

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION/REFERENCE NO.0024 OF 2011**

5       **(ARISING OUT OF ANTI CORRUPTION CRIMINAL CASE NO. 153 OF 2010**  
**BEFORE HER WORSHIP IMMACULATE BUSINGYE CHIEF MAGISTRATE OF THE**  
**ANTI CORRUTION DIVISION OF THE HIGH COURT)**

**UGANDA.....PROSECUTOR/PETITIONER**

**VERSUS**

10       **GEOFFREY ONEG OBEL.....ACCUSED/RESPONDENT**

**CORAM: HONOURABLE JUSTICE REMMY KASULE, JA/JCC**

**HONOURABLE JUSTICE ELDAD MWANGUSHYA, JA/JCC**

**HONOURABLE JUSTICE SOLOMY BALUNGI BOSSA, JA/JCC**

**HONOURABLE JUSTICE KENNETH KAKURU, JA/JCC**

15       **HONOURABLE JUSTICE PROFESSOR LILLIAN E TIBATEMWA, JA/JCC**

**JUDGMENT OF THE COURT**

20       This is a constitutional referencemade by Her Worship Immaculate Busingye, Chief  
Magistrate attached to the High Court Anti Corruption Division under *Article 137(5) of*  
*the Constitution*, whereby three questions were referred to this Court at the instance of  
the Respondent.

**Background**

25       The background to this reference is that the Inspector General of Government  
(IGG)instituted criminal proceedings in the Chief Magistrate’s Court attached to the High  
Court Anti-Corruption Divisionagainst the Respondent for abuse of office and causing  
financial loss to the National Social Security Fund, contrary to the provisions of the *Anti*  
*Corruption Act 2009*.

When the Respondent was charged in the said Court and before taking a plea, he made  
various objections challenging the constitutionality of the charges. He applied to the

trial Court to refer the questions raised by his objections to this Court for interpretation. On the basis of the submissions of the parties, the trial court thereupon framed the following questions for this Court for interpretation;

1. *Whether the provisions of the Penal Code regarding corruption were transferred to the Anti Corruption Act.*
2. *Whether an accused person can be charged with criminal offences under the Anti Corruption Act of 2009 founded on acts or omissions alleged to have taken place between 2003 and 2005.*
3. *Whether the decisions of the Supreme Court sitting in an ordinary appeal are binding on the Constitutional Court*

At the hearing of this Reference, Mr. Peter Mujimba learned Counsel represented the Respondent. Ms. Mutesi, Principal State Attorney represented the Attorney General and Mr. Sydney Asubo, Director of Legal Affairs of Inspector General of Government (IGG) represented the IGG.

At the commencement of the hearing, learned Counsel Ms. Mutesi raised a preliminary objection on a point of law that the Respondent could not raise and the parties could not argue the issues as framed for this court by Counsel for the Respondent as it was not part of the questions in the reference as framed by the trial court. She submitted that no leave had been sought by Counsel for the Respondent to raise any additional issues.

She further submitted that when the Respondent applied to the trial Court to make this reference, he raised three main issues. But in this Court, he wanted to rely on one issue raised in his conferencing notes, which is different from the questions raised at the trial when the Respondent sought to make this reference. The Respondent sought to rely upon a question which was framed at the conferencing by his Counsel. The new question is;

*"Whether the IGG acted constitutionally when he charged the Applicant with the offences when the Attorney General had advised against the charges".*

Counsel Mutesi argued that the Respondent on his own accord abandoned the initial questions that were referred by the trial Court to this Court and he continued benefitting from the stay of the trial caused by this Reference based on those abandoned questions.

She relied on the case of *Akankwasa Damian v Uganda Constitutional Reference No. 5 of 2011* where this court had addressed a similar scenario and declined to entertain an additional issue that was framed outside the questions referred by the trial

Court. A similar scenario was also considered by this Court in the case of *Thomas Kwoyelo alias Latoni v Attorney General Constitutional Petition/Reference No. 036 of 2011*. There the Attorney General raised an additional issue that had not been referred and the court in allowing the parties to argue that issue did so only on the basis that it touched on the legality and constitutionality of an Act of Parliament under which the Respondent was claiming a right. In this case, no leave had been granted to argue the additional issue, which was also not closely related to the questions referred. The issue on the table was therefore not properly before Court.

Mr. Asubowas in agreement with the submissions of Ms. Mutesi and he added that this Court does not even have the powers to grant leave to argue issues outside those framed by the trial court. Once issues have been referred to this Court by a trial court, then this Court's ambit is limited to those issues and leave cannot be granted at this stage to add any extra issue. In the instant Reference, the Respondent had abandoned the three questions as framed by the trial Court and a completely new question was framed by his Counsel at the conferencing. Therefore the Reference by the trial Court no longer existed and the matter should be remitted back to the trial court for the trial of the Respondent to commence because the proceedings were stayed before plea was taken, and the trial of the Respondent could not commence as it was pending the outcome of this Reference.

Mr. Mujimba submitted that the Respondent had not abandoned any of the questions referred by the trial Court. The difference lay in the phraseology of the question before this Court. The Applicant relied on issue number two. The Registrar on his own volition invited the Parties on the phrasing of the questions at the time of the conferencing. Counsel for the State did not show any objection to the conferencing process and the question. He however conceded that the question in the conferencing notes differs in wording from the questions that were referenced. But according to him, the content was whether the trial process is constitutional. The question framed at conferencing arises from question number two on whether the accused can be tried at all.

We observed that the reference from the trial record had only three questions, as outlined above. We further noted the ruling of this Court in the *Akankwas* case (**supra**) where the trial court framed issues for reference and in subsequent affidavits, the Applicant raised additional issues. The Court held that when the Constitutional Court is determining a reference, it is exercising special and limited jurisdiction on matters and issues that had arisen in the proceedings before the court which sent the reference. The additional issues that were framed by Counsel for the Applicant were outside the scope of the reference by the lower court. The Court therefore declined to consider them.

We further noted the ruling in the case of *Thomas Kwoyelo alias Latoni v Uganda (supra)*, where this Court allowed the Applicant to raise an issue which was not framed for its determination by the lower trial court, “because it touched on the legality and constitutionality of an Act of Parliament, under which the applicant was claiming that he had acquired a right to be granted amnesty. A law which is alleged to be inconsistent with the Constitution is null and void to the extent of the inconsistency-see **Article 2(2)** of the Constitution. The court could not close its eyes to an alleged illegality and has a duty to investigate the allegation.”

We observed that the new question framed by the Respondent in the reference before us was different and not among the questions that had been submitted by the trial court in this reference. On the basis of the above authorities and considerations, we upheld the preliminary objection and ordered Counsel for the Respondent to proceed with the questions as they were framed by the trial court.

Learned Counsel Mutesi then raised another objection on another preliminary point of law. She argued that there are two decisions of this court; *Akankwasa Damian v Uganda (supra)* and *Atugonza Francis v Uganda, Constitutional Reference No. 31 of 2010* in which the questions as framed by the trial Court have already been interpreted by this Court. That is the reason that they were abandoned by the Applicant. The two decisions render the questions as framed *res judicata*.

She further submitted that this Court interprets *the Constitution* as a supreme law and does not settle legal disputes between the parties. Once it has made an interpretation relating to certain provisions of the law and *the Constitution*, then that interpretation and its legal effect is not limited to the parties concerned in the case in which the interpretation is made. It is a binding pronouncement of the law. This Court could not therefore hear and determine the same substantial and legal issues of interpretation of the provisions of the Constitution more than once. The two authorities cited show that as it is in this case, the *Anti Corruption Act* came into force and there was a question whether the charges could be brought under the same Act. The same issues that the Applicant has raised in this reference were determined by this Court in those two cases cited.

Mr. Asubo agreed with Ms. Mutesi and submitted that decisions of this Court do not affect the parties only but also apply to similar cases. On the cases cited, he submitted that there were many files pending in the Constitutional Court regarding the same questions that were determined. Once this Court answered them in those two cases, all the files were returned to the trial courts. If the question has been answered this court does not have to sit to answer the same question it determined previously. The only

reason the current file remained was because it had an additional issue. He submitted that the file be remitted back on the ground that the question has been answered in the previous decisions.

Mr. Mujimba did not make any submissions regarding this point of law. Rather, he countered that it is trite law that an offence must be in existence at the time an act is committed before a person can be tried on it. Therefore the *Anti Corruption Act* could not be of retrospective effect. It could not be applied on matters concerning Nsimbe Project that happened in the year 2004. According to him, the second question was similar to the first question. He was therefore making the same submissions he made in respect of the first question. On the third question, he left it to the discretion of the court to determine.

## Resolution of the issues

### Issues 2 and 3

We decided to resolve the second preliminary point of law in this judgment and we hereby proceed to do so. We have considered the submissions of the parties and all the relevant law, including *the Constitution*. The reference on record had three questions, namely; whether the provisions of the *Penal Code Act* regarding corruption were transferred to the *Anti-Corruption Act of 2009*; whether an accused person can be charged with criminal offences under the *Anti Corruption Act* founded on acts or omissions alleged to have taken place between 2003 and 2005; and whether the decisions of the Supreme Court sitting in an ordinary appeal are binding on the Constitutional Court.

We have also closely scrutinized this Court's decisions in the cases of *Uganda versus Atugonza* (supra) and *Damian Akankwasa versus Uganda* (supra). The two cases were decided in March and April 2011, respectively. We note that in the former case, the accused was charged with the offence of abuse of office, contrary to **section 11(1) of the Anti Corruption Act**. The acts complained of are alleged to have been committed between December 2007 and December 2008. Counsel for the accused in that case raised a similar argument, namely that the accused objected to the charge because the *Anti Corruption Act* came into force much later than the alleged acts and therefore offended and/or violated **Articles 28(7) and (12) of the Constitution**.

The trial Judge framed the following question for this Court to determine; that is "*whether the charging of the accused under the Anti Corruption Act 2009 which*

commenced on the 25<sup>th</sup> August 2009, for the offence committed between December 2007 and December 2008 is inconsistent with Articles 28(7) and (12) of the Constitution."

In its decision, this Court noted that the language of *section 87 of the Penal Code Act* and *section 11(1) of the Anti Corruption Act* was plain and unambiguous and had to be given its natural literal meaning. It further observed that *section 11* of the *Anti Corruption Act* is a reproduction of *section 87 of the Penal Code Act*, with the only modification relating to the fine. The Court also determined the object of the *Anti Corruption Act* and held that it is a general rule that when a statute is repealed and all or some of its provisions are at the same time re-enacted, the re-enactment is considered a reaffirmation of the old law, and a neutralization of the repeal, so that the provisions of the repealed Act which are thus re-enacted continue in force without interruption and all rights and liabilities thereunder are preserved and may be enforced.

The Court stated further that;

"Similarly, apart from *section 87 of the Penal Code Act*, the repealed and replaced *Prevention of Corruption Act*, the amended *Penal Code Act*, the *Leadership Code Act* and other matters specifically mentioned therein which are in the same or substantially the same terms as in the new Act shall be taken to be a continuation of the former acts, although the former may be expressly repealed. We are therefore satisfied that in view of what we have stated above, the applicant is properly charged under section 11 of the Anti Corruption Act, which is a reaffirmation of section 87 of the Penal Code Act. This section cannot be treated as though it never existed because of the repeal. The principle that a repeal should treat such provisions as past and closed does not apply for reasons aforementioned...we thus consider that this reference is misconceived. (Emphasis added).

The reference was thus dismissed with costs.

In the latter case, the question was;

"Whether the charging and prosecution of the accused under *section 20(1) of the Anti Corruption Act No. 6 of 2009* for offences allegedly committed between August 2007 and February 2008 is inconsistent with *Articles 28(7) and (12) of the Constitution.*"

This Court held that this case raised similar issues with the *Uganda v Atugonza* case and dismissed the reference with costs.

We see no difference between the current case and those two cases mentioned above. The issues raised in this case are similar to those raised in the two cases. We agree with learned Counsel for the state that interpretation by this Court of any legal provision vis-à-vis *the Constitution* and its legal effect is not limited to the parties concerned in the case in which the interpretation is made. It constitutes a binding pronouncement of the law, subject to appeal to the Supreme Court. This Court cannot therefore hear and determine the same substantial and legal issues more than once. Accordingly, it is our judgment that issues numbers 1 and 2 are *res judicata*, having been adjudicated upon in the two cases quoted above. The two issues cannot therefore constitute a reference to this Court. They are therefore dismissed.

### **The third issue**

We consider that the answer to the first two questions is sufficient to dispose of this reference. We do not consider it necessary or even relevant to answer the third question. However, we feel constrained to comment on the advice that was rendered by the Attorney General to the President.

It appears that the IGG made independent investigations in the matter of the Development of Nsimbe Housing Project and compiled a report. H E the President then directed the Attorney General to study the report and give him a legal opinion on it. In response to the directive, the Attorney General made a detailed legal opinion that contained several recommendations. The relevant one was couched as follows;

*"Appropriate action against Mr. Onegi-Obel*

*... Prosecuting Mr. Onegi-Obel for alleged causing of financial loss and abuse of office is unlikely to secure a conviction on the evidence so far available. I do not recommend it. Moreover, it would currently be a violation of a subsisting court order and, therefore illegal..."*

The legal opinion was attached to a letter dated December 28, 2006, written by the Attorney General /Minister of Justice and Constitutional Affairs to H E the President. We note that this was well before the charges in issue in this case were filed. The letter and legal opinion were copied to the Right Honorable Prime Minister, the Honorable Minister of Finance, Planning, and Economic Development, and the Solicitor General in the Ministry of Justice and Constitutional Affairs. The IGG was not even copied the letter and the legal opinion.

We note that it was not advice sought and/or given to the IGG by the Attorney General. Furthermore, it was not established that the IGG was aware of the opinion. We

observe that one of the functions of the IGG, according to *Article 225(1) (e) of the Constitution*, is

5 *“...to investigate any act, omission, advice, decision or recommendation by a public officer or any other authority to which this article applies, taken, made, given or done in exercise of administrative functions...”*.

*Article 227 of the Constitution* guarantees the independence of the IGG in the performance of its functions. It provides:

10 *“The Inspectorate of Government shall be independent in the performance of its functions and shall not be subject to the direction or control of any person or authority and shall only be responsible to Parliament.”*

The language of both Articles is clear and unambiguous. So even if the IGG was aware of the legal opinion, it would not be bound by it as it is supposed to perform its work independently and is not subject to the direction of anyone.

15 In the result, we see no merit in this Reference which we hereby dismiss with costs. The Registrar is directed to return the record of the lower court of the Chief Magistrate in Criminal Case No. 153 of 2010 to the High Court Anti Corruption Division with the direction that the trial magistrate should proceed with the trial of the Respondent forthwith.

20 **Dated at Kampala this ...15<sup>th</sup> ...day of January 2014**

**Signed by:**

25 Honorable Justice RemmyKasule, JA/JCC \_\_\_\_\_  
Honorable Justice Eldad Mwangusya, JA/JCC \_\_\_\_\_  
Honorable Justice Solomy B Bossa, JA/JCC \_\_\_\_\_  
Honorable Justice Kenneth Kakuru, JA/JCC \_\_\_\_\_  
Honorable Justice Lillian E Tibatemwa,JA/JCC \_\_\_\_\_