**Tumukunde v Attorney-General and another**

**Division:** Constitutional Court of Uganda at Kampala

**Date of judgment:** 2005

**Case Number:** 6/05

**Before:** Mukasa-Kikonyogo DCJ, Mpagi-Bahigeine, Twinomujuni,

Kitumba and Kavuma JJA

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*[1] Constitutional law – Parliament – Duties of a member of Parliament representing the UPDF –*

*Conflict between duties and oath to Parliament – Freedom to.*

*[2] Constitutional law – Parliament – Resignation letter of a Member of Parliament – Duty to inquire*

*into the reasons for writing the resignation letter – Duty of the Speaker on receiving the resignation*

*letter – Duty to inform the Electoral Commission.*

*[3] Constitutional law – Presidency – Whether President can be subjected to court proceedings while*

*holding office.*

**Editor’s Summary**

The petitioner was a member of the Uganda People’s Defence Forces (UPDF) and a member of

Parliament, representing the UPDF. As a result of his comments, the petitioner was directed by the

President, as Commander-in-Chief of UPDF, to write to the Speaker tendering his resignation. He subsequently wrote the resignation letter and was arrested thereafter and charged in a court martial.

Subsequently, the petitioner filed this petition seeking, *inter alia,* declarations that the actions of the

Commander-in Chief and the army commander directing him to resign contravened Articles 80, 83 and

84 of the Constitution; that the Speaker’s action in accepting and declaring his seat vacant, on the basis of his letter, contravenes section 83(1), 80 and 84 of the Constitution; and that the act of the UPDF restraining him from expressing political matters while allowing others to do so contravened Articles 20 and 29 of the Constitution. The petitioner also sought damages for violation of his rights and freedoms of speech, movement and assembly and an order prohibiting the Electoral Commission from declaring his seat vacant or conducting elections to replace him.

**Held** – The President of Uganda, with the four attributes in Article 98(1) of the Constitution, is at all times entrusted with the complete control of the affairs of state. He occupies a unique office with powers and responsibilities so vast and so important that public interest demands that he devotes his undivided time and attention to his public duties.

Unless the President is immune from the legal proceeding while holding office, there exists a threat of judicial interference with the Executive branch through orders and other court decisions, which would violate the separation of power principle. (*Baker v Cart* 369 US 1962 applied).

However, the courts can review the Head of State powers if the President acts in bad faith or misconstrued his powers. When exercising his duties, he must do so legally and constitutionally. He has to exercise his powers in a non-arbitrary manner. As long as the President acts in good faith and if the political decisions are objectively rational, the court will not interfere with the decision because it disagrees with it.

On a proper interpretation of the Constitution and other relevant laws, there is nothing to stop the court from entertaining a complaint challenging the President’s act or acts. (*William Jefferson Clinton v*

*Paula Corbin Jones* 520 US [1997] considered).

However, challenging the act or acts of the President is one thing and prosecuting him and bringing him before a court of law is another. Under Article 98(4) the President cannot be prosecuted for a criminal offence or sued in a civil action in any court except in a Presidential Election Petition.

With regard to the parties to the action for complaints against an act or acts of the President, the proper respondent or person to sue is the Attorney-General.

The fact that the petitioner wrote the resignation letter on the directive of the Commander-in-Chief did not affect the effectiveness of the letter to the Speaker. The directive did not contravene sections 80,

83 and 84 of the Constitution.

It is not a requirement for the Speaker to investigate the reasons for the resignation. All that was required was fulfilled and hence the letter was an effective resignation.

Notification of the Electoral Commission, by the Speaker, that the petitioner’s seat had fallen vacant did not contravene Articles 80, 83 and 84 of the Constitution.

Under section 10(4) of the UPDF Act (Chapter 307) the UPDF operates under the general direction of the President. The President, as Commander-in-Chief of the UPDF, has the authority to direct or guide any soldier, including an army representative in Parliament on any military matter.

Soldier members of Parliament are full members of Parliament with equal rights and obligations as the civilian members of Parliament. They subscribe to an oath of office to defend, support and uphold the

Constitution at all times. However, the petitioner remained a soldier and had to obey the Army Code of

Conduct and observe the discipline. To defend the Constitution, the petitioner does not have to commit breach of the law. He is enjoined to employ lawful means to fulfil his obligations. The rights and freedoms under Articles 20, 21 and 29 must be enjoyed within the confines of the law. Those rights are not absolute. They are important but are not derogable freedoms under Article 44 of the Constitution.

By participating in radio talk shows and making statements to outsiders without permission from the relevant authority was an offence under the UPDF Act (*sic*). Military standing orders, army code of conduct and other military law are enacted in accordance with the Constitution to operationalise it. The petitioner should, therefore, not have chosen those methods to defend the Constitution and fulfil his obligations as a member of Parliament. He should have employed appropriate ones.

Preferring charges against the petitioner in the circumstances in which it was done was not inconsistent with and did not contravene Articles 20, 21 and 29 of the Constitution.

Once an army representative is allowed to subscribe to an oath of member of Parliament, he or she is faced with two masters to serve, the army code of conduct and the oath of member of Parliament. In this case, the oath of member of Parliament will always sway. (*per Mpagi-Bahigeine and Twinomujini JJA* dissenting)

Pressing charges against the petitioner would conflict with and violate Articles 20, 21 and 29 of the

Constitution. (*per Mpagi-Bahigeine and Twinomujini JJA* dissenting)

The President has total immunity against court proceedings both criminal and civil arising out of his or her acts or omissions done or omitted to be done either before or during his or her term in office as

President. Any person wishing to challenge those acts or omissions of the President in court has to wait until the President has ceased to be one. The only exception to this is for a challenge of the election of a

President of a person who happens to be the incumbent President at the time of the challenge. If the framers of the Constitution had intended the acts of an incumbent President should be challengeable in court, they would have clearly stated so, given the fairly detailed manner in which the Constitution deals with the question of Presidential immunity in Article 98. Where they wanted an exemption to this immunity, the framers of the Constitution said so in Article 109(8). (*William Jefferson Clinton v Paula*

*Cobin Jones* 520 US 681 distinguished) (*per Kavuma JA* dissenting).

The duty of the court is to interpret, not to amend or re-write, the Constitution. Courts should resist the temptation to venture into unnecessary judicial interpretations of the Constitution contrary to its clear provisions (*per Kavuma JA* dissenting).

To strike a difference between challenging the acts of the President in a court of law and making the

President a party to court proceedings or arguing that where a party seeks to challenge the acts of the

President in court such a party sues the Attorney-General is academic. The effect of either is to erode the

Presidential immunity embodied in Article 98 doing so would greatly undermine the rationale behind the

Article, which is to cater for the people’s aspirations about the person and office of the President. This is the preservation of the dignity of both the person and the office of the President. (*per Kavuma JA* dissenting)

The Constitution puts the question of how to promptly handle the liability of court proceedings by an incumbent President or immediately subjecting his or her acts or omissions to judicial review, beyond the court’s competence. It leaves it to the people, who through the exercise of their sovereignty, either directly or through their representatives in Parliament, may bring an end to the incumbent’s presidency thereby opening the door for legal action to be taken against him or her (*Attorney-General v Tinyefuza* Constitutional appeal number 1 of 1997 applied) (*per Kavuma* dissenting).

Where the President assigns any of his executive powers to ministers or other officers under Articles

99(4) and 113(3) of the Constitution, immunity does not extend to such other ministers or officers.

Where such ministers or officers act or omit to act in such a manner as to attract legal challenge or liability to government, the Attorney-General is sued in his representative capacity under Article 119(*c*) of the Constitution. (*Per Kavuma* dissenting).

Petition dismissed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Attorney-General v Tinyefuza* Constitutional appeal number 1 of 1997 – **AP**

*Uganda Law Society and another v Attorney-General* [2003] 2 EA 694

***United Kingdom***

*Gopal v State of Madras* [1950] 5 CR 88

*Nighell v Sultan of Jahore* [1894] QB 149

*William Jefferson Clinton v Paula Corbin Jones* 520 US 681 (1997) – **C** and **D**

***United States of America***

*Baker v Cart* 369 US 1962 – **AP**

*South Dakota*