(1) 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.

(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.

(3) 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.

(4) 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.

(5) 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.

(6) The judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.

(7) 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.

(8) 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."

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:-

"151 <u>Interpretation.</u>

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."

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

FAIR AND SPEEDY HEARING

The facts behind the Kotido military trial is that on the morning of the 22nd March 2002, two soldiers, Cpl James Omedoi and PTE Abdulla Muhammed were arrested for the murder of Rev. Fr. Dedan O'toole an Irish Catholic Priest and two of his companions. They were detained in a military barracks in Kotido. On the afternoon of the 25th March 2002, at exactly 12.50 pm they were indicted before a Field Court Martial presided over by Col. Sula Semakula and eight other soldiers. They were tried, convicted and three hours after their indictment, they were sentenced to death and executed by a firing squad. The issue is whether this was the FAIR AND SPEEDY HEARING envisaged in article 28(1) of the Constitution. In order to understand the meaning of this mandatory requirement, we have to look at relevant provisions in the whole Constitution, but also the entire provisions of articles 22, 28 and 44(c) of the Constitution. Can what is required to be done under those articles be accomplished in a matter of just three hours? Surely when considering the requirement of a speedy trial, speed must be measured against the requirement that the trial must be fair in all other aspects spelt out by the Constitution.

Speed must be **"reasonable"** speed measured against the overall objective of achieving a fair trial. In my opinion, this trial was not conducted in accordance with article 28(1) of the Constitution. The process was a clear contravention of that article.

THE RIGHT TO AN INTERPRETER

The record of the trial at Kotidio shows that at the beginning of the trial, the accused persons were asked the languages they preferred to use. They both stated that they preferred Kiswahili. It is true that the record does not state who was brought to interprete in Kiswahili. It does not show whether the person was sworn or not. The record shows that from the beginning to end the trial proceeded speedily without interruption up to the end of the judgment. In my judgment, though there was no 100% compliance with article 28(3) (b) of the Constitution, yet, I think there was

substantial compliance and no miscarriage of justice could have been occasioned. If the court had not complied, the accused persons would have complained. The record does not show that. I would therefore hold that the trial did not contravene article 28(3) (d) of the Constitution.

ADQUATE TIME AND FACILITIES TO PREPARE A DEFENCE

We have no information as to when (if at all) the accused persons were told of the offence they were going to be indicted on. All we know is that the indictment was read to them in court at 12.50 pm on 25th March 2003. Three hours later, the trial was over and they were dead. It seems to me that they were not accorded any time at all to prepare for their defence. This is contrary even to the provisions of the UPDF Act and the regulations governing trial procedure in military courts. I have no doubt in my mind that the Field Court martial in the Kotido trial grossly contravened article 28(3)(c) of the Constitution.

THE RIGHT TO LEGAL REPRESENTATION

Article 28(3) (e) of the Constitution categorically states that where an accused person is facing trial on a charge which carries a sentence of death or life imprisonment, he is entitled to legal representation at the expense of the State. This requirement is mandatory. A look at the proceedings of the Court Martial will reveal that the accused was not even informed that he had a right to legal representation. When the prosecution witnesses completed giving evidence, the accused would be given opportunity to cross-examine but in most cases, they had nothing to ask and yet the case had complex issues. In his article on Kotido military executions entitled: **SOLDIERING AND CONSTITUTIONAL RIGHTS IN UGANDA: THE KOTIDO MILITARY EXECUTION"** Mr. Henry Onoria, the Makerere University don, who did research on the Kotido trial discusses some of these complicated issues:-

> **"One needs only to consider the thread of evidence that was adduced before the military court to appreciate the fairness or otherwise of the trial – it included, *inter alia,* (a) footprints from scene of crime to the army detachment which linked Rev. Fr. O'Toole's killers to the army; (b)**

finding of discarded peeling of bananas that the priest had bought from a market; (c) a tee-shirt belonging to the priest was found on the person of one of the soldiers; (d) failure of the two soldiers to attend a parade called by one Sergeant Rubarekyera at the onset of the investigations; (e) failure to satisfactorily account for missing bullets issued to them and the fact that their guns had recently been fired; (f) confessions made by the two soldiers and later supposedly retracted during trial; (g) identification by a male nurse who survived the ambush, etc. Should this evidence add up to a guilty conviction? Were the footprints conclusively those of the two soldiers? How was it determined that the discarded peelings were of the same bananas and that the two soldiers were the ones who ate them and discarded the peelings: What was it that showed that the tee-shirt had not been innocently obtained and that it had been robbed? Was it determined conclusively that the missing bullets could only be explained by reference to those found on the bodies of the priest and his driver and cook? Was it ever determined under what circumstances the confessions were made given that they were supposedly retracted during the trial? More legalistically, was there forensic evidence on the footprints and the guns and bullets?

A glance at the evidence before the Field Court Martial demonstrates that it is circumstantial evidence, accomplice testimony and confessions that were later retracted- the law of evidence is clear on the matter, that these categories of evidence required corroboration. Was this aspect of the law and evidence drawn to the attention of, and appreciated by, the Court? Given that a military court is required to apply the rules of procedure and evidence in a manner that approximates those of proceedings before a civilian court, the fact that the trial before the Field Court Martial took less than three hours makes this having happened very unlikely. This only compounds the concern earlier raised about the competence in legal matters of the officers that constituted the court. On the other hand, the trial does in fact demonstrate the unlikelihood of the two soldiers being afforded adequate time and opportunity to prepare and present a defence in their trial as one of the guarantees of a fair trial."(sic)

It is not imaginable, that the accused persons who were not given even a few minutes to reflect on the indictment or the evidence against them, would be able to ask of the state witnesses any intelligent question in cross examination. No wonder then that they totally failed to cross-examine the witnesses.

This gross contravention of article 28(3) (e) of the Constitution can not be cured by the fact that there was a military legal officer present throughout the trial. The legal officer in this case was called Captain Kagoro Asingura. Dr. Henry Onoria observes:-

> **"Even if it was to be presumed that Captain Kagoro Asingura was a legal officer in terms of sub-section (b) of section 82 of the Statute, it is clear as to the role of such an officer- it is primarily to *'sit on and advise the court during its proceedings on the law and procedure.'* In effect, legal representation in this sense is not to accused soldiers – in fact, the reality is that a military court under Uganda's military law is represented twice by way of both the *'prosecutor'* and the so-called *'legal officer.'* In any case, the provisions on the legal officer apart, did the two soldiers have legal representation of their *own choice?* In light of the provisions of the NRA Statute and whatever legal representation that existed and was manifested during the trial, it can only be concluded that the right to legal representation was not adequately guaranteed as is required under the provisions of the 1995 Constitution."**

I share these sentiments and I would hold that the Kotido trial was conducted in total contravention of the provisions of article 28(3) (e) of the Constitution of Uganda. I have mentioned above that article 28 of the Constitution is a package of protections to accused persons in order to guarantee them a fair hearing. If anyone of them is denied, then the trial cannot be said to be fair. Article 44 (c) of the Constitution states that a right to a fair hearing is absolute. It must never be denied in any circumstances whatsoever. In this case the soldiers were tried and executed without according them virtually all basic human rights guaranteed by articles 28 and 44(c) of the Constitution. It was a denial of natural justice precedented only by military trials of President Idd Amin era.

[5] VIOLATION OF THE RIGHT TO LIFE

Article 22(1) of the Constitution provides:-

> **"22 Protection of Right to Life**
>
> **(1) No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court."**

The main issue is whether the Kotido trial and execution violated article 22(1) of the Constitution.

Under this heading, I propose to discuss four main matters:-

(a) Whether the accused persons had a fair trial.

(b) Whether they were tried by a court of competent jurisdiction.

(c) Whether the accused had a right of appeal.

(d) Whether their sentence was confirmed by highest courts.

FAIR TRIAL

I have discussed in this judgment at length whether the accused were accorded protections provided for under articles 28(1), 28(3) and 44 (c) of the Constitution. I came to the conclusion that the accused were denied those protections and that they were not accorded a fair hearing at all. It follows, therefore, that the answer as to whether they had a fair trial is in the negative. They did not receive a fair trial as required by articles 28, 22 and 44(c) of the Constitution.

THE COMPETENCE OF THE KOTIDO TRIAL FIELD COURT MARTIAL

Related to the issues as to whether courts martial are established by law and whether the Constitution of Uganda applies to them is whether the Field Court Martial that

conducted the Kotido trials of this petition was a court of competent jurisdiction. Under the Constitution, the word **"Court"** is defined as:-

> **"A court of judicature established by or under the authority of the Constitution."**

The phrase **competent court** is not defined in the Constitution but it is defined in Blacks Law Dictionary [8th Edition] to mean:

> **"a court that has power and authority to do a particular act; one recognised by law as possessing the right to adjudicate a controversy."**

In order to determine whether the Kotido Field Martial Court was competent court with powers to try the two soldiers on a murder charge, one needs to find out the exact extent of the powers given by the court by the law. The law applicable at the time when the soldiers were tried is the UPDF Act of 1992 where Section 78 provides:-

> **"(1) There shall be a Field Court Martial which shall consist of the field commander of the operation as the Chairperson and eight other members appointed in writing by the deploying authority before departure.**
>
> (2) **A Field Court Martial <u>shall only operate in circumstances where it is impracticable for the offender to be tried by a Unit Disciplinary Committee or Divisional Court Martial."</u> [**Emphasis mine]

In other words, <u>where it is not possible</u> for an accused to be tried by a Unit Disciplinary Committee or a Divisional Court Martial, then a Field Court Martial can be constituted to try the accused. The jurisdiction of the Committee and the Divisional Court Martial is spelt out in section 77(3) of UPDF Act in the case of Disciplinary Committees and section 80(1) of the UPDF Act in case of a Divisional Court Martial. Since the latter court has unlimited jurisdiction, then a Field Court Martial too has unlimited jurisdiction to try any offence under the UPDF Act. Murder is definitely one of them. The contentious question is whether at the time of the Kotido trial, circumstances existed such that it was not practicable for the alleged

offenders to be tried by a Unit Disciplinary Committee or a Divisional Court Martial. A Unit Disciplinary Committee has no powers to try the offence of murder but the Divisional Court Martial has the powers to do so. Was it impracticable in the circumstances of this case for the Divisional Court Martial to try the offenders? Who is competent to determine whether the requisite circumstances existed; is it subjectively the province of the appointing authority or can the matter be determined using an objective test by any other person or authority like a court of law?

After the Kotido trials, the matter was widely debated in public media and academic circles in Uganda and abroad. Below is a sample of the debate which appeared in an article entitled?

> **SOLDIERING AND CONSTITUTIONAL RIGHTS IN UGANDA: THE KOTIDO MILITARY EXECUTIONS" by Henry Onoria [supra]**
>
> **He wrote:-**
>
> **'However, the question is whether the Field Court Martial was a '*court of competent jurisdiction*" in the circumstances? As the jurisdiction of the Field Court Martial is limited to war situations and military operations, did the Karamoja disarmament exercise fall within such categories? A number of commentators have expressed doubt as to the categorization of the disarmament exercise as a war situation or military operation; given that it was in fact largely a non-combat incident. Lawrence Tumuwesigye argues thus:**
>
> > **'The operation in Karamoja… is not an operation of a nature that qualifies it to be an operational area within the meaning of the section [s.77(2) of the NRA Statute]. It could not have been the intention of the legislature that any area in which there is an operation is an operational area for the purposes of constituting a Field Court Martial… The section envisages an operation where there is an advance towards contact with the enemy on a frontline. I believe that what was obtaining in Karamoja is an internal security matter which could have been handled by the police if it disarmed partly through persuasion and partly through some**

force. That is why one should hesitate to categorize armed karimojong as enemies.'

Further, was the situation such that it was impracticable for the two soldiers to be tried by the Unit Disciplinary Committee and the Division Court Martial? Given that this was an incident involving an ambush, robbery and murder- a fact that is even admitted by the army spokesman, Major Shaban Bantazira, who regarded it as a clear case of violent robbery – it could have been referred to a civilian court or, if it warranted a military court, the other military courts with original jurisdiction. In this regard, doubts may be held as regards the Field Court Martial being a '*court of competent jurisdiction*' in the circumstances of the disarmament exercise in Karimoja."

From the evidence which was adduced at the trial, it seems the accused soldiers sneaked from the barracks in order to stage an illegal road block to extract some money from road users nearby. There is no evidence that on that particular day, a war situation or a military operation was in progress. However, the deploying authority, who was the Commander-in-Chief in this case, constituted and deployed a division under the command of Col. Sula Ssemakula to conduct a special military operation for an unspecified period. He, the Commander-in-Chief possessed better information to enable him determine the conditions that would be on the ground in Karamoja and the measures that would be required to deal with them. In that regard, he appointed a Field Court Martial in November 2001, one year before the Kotido incident, to handle all cases of indiscipline that would arise during the operation. He did this under the authority of section 78 of the Uganda Peoples' Defence Forces Act, 1992.

I think it is not possible for a person or authority [like this court] sitting in Kampala, to determine the nature of the military operation that was required in Karamoja to disarm the heavily armed war lords of Karamoja region.

In my judgment, this should be left to the military command and the appointing authority to use his good judgment in accordance with the intelligence he may be in possession of. That is what was done in the instant case and I would hold that the

Field Court Martial which handled the Kotido trial was a competent court within the meaning of article 22(1) of the Constitution of the Republic of Uganda.

RIGHT OF APPEAL

At the trial of this appeal, both counsel for the petitioners and the respondent appeared to accept the argument that the UPDF Act does not provide for a right to appeal against the decision of a Field Court Martial.

I am unable to tell precisely how they came to that conclusion. However, from the submissions of counsel Philip Karugaba, I hold the view that the impression emanated from the fact that section 78 of the UPDF Act, 1992 which created the Field Court Martial and gave it powers did not state that a decision of that court could be appeallable. It is said that there is no right of appeal as such unless that right has been specifically created by the relevant statute. This means that where a Statute grants a jurisdiction to a court, then unless the Statute states that a person aggrieved by a decision of such a court can appeal, then there is no right of appeal. This further means that there is no automatic right of appeal. This is frequently asserted in our courts as if we forget that the African Charter on Human and Peoples Rights [Banjul Charter] which was adopted on 27th June, 1981 by he OAU and which came into force on 21st October, 1986 is part and parcel of our Constitution. This is so by virtue of article 287 of the Constitution which states:-

"287 International agreements, treaties and conventions.

Where-

(a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or

(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention,

The treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it."

Article 7 of the African Charter on Human and Peoples Rights states:-

"Article 7

1. **Every individual shall have the right to have his cause heard. This comprises:-**
    - **(a) the right to an appeal to competent national organs against acts of violating fundamental rights as recognised by conventions, laws, regulations and customs in force.**
    - **(b) ……**
    - **(c) …….**
2. **……."**

I stated earlier in this judgment that article 45 [supra] of our Constitution clearly states that Chapter IV of the Constitution is not exhaustive of fundamental human rights and freedoms available to the people of Uganda. An automatic right of appeal where ones fundamental rights and freedoms have been violated is one good example. In the instant case the accused persons in the Kotido trial were entitled to a right to life guaranteed under article 22(1) of the Constitution. The right of appeal was therefore automatic. A denial of that right was clearly unconstitutional.

The denial was unlawful and unconstitutional on another ground. I do not agree that the UPDF Act of 1992 did not create a statutory right of appeal. Section 81 of the Act provides:-

"81 <u>General Court Martial</u>

(1) There shall be a General Court Martial which shall have both original and <u>appellate jurisdiction over all offences and persons under this Act."</u> [Emphasis supplied]

I emphasise that the General Court Martial has appellate jurisdiction over all **offences and persons under the UPDF Act**. In the UPDF Military Court structure, there are three inferior courts to the General Court Martial.

They are:-

(a) The Unit Disciplinary Committee.

(b) The Field Court Martial.

(c) The Divisional Court Martial.

Any decision of those three courts is appeallable to the General Court Martial as of right by virtue of section 81 of the UPDF Act.

I am unable to accept the argument that UPDF Act does not grant a right of appeal from the decision of a Field Court Martial or any other Military Court.

CONFIRMATION OF SENTENCE BY HIGHEST COURT

An argument was made before us to the effect that a Field Court Martial is a special court recognised by the Constitution of Uganda as such and therefore the provisions of article 22(1) of the Constitution did not apply to its decisions. A similar argument was advanced by the respondent in this court in **Uganda Law Society vs Attorney General Constitutional Application No.7 of 2003.** The Uganda Law Society filed a petition challenging the constitutionality of the NRA Statute No.3 of 1992 is so far as it provided for the passing of a death sentence at all or without an appeal to the Supreme Court. The application sought for an injunction to restrain the state from carrying out the death sentences until the petition was heard. The facts which gave rise to the petition were similar and on all fours with those of the Kotido trial except that the accused persons were different. The Attorney General advanced two arguments in support of his contention that a decision of a Field Court Martial is not appeallable to the Supreme Court:-

(a) Article 22 did not apply to the court because it was not a Court of Judicature.

(b) Even if it was, the court should because of articles 137(5) and 121 of the Constitution hold that that article 22(1) was never intended to apply to the court.

This court, rightly overruled the first argument that the Field Martial Court was not a court of Judicature. The court upheld the second argument that the court is exempted from the application of article 22(1) of the Constitution. This is a highly contentious decision.

The rightness of the decision in this court that a Field Court Martial is a Court of Judicature was recently confirmed by the Supreme Court in **Attorney General vs Tumushabe [supra]** which I discussed earlier in this judgment. I need not repeat what I stated there.

In upholding the argument whether a Field Court Martial is a special court exempt from the provisions of article 22(1) of the Constitution, this court stated:-

> **"The next question to resolve is whether it is a special court exempt from the provision of that article. From the provisions of section 77 of NRA State, a Field Court Martial is established for the trial of both service men and women who commit service offences in a field of operation where it is unpracticable for the offender to be tried by a Unit Disciplinary Committee or a Division Court Martial. The court is established before the soldier departs for the operations they are involved in. It is disbanded when the operation is completed. The soldiers then return to their Units or division. Its primary objective, as explained in the affidavits of the respondents, is to administer instant justice and instil discipline among the men and women at the front line. To that extent, we agree that, a Field Court Martial, is a special court which should not be bogged down by appeal procedures.** [emphasis supplied]
>
> **Article 137(5) of the Constitution also recognises the special nature of a Field Court Martial, in that if a question as to the interpretation of a provision of the Constitution arises in any proceedings before it, such a question cannot be referred to the Constitutional Court for a decision.**
>
> **Again by clause 6 of article 121 of the Constitution the provisions in that article relating to Prerogative of Mercy do not apply to convictions and sentences imposed by a Field Court Martial.**

> **It is clear from the above that the Constitution itself regard a Field Court Martial as a special court which is only established to maintain law and order and military discipline in a field of operation where to employ the normal courts structures would create problems for the field Commanders.** [emphasis supplied]
>
> **We therefore, agree with argument of Mr. Barishaki that Parliament never intended that article 22(1) would apply to Field Court Martial. We therefore think that, on the evidence before us, there is no probability that the petitions would succeed."**

With the greatest respect to my learned colleagues, I am unable to support this decision for the following reasons:-

In principle, except where the Constitution expressly exempts application of an article to any person or authority, the Constitution applies to all. In **Attorney General vs Tumushabe [supra]**, Mulenga JSC observed:-

> **"But more significantly, I should stress that the constitutional guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in circumstances that are expressly stipulated in the Constitution."**

Article 137(5) of the Constitution exempts the proceedings in the Field Court Martial from being subjected to reference of questions of a constitutional nature to the Constitutional Court. In my view, this provision is intended to ensue that proceedings which start in Military Courts remain there until they are finalised in the Court Martial Appeal Court or in case of capital offences, until they are referred to the Court of Appeal. This is logical in that it minimizes delays which would otherwise occur if cases moved from Military Courts to civilian courts and then backwards to Military Courts. I do not read this article as recognising that the Field Courts Martial as special courts that should be exempted from the application of article 22(1) of the Constitution.

Article 121 of the Constitution creates an Advisory Committee on the Prerogative of Mercy. On the advice of that Committee, the President may:-

(a) grant pardons,

(b) grant respite

(c) substitute less severe punishment,

(d) remit performance of any punishment.

This procedure, however, does not apply where the punishment, penalty, sentence or forfeiture has been imposed by a Field Court Martial. This does not mean that the President does not exercise the prerogative of mercy in those cases handled by the Field Courts Martial. He can definitely exercise it but without the intervention of the Advisory Committee on the Prerogative of Mercy.

Again, with respect, this is merely designed to expedite proceedings in cases emanating from the Field Court Martial. This does not in any way exempt the court from the mandatory application of article 22(1) of the Constitution, nor does it affect the automatic right of appeal, which I have discussed above. It does not affect the operation of the right of appeal guaranteed by section 81 of the UPDF Act.

In the result, I would hold that the accused persons in the Kotido trial were entitled, as of right, to appeal through the Military Courts system up to the Supreme Court. However, after that, the President would be entitled, if he so wished, to exercise his prerogative of mercy without the intervention of the Advisory Committee on Prerogative of Mercy. I am fortified in this holding by the provision of section 92 of the UPDF Act of 1992 [which was applicable then] which states:-

> **"92 <u>Prerogative of Mercy.</u>**
>
> **The President shall, while exercising his powers under article 121 of the constitution, be advised by members of the High Command in cases falling under this Act."**

This eliminates any role of the Committee on the Prerogative of Mercy in cases decided by military courts. Unfortunately, the execution of the soldiers in the Kotido

trial put an end to this procedure. That was in contravention of article 22(1) of the Constitution of Uganda.

[6] Remedies

The full meaning of this judgment is that the execution of No.R/A 13355 Cpl Omodio James and RA/162039 Abdalla Mohamed on 25th March 2002 at the orders of a Field Court Martial was illegal, unlawful and unconstitutional. Unfortunately it is irreversible. Mr. Philip Karugaba suggested to us that we should award a redress of shs.50 million. He does not tell us to whom that money should be paid and on what basis. The soldiers who were wronged are no more. No dependants were brought to court to support such a claim. It is not appropriate in those circumstances to award any redress.

The parties appear to have agreed that no award of costs should be made to any party.

The conclusion is that this petition is allowed. Each party will meet its own costs.

Dated this day…5th …..day of…February……2008.

Hon. Justice Amos Twinomujuni
JUSTICE OF APPEAL.

JUDGEMENT OF HON. A.E.N.MPAGI-BAHIGEINE, JA

I have read in draft the judgement of Twinomujuni JA.
I agree with his reasoning and findings. I would have nothing useful to add.

Since my Lords S.G. Engwau, C.N.B. Kitumba and S.B.K. Kavuma JJA all agree, the petition is hereby allowed as proposed by Twinomujuni JA.
Each party is to bear its own costs as this is public interest litigation.

Dated at Kampala this …05th ….day of …February….. 2009.

……..

HON. A.E.N.MPAGI-BAHIGEINE

JUSTICE OF APPEAL

JUDGMENT OF ENGWAU, JA.

I had the benefit of reading in draft the lead judgment prepared by my learned brother, Twinomujuni, JA. I fully support his reasoning and finings that the consolidated petitions ought to succeed. Each party is to bear its own costs.

Dated at Kampala this ……05th …….. day of …February….. 2009.

S.G. ENGWAU

JUSTICE OF APPEAL

JUDGEMENT OF KITUMBA, JA

I have read in draft the judgement of Twinomujuni, JA. I concur.

Dated at Kampala this……5th ...day of…February…2009.

C.N.B. Kitumba

JUSTICE COURT OF APPEAL

JUDGEMENT OF S.B.K KAVUMA, JA

I have had the benefit of reading in draft the judgement prepared by my brother Twinomujuni .A. Justice of Appeal. I agree the petition should succeed. However, I would like to make some observations, comments and propositions as will shortly follow below.

In the introduction to his judgement, Twinomujuni JA gives the background to the petition spelling out the common position adopted by the parties in their joint scheduling memorandum. The position covers the agreed facts, agreed status of the consolidated petitions, points of disagreement and the agreed issues. The Justice of Appeal also gives the representation of the parties and their respective cases. With all the above I agree and I do not have to repeat them here.

This petition having been brought under **Article 137(3)** of the Constitution seeks this Court's interpretation of the relevant provisions of the Constitution in order to resolve the agreed issues. In that regard, I find it appropriate to set down here some of the established principles of Constitutional interpretation which will guide me in the task at hand. This however, is by no means an exhaustive list of those principles.

The principles are:-

(1) The principles which govern the construction of statutes also apply to the construction of constitutional provisions. The widest construction possible in its context should be given according to the ordinary meaning of the words used and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provisions is called for.

(2) **The Republic Vs Eh Mann [1969] E.A 357 and Uganda-vs-Kabakas government [1965]EA 393**

A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given dynamic progressive and liberal or flexible interpretation, keeping in mind the ideals of the people, social economic and political-cultural values so as to extend fully the benefit of the right.

(South Dakota V North Carolina, 192 Vs 268 1940 LED 448).

(3) The entire Constitution has to be read together as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramouncy of the written Constitution **(Paul Kawanga Ssemogerere and two others Vs Attorney General, Constitutional Appeal No.1 of 2002)**

(4) Judicial power is derived from the people and shall be exercised buy courts established under the constitution in the name of the people and in conformity of with the law and with the values, norms and aspirations of the people. **(Article 126(1)** of **the Constitution of Uganda 1995)**

(5) The Constitution is the supreme Law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency **(Article 2(I) and (2) of the Constitution of Uganda 1995).**

(6) Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity.

(7) Decisions from foreign jurisdictions with similar Constitutional provisions as ours are a useful guide in the interpretation of our own Constitution.

(8) Putting it in another way and apparently in a more couple form in **Onuoha Kalu-v-the State [1998]NWLR 531**, the Supreme court of Negeria stated thus:-

> **"Although the Nigerian Courts may in appropriate cases give due regard to international jurisprudence and seek guidance, as persuasive authorities only, from the decision of the Courts of other common law jurisdictions on the interpretation and**

constructions of similar provisions of their constitutions which are in *peri materia* with the relevant provisions of the Nogerian Constitution, the court will nevertheless accord due weight to the Nigerian peculiar circumstances, the generally held norms of society, values aspirations and local conditions.

This, in my view, applies to Ugandan courts with equal force with appropriate modifications.

(9) Both purpose and effect are relevant to determine Constitutional validity of a legislative or Constitutional provision

(Attorney General Vs Salvaton Abuki, constitutional No. 1 of 1998), (sc).

In interpreting our Constitution this court must not lose sight of our chequered history. The frames of the Constitution were acutely alive to this when they stated in the preamble:-

"Recalling our history which has been characterized by political and Constitutional Instability;

Recognizing our struggles against the forces of tyranny, oppression and exploitation;

……..

……

Do hereby, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity this Constitution of the Republic of Uganda……."

In De Clerk Snot-Vs-Dn Plassis and Another [1990]6 BLR 124 at P.128, the Supreme court of South Africa recalling their own country's past chequered history of human rights abuses stated:-

"**When interpreting the Constitution and more particularly the bill of rights it has to be done against the backdrop of our chequered and repressive history in human rights field. The State by legislative and administrative means curtailed……the human rights of most of its citizens in many fields while the courts looked on powerlessly. Parliament and Executive reigned supreme. It is this malpractice which the bill of rights seeks to combat. It does so by laying down ground rules for state action which may interfere**

with the lives of its citizens. There is now a threshold which the state may not cross. <u>The courts guard the door"</u>.(emphasis added)(sic)

This case was cited with approval in **Major General David Tinyefuza-vs-Attorney General, Constitutional Appeal No. 1 of 1997 (sc).**

Bearing in mind our chequered history of political and constitutional instability and in recognition of the people of Uganda's struggles against the forces of tyranny, oppression and exploitation, I consider it a appropriate to adopt what has been termed the 'contextual approach' to the interpretation of the Constitution.

See Micheal Genereux-Vs-Her Majesty Queen [1992].S.CR.Z Per L'Heureux-Dube'J.

Though a dissenting judgement, I find the learned judge's application of the contextual approach very persuasive with regard to Uganda's Constitutional provisions and their interpretation as they relate to the Uganda Peoples Defence Forces (UPDF) as an institution and to its individual members. The approach becomes even more persuasive in the context of our recent history, a history awash with numerous atrocities committed with impunity by indispcplined personnel of a grossly indisciplined and inefficient army which frequently led t o extra judicial killings of innocent civilians.

L'Heureux-Dube'J in-R-Vs-Genereux (Supra) asserts that the contextual approach is a tenet of Constitutional interpretation which is of paramount importance.

One virtue of the contextual approach is that it recognizes that a particular right or freedom may have different values depending on the context. It attempts to bring into sharp relief the aspect of the right or freedom at stake in the case as well as the relevant aspects of any value in competition with it. It being sensitive to the reality of the dilemma posed by the particular facts, the contextual approach proves very realistic and conclusive in finding a fair and just compromise between the two competing values.

I hold the view, that invoking the contextual approach does not necessarily result in infringing any of the even most absolute rights and freedoms entrenched in our Constitution by **Article 44.**

It is also pertinent to keep in mind that this petition arose from a situation where members of the Uganda Peoples Defence Forces (UPDF), in a special operational zone involved themselves in acts of gross indiscipline which resulted into the extra judicial killing of three innocent individuals. They were, therefore, tried by a Field Court Martial Court. Speaking of

members of this institution the Supreme Court had occasion to pronounce in **Attorney General and Major General David Tinyefuza Constitutional Appeal No.1 of 1997 (sc).**

> **"The members and officers of the Armed forces are in a category of people who are different from other citizens. The Armed Forces are instruments of state equipped, disciplined and trained to exercise physical force in the interest of the State. They are subject to both civilian and military law"**

This Supreme Courts' authoritative pronouncement, in my view, categorises the army in Uganda and the personnel that serve in it as peculiar in society regulated by a legal frame work that is more strict than that which regulates the rest of society.

The Constitution therefore, mandated Parliament under **Article 210** to make provisions to regulate, by law, the UPDF. Persuant to this mandate, Parliament made the UPDF Act under which, among other things, a special court system peculiar to the UPDF was established to administer military law over persons subject thereto. It is in line with this constitutionally recognized peculiarity of the UPDF and its personnel that the contextual approach to the interpretation of the provisions of the Constitution which apply to that institution and its members becomes of paramount importance. The justification for this approach is firmly anchored into the need to ensure maximum discipline and efficiency in the army. Without this, there cannot be any guarantee that the country may not, at any point in time, slip back into the dark periods of our history where indiscipline and inefficiency in the army was the order of the day with grave consequences to society.

The existence of a military Court system complementary to the Civil Court system, staffed by members of the military who are aware of and sensitive to military concerns, even when not all of them may be professionally trained lawyers, is not necessarily in contravention of the Constitution. The existence of such a system, for purposes of enforcing discipline and efficiency in the army is very central to the aspirations of the people of Uganda and is supported by very compelling reasons.

'**Dube' .J. in R-V-Genereux,(supra) stated**;

> **"In military organizations, such as the Canadian forces, there cannot ever be a truly independent military judiciary; the reason is that the military officer must be involved in the administration of discipline at all levels. A major strength of the present military judicial system rests in the use of trained military officers, who are also legal officers, to sit on Courts Martial in judicial roles. If this**

connection were to be severed,(and true independence could only be achieved by such severance) the advantage of independence of the judge that might thereby be achieved would be more than offset by the disadvantage of the eventual loss by the judge of the military knowledge and experience which today helps him to meet his responsibility effectively. Neither the Forces nor the accused would benefit from such a separation".

It is, unquestionably desirable that all military judicial officers should be professionally trained lawyers. In Ugandans context however, such a situation can only be the ideal. The constitution, the law and other realities in society do not however always guarantee the ideal.

The Constitution itself emphasize the importance of context in numerous provisions relating to the interpretation of its provisions as illustrated by the following two examples.

Article 257, the main interpretation a Article provides;-

"257 Interpretation

(1) In this Constitution, unless the context otherwise requires:-

(a) …….

…….

(ee)……..."

(2) In this Constitution-

(a) unless the context otherwise requires,…….

(i)…….

(ii)…….

(b) .....

(3)In this Constitution unless the context otherwise requires…….

Article 151 provides:-

"151 interpretation.

In this chapter, unless the context otherwise requires,……..-

(a)……..

(b)……..

(c)…… ."

RESOULUTION OF ISSUES

I shall now proceed to consider the agreed issue in the same order as they were treated in the judgement of my brother. In resolving the issues, Justice Twinomujuni, JA, posed the following questions and provided answers thereto.

1. Is the field Court Martial a competent court established under the authority of the 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?

4. Did the execution of the soldier in the Kotido trial violate **article 22(1)** of the constitution?

5. Are there any reliefs available to the parties to this petition or the deceased persons?

I find it convenient to adopt the above questions and provide my own answers and make comments, observations and propositions where necessary.

It is now settled that Courts Martial Courts are competent courts of Judicature established under the authority of the constitution under **Article 129**. They are part of a specialized court system which administers justice in accordance with military law. It is also settled that the constitution of Uganda, applies to Courts Martial Courts just as it applies to other courts established under or under the authority of the constitution subject to specific constitutional exemptions. The Constitution is the supreme law of the land and binds these courts by virtue of the provisions of **Article 2 (1)** and **(2)** of the constitution. See also **Attorney General Vs**

Joseph Tumushabe, Constitutional Appeal No.3 of 2005 (sc). This fully answers questions (1) and (2) above.

This aspect of Courts martial Courts as a specialized system of courts to administer military law and the nature and role of the army duly recognized in **Attorney General Vs Major General Tinyefuza** (supra) of necessity, in my view, calls into play the contextual approach when considering provisions of the constitution that have a bearing to the army and the army personnel.

As to question, 3 above, there is no doubt whatsoever that the two accused persons, namely RA/13355 Omedio James and RA/62039 Pte Abdalla Mohamed in criminal case No. CR/3/SIB/02/2002 had the constitutionally protected absolute right to a fair hearing under **Articles 28** and **44(c)** of the Constitution.

As regards the independence of the Field Court Martial Court that tried the two accused persons, I am in total agreement with Justice Twinomujuni, JA, that the fact that the members of the court were appointed by the President, Commander in Chief of the UPDF and Chairman of the High command does not necessarily undermine their individual independence or that of the institution they served.

Once appointed, members of the Field Court Martial Court (FCMC) in question were independent of the appointing authority to the extent that not even their decisions required confirmation by the appointing authority. Members of the Court, ideally, should have been soldiers with legal training. However, neither the Constitution, nor the law or the realities in our society could guarantee this ideal. This is one of those areas that should seriously be examined as part of professionalizing the UPDF. In the instant case however, I find no evidence to suggest that their being non lawyers caused a miscarriage of justice. They were, according to the record, constantly guided by a legally trained legal officer who, on the basis of the record, did a good professional job.

It is not necessary, in my view, that all the protections and privileges accorded to judicial officers in the civil court system must necessarily fully apply to those who serve in the special system of military courts. There must be flexibility to accommodate the special attributes of discipline and efficiency of the military but maintaining the independence of the individual military judicial officer which really is a matter of the state of mind of the individual, and the impartiality of the military court system as an institution.

Section 88 of the National Resistance Army under which the accused person were tried (Now S201 of the UPDF Act) provided:-

"88 (1) in any military court the verdict shall be by majority opinion and when a decision is reached in that manner, it shall be binding on all members of the court concerned.

2)……"

(Reg 49(1) of the Uganda People's Defence (Rules of Procedure) Regulations provides:-

"49. Expression of opinion on finding

(1)The opinion of the Chairperson and each member as to the finding shall be given in closed court, orally and on each charge separately, and their opinion shall be given in order of seniority commencing with the junior in rank"

Section 201 of the UPDF Act is in virtually similar terms as s.88 of the now repeated NRA statute 1992.

Reg 49 (supra) governed the proceedings in the Field Court Martial Court that tried the accused persons. There is nothing on record to show that the procedure of decision making was not followed in that trial.

The members of the Field Court Martial Court that was constituted by the appointing authority were to serve until the end of the operation when the court would be disbanded. There is no evidence of involvement or interference with their duties as members of the court from any outsider, the appointing authority inclusive. Speaking for myself, therefore, I cannot say that the court did not pass the test of independence for its individual members or as a tribunal. Within the context of Uganda and its military, therefore, there was no violation of **Articles 28(I)** and **44(C)** of the constitution.

On the question of a speedy and fair hearing, again the true context of a disciplined and efficient military must not be lost sight of.

Among the cardinal principles of the army is one that the armed forces depend upon the strictest discipline in order to function efficiently and that all alleged instances of non adherence to the rules of the military need to be expeditiously dealt with within the chain of command and punishment therefor administered without undue delay. According to the affidavit evidence of Colnel Ssemakula (RIP) on record, this important aspect of the Uganda

military and its court system comes out very clearly. The Colnel stated in paragraph 8, 9, 10, 11 and 17 thus:-

8. "That I understand the workings of UPDF court martial system and in particular the Field Court Martial which is important to the discipline of soldiers in situations of operations.

9. That I know that the existence of a field Court Martial is important in instilling discipline and courage in the soldiers during operations. I also know that solders who commit offences during special operations are subjected to the Field Court Martial and punishment is carried out in public immediately after a verdict of the court to reign public confidence in UPDF's determination for good discipline and to deter soldiers who would be inclined to act in a similar manner.

10. That I know that the Field Court Martial is effective and there is a sharp contrast between the UPDF and other defunct armies prior to 1986, for the soldiers are fully aware that UPDF does not tolerate indiscipline and that acts of indiscipline would attract severe punishment.

11. That I know that a Field Court Martial sits and reaches its verdict expeditiously in its course of sitting. I also know that the reason for this kind of action is to avoid jeopardizing the momentum of the operation.

16. That I know that the Field Court Martial that tried the two accused soldiers had competent jurisdiction. I know that the trial was fair, the two accused soldiers were given a fair hearing, they appeared in person before the Field Court

Martial, they defend themselves, they called their witness and cross examined prosecution witnesses, they were informed of the nature of the offences against them and in a language of their own choice-Kiswahili and they were given adequate time and facilities for the preparation of their defences in the circumstances. A photocopy of the charge sheet and the record of proceedings are hereto attached and marked annexture "B" and "C" respectively.

17. That I know any delay in identifying and trying indisciplined and or errant soldiers and making and executing decisions during operations would be very disastrous and costly. I also know that discipline is paramount and operations are a matter of life and death."

The above evidence was largely left intact in all material aspects.

Speed in military matters is of the essence. This is so notoriously known a fact in all militaries the world over, but more appropriately with the UPDF, that even in the absence of some evidence to that effect, a court of law would safely take judicial notice of this compelling fact.

According to the record, the accused persons were arrested on the 22ndMarch 2002 for the murder of three civilians the previous day. They were indicted on the 25th March, that is three days later. There is no evidence that the accused persons were not informed of the reasons for their arrest at or immediately after, their arrest. Infact Col Ssemakula (RIP) states in paragraph 16 of his affidavit above that they were so informed.

The accused persons did not complain that the trial lasted three hours from start to sentencing. To the ordinary citizen, this may seem too much speed but again within the context of the administration and operations of the military, that presents nothing out of the ordinary. Things in the military move with that kind of speed especially in all war situations or within special operational zones which the Karamoja region was at the material time. The reason for this absolute necessity of speed in accomplishing assignments is not difficult to contemplate. Failure to act with speed may result into untold loss of life and valuable property. That is why in his affidavit, Col, Ssemakula calls it a question of life and death.

In determining whether the accused persons had a fair and speedy hearing, one should in my view, be more realistically guided by treating the trial as part of a process that started on the 21st and ended on the 25th march 2002, a period of 5 days and 5 days in military terms, especially in a special operational area, is a very long time. I would therefore, not characterize the speed at which the trial proceeded as **unreasonable.** Doing so would lead to the question as to whether that would not amount to amending the constitution by addition to **Article 28(1)** by introducing the word **'reasonable'** into it. I would, respectfully resist the temptation to appear to be doing so in apparent forgetfulness of the clear command of **Article 259** of the Constitution.

As to the right to an interpreter, I would only observe that the accused preferred Kiswahili as the language to use. The record shows they followed in detail the proceedings at the trial. As to who interpreted or whether he or she was sworn or not, these are matters that can be taken to have been properly complied with. In any case, the record of proceedings of the Field Court Martial Court show substantial compliance with the requirements of the law and no miscarriage of justice could have been occasioned to the accused persons.

On the question as to whether the accused persons had adequate time and facilities to prepare their defences, much of what I stated under the question of a fair and speedy hearing applies to this with equal force. None of the accused persons complained to court over the matter. They, in their evidence on record, confirmed they were ready for the trial. Cpl Omedio James and Pte Abdalla actually cross-examined prosecution witnesses and this comes out clearly at pages 12,13,14 and 15 of the record, **Annexture "C"** to the affidavit of Colnel Ssemakula. Cpl Omedio James, A1, called his own witness, one Pte Osirimat. Pte Abdalla opted to call none. This being not only a Courts Martial but a Field Court Martial Court, relying on the contextual approach, I find no infringement of this right of the accused persons.

On the right to legal representation, my view is that urgent steps to strengthen the legal department of the UPDF are called for so that it becomes adequately facilitated to provide legal services to soldiers that may find themselves in need of such service fully to meet the commands of the Constitution. My perusal of the record of proceedings in case No. CR/3/SIB/02/2002 shows that the legal officer was a competent officer of court who carried out his duties with remarkable skill and professionalism throughout the trial. That notwithstanding, his role cannot pass for what the constitution intended in requiring legal representation of the accused in a trial with such a grave punishment in the event of

conviction. I would caution that the Constitution cannot be said to have envisaged that in 2002, six years after its commencement, there should still be failure to meet its command in this regard. Society expects that constitutional promises, once made, should be fulfilled without undue delay. Failure to provide legal representation to the accused persons was, therefore a violation of their rights protected by the Constitution under **Article 28.**

On the violation of the right to life, **Article 22(I),** I have earlier on in this judgement dealt with the questions of fair hearing and the competency of the Field Court Martial Court that tried and convicted the two accused persons. I will now consider the question of whether or not the two accused persons had a right of appeal. My view slightly differs from those of my brother Twinomujuni JA in the lead judgement. First I agree that by virtue of **Article 287** of the Constitution, the **African Charter on Human and Peoples' Rights (the Banjul Charter)** remains part of our law and Uganda as a country and its Government continue to be a party to it.

The Article provides

"287 **International agreements, Treaties and conventions**

Where-

(a) Any treaty, agreement or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or

(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention,

the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it."

I find myself unable to state with absolute certainty that by virtue of that article the African Charter on Human and Peoples' Rights automatically became a part of our Constitution although it remains part of the law of the land. By virtue of that position therefore, the accused persons had a right of appeal, the Banjul Charter playing the role of being the

equivalent to an operationalizational law to **Article 28** of the constitution. The charter in its Article states:-

"Article 7

1. Every individual shall have the right to have his cause heard. This comprises:-

(a) The right to an appeal to competent national organs against acts of violating fundamental rights as recognized by conventions, laws, regulations and customs in force.

(b) …….

(c) …….

2. ……"

Secondly, I hold the view that section 80(I) of the NRA Statute Act 1992, concerned itself with the creation of the General Court Martial and defining its Jurisdiction. In my view, a right of appeal should be specifically conferred by statue. This, as just indicated above, is where the (Banjul Charter) comes in handy to provide the necessary bridge between the UPDF Act and **Article 28** which calls for confirmation of the death sentence by the Highest Appellant Court. This removes an apparently serious lacuna in our law.

It appears to me that the immediate execution of Cpt Omedio and Pte Abdalla Mohamed after their conviction and sentence by the Field Courts Martial Court that tried them was premised on the absence of a clear right of appeal from the provisions of the then applicable NRA Statute 1992. The UPDF Act, Cap 307 of the laws of Uganda was too, like its predecessor, the NRA Statute 1992, silent about a right of appeal from a sentence of death pronounced by a Field Court Martial Court. The current UPDF Act, Act 7 of 2005 provides in its S.227 as follows:-

"227 Jurisdiction of appellate courts.

(1) A party to the proceedings of a…….court martial other than a

Field Court Martial who is not satisfied with **its decision shall have the right to appeal to an appellate court on any of the following matters:**

(a) the legality of propriety of any or all the findings;

(b)the legality of the whole or part of the sentence;

(c)the severity or leniency of the sentence.

(2) **Subsection(1) shall not affect the operation of any sentence of a…….court martial, other than a sentence of death imposed by a court martial*, not being a Field Court Martial.***

(3) In the case of a sentence of death imposed by a court martial *other than a Field Court Martial,* the sentence shall not be executed until after the expiration of the time within which notice of intention to appeal against conviction may be given and, if notice of intention to appeal is duly given, the sentence shall not be executed until the appeal has been determined or abandoned."

It is evident from the above statutory provisions that the current UPDF Act does not provide for a right of appeal from a sentence of death passed by a Field Court Martial Court either. These two positions in the NRA Statute 1992, the UPF Act Cap, 307 and The UPDF Act No 7 of 2005 therefore, in my view throw some light as to why there exists a school of thought that for sentences of death handed down by Field Court Martial Courts, there is no right of appeal to any court including the Supreme court. The Banjul Charter, however deals with the situation as indicated above.

I now turn to the question of confirmation of the death sentence handed down to Cpl Omdio and Pte Abdala Mohamed by the Field Court Martial Court that tried them. I have stated elsewhere in this judgement that **Tumushabe Vs the Attorney General** (Supra) has settled the question of whether or not a Field Court Martial court is bound to follow all the relevant provisions of the Constitution. It has to do so.

Article 22(I) clearly requires confirmation of any death sentence handed down by any competent court in this country by the highest appellant court of the land which is the

Supreme Court of Uganda. The Field Court Martial Court that sentenced Cpl Omedio and Pte Abdalla Mohamed was, therefore, in error to order the execution of the two before their sentences had been confirmed by the Supreme court. The two persons' execution therefore violated their right to life protected under **Article 22(I)** of the Constitution.

True the two are no more but still jurisprudence in this area has to continue developing. The significance of this petition, therefore, remains, in my view. The petition has clearly exposed the fact that there certainly exists competition between the need to ensure expeditious and conclusive handling of matters of the army central to the discipline and efficiency of the forces and the necessity to comply with the clear relevant commands of the Constitution. The crucial question is how to achieve reconciliation between the two.

Allowing appeals to go through the normal appellate structures provided by the UPDF Act through the various military courts and then to the civil courts beginning from the Court of Appeal and ultimately to the Supreme Court would, in my view, subject the process to unwarranted delays to the prejudice of that all important principle of the military expeditiously accomplishing assignments before them, the administration of justice, especially in war or military operations inclusive.

The challenge therefore to all concerned is to urgently provide a simple mechanism that would sustain the speedy handling of all cases of this nature by the Fielded Court Martial Courts and an equally expeditious compliance with the commands of the Constitution by securing the confirmation or otherwise of the death sentence by the Supreme Court before execution of the same. What is important is that the Supreme Court, should have an opportunity to subject a decision of any military court including a Field Court Martial Court, where the sentence passed by it is to take away human life to at least a second opinion. This is the unquestionable current command of the Constitution. It is unacceptable that any free democratic society in the modern world, which jerously protects fundamental human rights of all, which Uganda's society is, should ever experience a situation where even one life of an individual can be terminated by a court of first instance without at least a second opinion on whether or not such a life should be terminated.

I agree with my Brother Twinomujuni JA that in fact after confirmation of a death sentence by the Supreme Court, there is nothing to stop the President from exercising the Presidential prerogative of mercy under **Article 121** of the constitution without the intervention the

Advisory Committee on the Prerogative of Mercy. Further justification in this view is to be found **Article 98(I)** of our Constitution under which the President has enormous military powers by virtue of which he can, in my judgement, exercise that prerogative as Commander in Chief of the UPDF in a deserving case.

98. The president of Uganda

> **"(1) There shall be a President of Uganda who shall be the head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour".**
>
> **(2)…….**
>
> **(3)……..**
>
> **(4)……**
>
> **(5)…….**

Speaking of the Commander-in-Chief clause in the Constitution of the United States of America, Edward S.Lorwin in his, the Constitution and what it means to-day, 1978 edition at Pg 157 had this to say,

> **"The purely military aspects of the Commander-in-Chiefship were those which were originally stressed. Hamilton said, the office would amount to nothing more than the supreme command and direction of the military and naval forces, as first federal and admiral of the confederacy**".

Sorry wrote to the same effect in his commentaries and in 1850, the Supreme Court of the United States of America, speaking by Chief Justice, Taney asserted,

> **"His (President's) duty and power are purely military"**

These are indeed very extensive powers under which the Commander in Chief can pardon a convict of a Court Martial Court.

What is important is that the mechanism put in place to achieve this should be free from unwarranted delays. One way this could be achieved is by providing stiff time benchmarks within the process.

There are also other good examples from other jurisdictions on this subject which may be of interest to Uganda. For instance in the **Manual for Courts Martial, United States 1995, Edition section 871 Article 71** of, **appendix 2, the Uniform Code of Military Justice** there is this provision:-

"871 Article 71 **Execution of sentence; suspension of sentence.**

(a) If the sentence of the Court Martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the president may commute, remit or suspend the sentence or any part thereof as he sees fit. That part of the sentence providing for death may not be suspended."

Reg **C.126** of The Defence Forces Regulations for the Tanzanian Peoples' Defence Forces Volume II provides:-

"C.126 Punishments requiring Approval

C.126 (I) A punishment of death imposed by a court Martial is subject to approval by the President and shall not be carried out unless so approved.

(ii)…….

(iii)…….

(iv)……."

The Zimbabwe Defence Act (Chapter 94) as amended at 1st January 1979 provides in S.57 thus:-

"57 (I)The President may

(a) ……

(b) ……

and

(c) as confirming authority, review and deal with the finding and sentence of any general Court Martial as in section *seventy-one and seventy-two* is provided."

(2)……

(3)……"

(4)……..”

The Kenya Armed Forces Act (Chapter 199) section 106 provides:-

“106 (1)……

(2)Where the person is sentenced to death, the sentence shall be executed until his case has been reviewed under section III”

I have taken the liberty to reproduce the above statutory provisions obtaining from other jurisdictions if only for purposes of emphasizing the necessity of at least a second opinion before what can be described as the fulcrum of all the Fundamental Human Rights, the right of life, is taken away.

The above puts to rest my consideration of and answers to questions 3, 4 and 5.

In the final result the petition succeeds.

Remedies

I fully agree with the reasons, conclusions and orders of my brother Twinomujuni JA on issue number 6 regarding remedies.

I, however, would add that this petition has exposed serious weakness in our judicial system with regard to the administration of justice by Courts Martial Courts according to military law. These weakness, need urgent attention and correction. This is so because military courts are special court systems entrusted with the task of ensuring the strictest degree of discipline and efficiency in the military. The memories of the adverse effects of state inspired violence championed by indisciplined men in uniform and the harvock they racked to society with impunity in the history of our country are too fresh to be forgotten or ignored. The desire by all to avoid a return to those dark days is clearly unquestionable. Equally unquestionable is the need to ensure that all persons, organs and institutions of state, the army inclusive, observe and obey the commands of our Constitution both in letter and spirit.

Bearing the above in mind I would propose the following additional orders:

1. That within a period of three years from the date of this judgement the Executive and the Legislative arms of government review and where necessary amend the laws relevant to the administration of justice by Courts Martial Courts.

2. That during the said period, executions of death sentences by Field Court Martial Courts without at least a second opinion remain suspended.

3. That the Attorney General makes annual reports to the Chief Justice on the progress made towards the fulfillment of the order in (1) above.

Dated this……5th …..day of…February……2009

…….

STEVEN.B. K KAVUMA,

JUSTICE OF THE CONSTITUTIONAL COURT