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

5 CONSTITUTIONAL PETITION NO.46 OF 2011

And

CONSTITUTIONAL REFERENCE NO.54 OF 2011

(Arising from the Anti-Corruption court at Kololo Criminal Case No.184 of 2011)

10

1. HON. SAM KUTEESA
2. HON.JOHN NASASIRA ::::::::::::::PETITIONER/APPLICANTS
3. HON. MWESIGWA RUKUTANA

VERSUS

15 ATTORNEY GENERAL

UGANDA ::::::::::::::::::::::::::::::::::RESPONSENTS

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE,

DCJ;/PRESIDENT CONSTITUTIONAL COURT;

20 HON. JUSTICE S.B.K. KAVUMA, JA/cc

HON. JUSTICE A.S. NSHIMYE, JA/cc

HON. LADY JUSTICE M.S. ARACH AMOKO, JA/cc

HON. JUSTICE REMMY KASULE, JA/cc.

25

JUDGEMENT

This judgement is in respect of both Constitutional Petition No.46 of 2011 and Constitutional Reference No.54 of 2011 consolidated into one.

Background:

Hon. Sam Kuteesa, Hon. John Nasasira and Hon. Mwesigwa Rukutana, herein to be referred to as the "petitioner/applicants", all ministers in the Uganda Government were jointly charged, at the instance of the Inspector General of Government, with the offences of abuse of office and causing financial loss **C/s 11 and 20** of the Anti-Corruption Act, before the Chief Magistrate, Anti-Corruption Court, Kampala, on 13.10.2011, in Criminal case No.184 of 2011.

Each petitioner/applicant pleaded not guilty to the charges and was subsequently released on bail with stringent conditions being attached. None of the petitioner/applicants has breached any bail conditions to date. Each one also took leave away from the office pending completion of these criminal proceedings.

Through Constitutional Petition No.46 of 2011, filed in this court on 21.10.2011, the petitioner/applicants question the constitutionality of section **168 (4)** of the Magistrate's Courts Act vis-à-vis **Article 23 (6) (a)** of the Constitution.

They thus pray this court to declare and order that the impugned section is inconsistent with and in contravention of the constitution, that bail granted by a Magistrate to an accused does not lapse by reason of that person being committed for trial to the High Court and that the committing Magistrate's court has power to maintain or grant bail to the person being committed.

Also, at the instance and prayer of both the petitioner/applicants, and the Inspector General of Government, as prosecutor, the Anti-Corruption Chief Magistrate's Court, on 24.10.2011, referred to this Court for interpretation four questions. The court also stayed the criminal proceedings before it in the case, pending resolution of the four (4) questions.

The four questions are:-

(i) Whether the Inspector of Government can prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office under Article 230 of the Constitution of the Republic of Uganda, when it is not duly constituted in accordance with Article 223 (2) of the

75 ***Constitution and section 3 (2) of the Inspectorate of Government Act to consist of the Inspector General of Government and two Deputy Inspectors General.***

(ii) Whether Section 49 of the Anti-Corruption Act, 2009, which gives powers of prosecution to the Inspector General of Government is inconsistent or

80 ***in contravention of Article 230 (1) of the Constitution, which gives prosecution powers to the Inspectorate of Government.***

(iii) Whether committal proceedings by Magistrates in the Anti-Corruption Division and cancellation of bail

85 ***under section 168 (4) of the Magistrates Courts Act do not violate Article 23 of the Constitution of the Republic of Uganda, which provides for protection of personal liberty, especially in view of section 51 of the Anti-Corruption Act, 2009, which gives***

90 ***special jurisdiction to the Magistrates in the Anti-Corruption Division.***

(iv) Whether Article 137 (5) of the Constitution which denies the original court the exercise of the discretionary powers, is in contravention and

95 ***inconsistent with Article 128 of the Constitution, which provides for the independence of the judiciary.***

Legal Representation:

At the hearing, Dr. Joseph Byamugisha assisted by Edwin Karugire, Kiwanuka Kiryowa and Albert Byamugisha appeared for Hon. John Nasasira, the 2nd petitioner/applicant. Didas Nkurunziza, also assisted by Edwin Karugire, represented Hon. Sam Kuteesa, the 1st petitioner/applicant. Oscar Kambona assisted by Ahmad Kalule represented Hon. Mwesigwa Rukutana, the 3rd petitioner/applicant. Sydney Asubo, assisted by Sarah Birungi were for the Inspector General of Government, while Martin Mwangutsya, State Attorney represented the Attorney General.

Issues For Resolution

The parties and their respective counsel all agreed that the questions framed under the reference constituted the issues for determination both in the petition (questions iii and iv) and also the Reference (question (1), except question (ii) which was by consent, and leave of court, abandoned by everyone.

Submissions of respective counsel:

Submissions for petitioners/applicants.

1st issue:

Learned counsel Oscar Kambona submitted that the power of the Inspectorate of Government to criminally prosecute anyone is a special power derived from **Article 230** of the Constitution in contrast to the general functions of the Inspectorate of Government set out in **Article 225** of the Constitution.

Counsel further submitted that **Article 223 (2)** creates the Inspectorate of Government as consisting of the Inspector General of Government and Deputy Inspectors General which have been prescribed to be two (2) under section 3 of the Inspectorate of government Act No.5 of 2002.

According to counsel, **Article 223(3)** requires that the Inspectorate must have as one of its members, one person qualified to be appointed a judge of the High Court. This requirement is not being fulfilled in the prosecution of the petitioners/applicants since no Inspectorate of Government exists at all.

It follows, therefore, that there cannot be any signification of acts of the Inspectorate of Government by the Inspector-General under section 32 of the Inspectorate of Government Act. The

inspectorate is not there to do the acts that ought to be the basis of signification. This signification has its foundation in **Article 230 (2)** of the Constitution. The acts, the subject of signification by the Inspector General under **section 32** of the Inspectorate of Government Act, are those that the Inspectorate of Government must first originate or be ancillary to while carrying out its functions under **Articles 225 and 230 (1) and (4)** of the Constitution and under **sections 8, 12, 13, 14(5)** and other provisions of the Inspectorate of Government Act.

Counsel further submitted that the Constitution and the Inspectorate of Government Act, cannot be interpreted to lead to an absurd result that the framers of the Constitution and Parliament intended that the Inspector General of Government replaces and singly carries out the constitutional and statutory responsibilities vested in the Inspectorate of Government, which is a constitutional organ.

Counsel urged this court to give a reasonable interpretation to the effect that the framers of the Constitution and Parliament intended that an independent Inspectorate of Government constituted under **Article 223 (2)** and **section 3 (2)** of the Inspectorate of government Act, be always in place, with the Inspector General of Government performing his/her duties as part and parcel, but not as a substitute of, the Inspectorate of Government.

Counsel referred court to ***Supreme Court of Uganda Constitutional Appeal No.1 of 1997: TINYEFUNZA VS THE ATTORNEY GENERAL, and the Kenyan High Court PETITIONS NOS. 65, 123 & 185 OF 2011: JOHN HARUN MWAU & 3 OTHERS VS ATTORNEY GENERAL OF KENYA & 20 OTHERS [2012] eKLR***

He invited us, to interpret the Constitution as an integrated whole with no one particular provision destroying the other but each sustaining the other.

He further invited us to hold that it is unconstitutional, in the absence of the Inspectorate of Government, to prosecute, the petitioner/applicants through the Inspector General of Government.

The submissions of counsel Oscar Kambona for the 3rd petitioner/applicant on the first issue were adopted by the 1st and 2nd petitioner/applicants.

As to the 3rd issue: Dr. Byamugisha, for the 2nd petitioner

/applicant, submitted for all the petitioners/applicants.

He argued that the Magistrates Courts Act that provides through its **section 168 (4)** for the automatic lapse of bail of a person on being committed to the High Court for trial was in existence
195 before the promulgation of the 1995 Constitution. It is, therefore, "an existing law" under **Article 274 (2)** of the Constitution, and as such, must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution under **Article 274 (1).**

200

Counsel further contended that under **Article 23(6)** of the Constitution the entitlement by an accused to apply for bail is guaranteed and the court in the exercise of its discretion decides whether or not to grant bail on such conditions as the court may
205 deem reasonable.

Section 168 (4), of the Magistrates Courts Act counsel asserted, is therefore, unconstitutional as it deprives one of personal liberty guaranteed by **Article 23 (1)** of the Constitution. The section
210 does not only mandatorily cancel bail, thus interfering with the discretion of the court that granted the bail. The cancellation is also done without giving any hearing to the victim. All this is unconstitutional.

215 According to counsel, the fact that a person whose bail has been cancelled may apply for bail in the High Court, does not in any way justify the miscarriage of justice done to one who has been honouring the bail conditions and now finds him/herself having the bail cancelled.

220

The petitioner/applicants had thus, through this petition and reference, sought protection of the Court, as they would lose their respective bail on being committed to the High Court for trial. He referred court to the case of ***Attorney general Vs Tumushabe***
225 ***[2008] 2 EA 26,*** and invited us to hold that the right to bail ought to enjoy constitutional protection as it is the protection of the right to liberty. Relying on ***Supreme Court Constitutional Appeal No.1 of 2006: Attorney General Vs Uganda Law Society,*** counsel urged us to apply the principle that a
230 constitutional provision which relates to a fundamental right must be given an interpretation that realizes the full benefit of the guaranteed right. **Article 23 (6)** is such a provision.

With regard to the 4th issue, which was raised by the Inspector
235 General of Government, Dr. Byamugisha submitted that **Article 137 (5) (b)** providing that a court of law shall refer a question as to the interpretation of the Constitution to the Constitutional Court, if any party to the proceedings so requests, is not at all in contravention of or inconsistent with **Article 128** of the

constitution which provides for the Independence of the Judiciary. This is because, whatever the case, the court handling the matter, must always first satisfy itself of the existence of a question calling for the interpretation of the Constitution before deciding whether or not to make a reference.

Counsel accordingly prayed that we declare **S.168 (4)** of the Magistrates Courts Act unconstitutional and that we dismiss the Inspector General of Government's question that **Article 137 (5) (b)** of the Constitution is inconsistent with **Article 128 (1)** of the Constitution.

Submissions for respondent:

Learned counsel Sydney Asubo of the Inspectorate of Government, asserted in respect of the 1st issue, that he disagreed with the submissions made on behalf of the petitioners/applicants on the issue. He admitted the fact that the Inspectorate of Government had not yet been constituted as required by **Article 223 (2)** of the Constitution and section 3(2) of the Inspectorate of Government Act. He, however, maintained that inspite of the Inspectorate not being constituted, the Inspector General of Government can carry out functions of the Inspectorate of Government and those of his/her office pursuant to **Article 230 (2)** of the Constitution and **section 14 (6)** of the

Act. Further, **section 32** of the Act empowers the Inspector General of Government or a Deputy Inspector General to carry out individual acts by virtue of their offices, regardless of whether or not the Inspectorate of Government is in existence. This has been the position since 1998 to date. To uphold the submission of the petitioners, would result in undoing all that which has gone on in the Inspectorate of Government since 1998, with all the negative repercussions.

With respect to issue 3, counsel Asubo maintained that the automatic lapse of bail upon committal for trial by the High Court cannot be a violation of the Constitution. An accused person whose bail has lapsed, is at liberty, in accordance with the Constitution, to apply for bail in the High Court.

As regards issue 4, learned counsel for the Inspectorate contended that **Article 137 (5) (b)** is mandatory in its language and as such the court has no other option, but to make a reference to the Constitutional Court, once any party to the proceedings requests so. This interferes with the independence of the court in terms of **Article 128 (1)** of the Constitution. Counsel thus prayed us to declare **Article 137 (5)(b)** to be inconsistent and in contravention of **Article 128 (1)** of the Constitution.

Mr. Mwangutsya for the Attorney General adopted and associated himself with the submissions made by learned counsel Sydney Asubo.

Principles of Interpretation of the Constitution.

This court in this matter is called upon, in resolving the framed issues, to interpret the Constitution vis-à-vis provisions of the Inspectorate of Government Act No.5 of 2002 and the Magistrates Courts Act, cap.16.

It is, therefore, important to consider some principles applicable in interpreting the Constitution, relevant to this case before proceeding to determine the framed questions/issues.

The 1st National objective and Directive Principles of state policy provides:

1. Implementation of objectives.

(i) The following objectives and principles shall guide all organs and agencies of the state, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the

310 ***establishment and promotion of a just, free and democratic society."***

Hence, the national objectives and directive principles of State policy guide the courts in applying and interpreting the Constitution. The interpretation of the Constitution must be 315 therefore in such a manner that promotes the national objectives and directive principles of State policy.

In the Namibian case of ***STATE VS ACHESON (1991) (20) SA 805 (page 813) MOHAMED AJ*** stated:

320 ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the 'national soul' the identification of ideas and……………aspirations of a nation, the articulation 325 of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion."***

The above has been held as applicable to Kenya: See ***Kenya 330 Supreme Court Re The matter of the Interim Independent Electoral Commission Constitutional Application No.2 of 2011,*** and also ***High Court of Kenya Constitutional Petitions***

Nos 65, 123 & 185 of 2011: John Harun Mwau eKLR. We have no hesitation in applying the same to this case.

335

The Constitution must be interpreted broadly, liberally and purposively.

The entire constitution has to be read as an integral whole with its

340 letter and spirit, as the supreme law, being respected. See: ***Minister of Home Affairs (Bermuda) Vs Fisher [1980] AC 319.***

The principle of harmonization goes hand in hand with the broad

345 approach to interpreting the Constitution. Where there are several articles that conflict with each other in the same constitution, it is the duty of the court to give effect to the whole constitution by harmonizing its provisions. In ***TINYEFUNZA VS. THE ATTORNEY GENERAL: CONSTITUTIONAL APPEAL NO.1***

350 ***OF 1997,*** the Uganda Supreme Court adopting the decision of the US Supreme Court in ***SMITH DAKOTA VS NORTH CAROLINA 192 V 268 [1940],*** held:

" the entire Constitution has to be read as an integrated whole and no one particular provision destroying the

355 ***other but each sustaining the other. This is the rule of***

harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."

Constitutional provisions that contain fundamental rights must be
360 taken to be permanent provisions intended to cater for all times extending fully the benefit of the rights which have been guaranteed to the intended beneficiaries. See: ***UGANDA CONSTITUTIONAL COURT CONSTITUTIONAL PETITION REFERENCE NO.036/11: THOMAS KWOYELO ALIAS LATONI***
365 ***VS. UGANDA.***

Both purpose and effect are relevant in interpreting the Constitution. In ***SSEMOGERERE & OTHERS VS ATTORNEY GENERAL, EALR [2004] 2 EA 276 at p.319,*** the Uganda
370 Supreme Court adopted the above principle expressed by the Canadian Supreme Court in ***THE QUEEN VS BIG M DRUG MART LIMITED [1986] LRC 332. See also: ATTORNEY GENERAL VS SILVATORI ABUKI, Supreme Court of Uganda Constitutional Appeal No.1 of 1998.***

375

Being mindful of these principles we now proceed to resolve the framed issues.

Resolution of issues:

380 The issues arise from the framed questions. Question No.2, having been abandoned, three (3) issues remain.

I. The capacity of the Inspectorate to prosecute.

The issue to be resolved is whether, when only the Inspector
385 general of Government (in an acting capacity) is the only one lawfully appointed in office, and the other two deputies are not yet appointed, it is constitutional that the Inspectorate of Government, as an Institution, can prosecute or cause prosecution in respect of cases of corruption, abuse
390 of authority or of public office.

The Inspectorate of Government is a creature of the 1995 Constitution. It was absent from the Independence Constitution of 1962 and in the 1967 Republican
395 Constitution. Its creation is founded in the part of the preamble to the 1995 constitution which provides:

"WE THE PEOPLE OF UGANDA:

Recalling our history which has been characterised by political and constitutional instability;

400 ***Recognizing our struggles against the forces of tyranny, oppression and exploitation; …………………",***

and to the National objectives and Directive Principles of State policy of:

" II. Democratic Principles

405 ***(V) All political and civic associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisations and practice.***

and

" XXVI. Accountability.

410 ***(i) All public offices shall be held in trust for the people.***

(ii) All persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people.

415 ***(iii) All lawful measures shall be taken to expose, combat and eradicate corruption and abuse or misuse of power by those holding political and other public offices."***

Pursuant to the aspirations of Ugandans as expressed in the
420 above quoted parts of the preamble and the National objectives and Directive Principles of State policy for democratic governance, public offices to be held in trust for the people, rendering public accountability, the eradication of corruption and

abuse of power of the state, the Institution of Inspectorate of
425 Government was created to answer those aspirations.

The Inspectorate of Government constitutionally is supposed to consist of the Inspector General of Government and a number of Deputy Inspectors General, as prescribed by Parliament: **Article**
430 **223 (1)** and **(2).** Through **section 3 (2) (b)** Parliament prescribed two as the number of Deputy Inspectors General. The appointment of the three is by the President with the approval of Parliament: **Article 223 (4).**

435 **Article 225** provides for the functions of the Inspectorate of Government as to include promotion of the rule of law, eliminate corruption, abuse of authority and public office, promote good governance in public offices, supervise the enforcement of the leadership code of conduct and disseminate values of
440 constitutionalism to the public. **Section 8 (1)** of the Inspectorate of Government Act is basically a repeat of **Article 225.**

Article 230 vests special powers in the Inspectorate of Government by providing:

445 ***"230. Special powers of Inspectorate.***

(1) The Inspectorate of Government shall have power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of
450 ***public office.***

(2) The Inspector General of Government may during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in
455 ***the circumstances.***

(3) ……………………………

(4) ……………………………

(5) ……………………………"

Section 14 (1) and **(6)** of the Inspectorate of Government Act is
460 similar to **Article 230 (1)** and **(2).**

A careful scrutiny of the provisions of the Constitution and those of the Act that relate to the Inspectorate of Government shows that there are specific functions and responsibilities vested in the
465 Inspectorate of Government as a composite entity and those vested in the Inspector General of Government as an individual holder of that office.

Article 225 vests and sets out the functions vested in the Inspectorate of Government **Article 226** prescribes the jurisdiction of the Inspectorate and its independence **(Article 227),** Inspectorate's power to enter and inspect premises/property **(Article 230 (3)** and power to enforce the Leadership Code **(Article 230 (4).**

Therefore, in the Constitution, it is only under **Article 230 (2)** that the Inspector General of Government, in the course of his employment, may make orders and give directions as are necessary and appropriate in the circumstances.

In the Inspectorate of Government Act, the Inspector General of Government carries out some functions, as an individual, in the course of employment, as of being chairperson of the Appointments Board **(S.7 (1) (a)** searching any person, premises or property or giving directions to that effect in connection with a matter being investigated **(S.13 (2),** investigate accounts, make and give orders/directions necessary in the circumstances **(S.14 (1) and (6).**

Section 32 of the Act provides for the signification of acts of the Inspectorate of Government. It provides:

"Subject to this Act, where any instrument or document is required or authorized to be issued by the Inspectorate or any act is required or authorized to be done by the Inspectorate in the performance of its functions under this Act, the instrument or document or act may be signed, executed or done by the Inspector General or a Deputy Inspector General or by any person authorized in writing by the Inspector General or by a Deputy Inspector General."

We note that apart from the above stated provisions of the Act, elsewhere in the Act the functions and obligations required to be carried out in the Act are vested in the Inspectorate of Government as a composite entity. These are: functions, **(S.5),** jurisdiction **(S.9),** Independence **(S.10),** general powers **(S.12),** powers of access and search **(S.13),** enforcing the leadership code **(S.14 (7),** Rules of Procedure **(S.18),** Limitation on Investigation by the Inspectorate of Government **(S.26),** submission of reports to Parliament **(S.29)** and making regulations **(S.39).**

It has been submitted for the Inspectorate of Government and the Inspector General of Government that **Article 230 (2)** of the Constitution vests powers in the Inspector General of Government to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases of corruption, abuse of

authority or of public office; even when the Inspectorate of Government as is supposed to be constituted under **Article 223 (2)** is not in place.

520

Further, it is submitted that the sum total of sections **13 (2), 14 (1) (2) (3) (4) and (6)** as well as **section 32** of the Inspectorate of Government Act is to empower and vest in the office of Inspector General of Government powers to investigate, arrest

525 and prosecute in cases of corruption and/or abuse of authority or public office, even when the Inspectorate is not duly constituted and thus absent.

In respect of **Article 230 (1) and (2)** of the Constitution, it is

530 necessary to determine the relationship between the two provisions (1) and (2).

The Constitution has to be regarded as one integrated whole with no one particular provision destroying the other, but rather, each

535 provision sustaining the other.

It is of some significance that the heading to **Article 230** is “special powers of Inspectorate.”

540 A heading prefixed to an article, like this one, is in a way a preamble to the article. Such a heading may not control the plain words of the article, but it may be an aid in explaining any ambiguity: ***MARTINS V FOWLER [1926] AC 746.***

545 From the heading, the special powers, the subject of the article, are being vested in the Inspectorate of Government. It is clear to us that the powers that are passed over to the Inspector General of Government under **Article 230 (2)** arise from the special powers already vested in the Inspectorate of Government under 550 **Article 230 (1)** of the Constitution. There must be an Inspectorate in place to carry out the constitutional duties under **Article 230 (1);** and what the Inspector General of Government does "during the course of his or her duties or as a consequence of his/her duties or as a consequence of his/her findings, must 555 relate to the Inspectorate of Government having decided to exercise the power to investigate, arrest or prosecute in cases of corruption, abuse of authority or of public office.

We are not persuaded by the submission that the framers of the 560 Constitution intended that the powers vested in the Inspectorate of Government, as a composite entity, were also vested in the Inspector General of Government who at the same time is a member of the Inspectorate of Government to be exercised singularly and/or independently of the Inspectorate of

565 Government. The ultimate result of that would be for the Inspector General of Government to override, at his/her whims the Inspectorate of Government as to the exercise of powers vested into the Inspectorate of Government.

570 It is clear to us that under the Constitution the foundation of the powers of the Inspector General of Government is the existence of the Inspectorate of Government. The Inspector general of Government can only carry out the powers vested in that office as such only when the Inspectorate of Government is in place 575 exercising its powers. The Inspector General of Government implements what the Inspectorate of Government has resolved upon.

The Inspectorate of Government **Act No.5 of 2002** must be 580 applied and interpreted in conformity with the Constitution. **Article 2** of the Constitution makes any law or act that contravenes the Constitution to be void to the extent of the contravention. See: ***Constitutional Petition No.2 of 2006: NSIMBE HOLDINGS LTD VS ATTORNEY GENERAL &*** 585 ***ANOTHER.***

As already pointed out, the language of the Act in its various provisions vests powers in the Inspectorate of Government and

not in the Inspector General of government. Sections 14(5) and (6) are in similar terms as **Article 230 (1) and (2)** of the Constitution. The interpretation we have already made, therefore, also applies to these sections.

We are unable to read in section 32 of the Act any powers of prosecution being vested in the Inspector General of Government independently of or in the absence of the Inspectorate of Government.

Our appreciation of the section is that the Inspectorate of Government must first act so as to give necessity for the requirement of an instrument, or document or some act to be signed, executed or done by the Inspector General of Government or a Deputy Inspector General of Government or by any person authorized in writing by the Inspector General of Government or Deputy Inspector General of Government. Surely Parliament cannot be taken to have intended that the Inspector General of Government or the Deputy Inspector General of Government or even a person authorized by anyone of the two, can assume and exercise the powers of the whole Inspectorate of Government through **section 32** of the Act.

It is a fact that the Inspectorate of Government by the nature of its responsibilities exercises judicial or quasi-judicial powers while carrying out its duties. To that extent we find as relevant to this
615 case, the words considered in the South African case of South Gauteng High Court, Johannesburg: ***RADIO PULPIT VS CHAIRPERSON OF THE COUNCIL OF THE INDEPENDENT AFRICA AND ANOTHER (09/19114) 2011 ZAP JHC 83 (8 MARCH 2011)*** when the court held that:

620 ***" When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can be only one adjudication, and that must be the adjudication of the entire body, and the same rule would apply whenever a***
625 ***number of individuals were empowered by statute to deal with any matter as one body; the action taken would have to be the joint action of all of them for otherwise they would not be acting in accordance with the provisions of the statute."***

630

It is our conclusion, therefore, that neither the Constitution nor the Inspectorate of Government Act empowers the Inspector General of Government to act alone as if he were the whole Inspectorate of Government in taking decisions that are of a
635 quasi-judicial nature, including the decisions to prosecute.

In arriving at this conclusion, we are not unmindful of the recent decision this court took in ***Constitutional Petition No.30 of 2011: Prof. GILBERT BALIBASEKA BUKENYA VS ATTORNEY***
640 ***GENERAL*** where we held:

" As regards issue No.3 whether the Acting IGG has authority to perform the functions of IGG under Article 223. Section 2 of the Act No.5/2002 provides that: "Inspector General" means the Inspector General of
645 ***Government appointed under section 3 of the Act and includes a Deputy Inspector General. It is correct that the Inspectorate is manned by the IGG and such number of Deputy Inspectors General as Parliament may prescribe. There is no position designated as Acting IGG currently.***
650 ***However, the current IGG, Mr. Raphael Obudra Baku is substantively a Deputy IGG who now happens to be carrying out the duties of IGG since the position of the substantive IGG has not yet been filled. This, however, does not nullify his position and powers as Deputy IGG***
655 ***who is capable of prosecuting offences. We do consider this to be an internal administrative arrangement which does not affect the capacity of the officer to perform his constitutional duties. At any rate, the charge sheet "A"being impugned by the petitioner was also co-signed***
660 ***by the Director, legal Affairs, Inspectorate of Government, Mr. Asubo. We received no objection to the effect that the latter officer had no capacity to sign the charge sheet".***

It is thus obvious that the above holding concerned itself with the issue of whether or not a Deputy Inspector General, in an acting capacity of Inspector General of Government could validly commence prosecution against an accused for the offences of abuse of office and fraudulent practice contrary to **section 11** of the Anti-Corruption Act, 2009, and **section 95 (1) (d)** of the Public Procurement and Disposal of Public Assets Act, 2003.

The issue of whether or not the Inspector General of Government can act as the Inspectorate of Government or Independently commence prosecution against anyone when the Inspectorate of Government is not legally constituted, was never addressed by counsel, and was not at all considered by court in the ***Bukenya Petition*** (supra).

In conclusion on the 1st issue, our holding is that the Inspectorate of Government must be in existence when fully constituted as provided for in **Article 223 (1) and (2)** of the Constitution and **section 3 (2)** of the Inspectorate of Government Act so as to be able to prosecute or cause prosecution of cases involving corruption, abuse of authority or of public office.

We are mindful of the fact that in the past criminal prosecutions have been done and completed and other acts have also been carried out by the office of Inspector General of Government in the absence of the Inspectorate when fully constituted. Rights of 690 those people that have been the subject of these prosecutions and acts have been affected, whether positively or negatively. The decision we have reached will, therefore, not be applied retrospectively so as to undo what has happened. This is to ensure that there is no disruptive effect in the administration of 695 justice system. It will only be applied prospectively as from the date of delivery of this Judgement.

2. Automatic lapse of bail:

The essence of the second issue is whether or not it is 700 constitutional for a person who has been on court bail to automatically have that bail lapse under **section 168 (4)** of the Magistrate's Courts Act, cap 16, on that person being committed to the High Court for trial. The issue involves the determination of whether **section 168 (4)** of the Magistrates Courts Act is 705 constitutional or not.

The genesis of the right to bail is the protection of the right to liberty. It is now axiomatic that the right to liberty is a universal human right and freedom which is inherent and not granted by

710 the state. **Article 20(2)** of the Constitution enjoins all organs and agencies of Government and all persons to respect, uphold and promote the fundamental rights and freedoms, which also includes the right to bail.

715 **Section 168 (4)** of the Magistrates Courts Act provides that:-

"168. Committal for trial by High Court.

(1) …………………………………………….

(2) ……………………………………………...

(3) ……………………………………………..

720 ***(4) If a person committed for trial by the High Court is on bail granted by any court, without prejudice to his or her right to apply to the high Court for bail, the bail shall lapse, and the Magistrate shall remand him or her in custody pending his or her***

725 ***trial.***"

The Magistrates Courts Act, of which **section 168 (4)** is a part was first enacted as **Act 13 of 1970.** It, therefore, pre-dates the 1995 Constitution. It is therefore an existing law which under **Article 274 (1)** of the Constitution, must:

730 ***"be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."***

In Attorney General Vs Osotraco Ltd: Court of Appeal of
735 ***Uganda Civil Appeal No.32 of 2002,*** the import of **Article 274** (then **Article 273**) was stated by court to be:

" ………….it only empowers all courts to modify existing unjust laws without necessarily having to refer all such cases to the Constitutional Court. This provision enables
740 ***the court to expedite justice by construing unjust and archaic laws and bringing them in conformity with the Constitution, so that they do not exist and are void."***

In reaching to the above conclusion, the court, considered similar
745 cases from the neighbouring jurisdictions. The Tanzanian Court of Appeal in ***EPHRAHIM VS PASTORY & ANOTHER [1970] LRC (Const.) 757,*** construed **section (4) (1)** of Act No.16 of 1984, the section being similar to Uganda's **Article 274,** and held that the customary law of Tanzania, as an existing law, had to be
750 construed as modified to be void for being inconsistent with the Bill of Rights in the new Constitutional order that barred discrimination on the basis of sex. The Tanzanian customary law in question prevented a female clan member from selling land to a non clan member, while the male clan member was allowed to
755 do so.

The facts in the Zimbabwe Supreme Court case of ***BULL VS MINISTER OF HOME AFFAIRS [1987] LRC (Const.) 547*** are
760 also very relevant to the case under consideration. In 1980 Zimbabwe adopted a new constitution with a provision similar to Uganda's **Article 274.** Certain provisions in the Criminal Procedure and Evidence Acts that restricted the right to bail were in operation before the coming into effect of the new Constitution
765 that had provisions whose interpretation tended to remove the bail restrictions. Court held that the Criminal Procedure and Evidence Acts had to be applied with such modifications that they are not inconsistent with the constitutional right to liberty, and where inconsistent, then they were void to the extent of the
770 inconsistency.

It follows therefore that **section 168 (4)** of the Magistrate's Courts Act must be construed as if the Legislature enacted it under the authority of the 1995 Constitution.

775

The 1995 Constitution, is a culmination of Ugandans' struggles against the forces of tyranny, oppression and exploitation brought about by political and constitutional instability. This is why the preamble to this constitution is worded as it is.

780

Accordingly, one of the cornerstones of the 1995 Constitution is the protection and promotion of fundamental and other human rights and freedoms as is exemplified by the national objective and directive principle of state number (v) of the Constitution. 785 Uganda as a state obliges to guarantee and respect institutions that are charged by the state to protect and promote human rights by providing them with adequate resources to function effectively.

790 Chapter four of the Constitution is a detailed Bill of Rights titled **"Protection and Promotion of Fundamental and other Human Rights and Freedoms."**

The enjoyment of these rights and freedoms is guaranteed under 795 the Constitution, except only in the circumstances that are expressly set out in the Constitution.

Article 23 provides for the protection of the right to liberty. The enjoyment of bail, as already stated, is embedded in this right to 800 liberty. **Article 23** provides, so far as is relevant to the facts of this case, that:-

"23. Protection of personal liberty.

(1) No person shall be deprived of personal liberty except in any of the following circumstances:

805 ***(2) ……………………………………………….***

(3) ……………………………………………….

(4) ……………………………………………….

(5) ……………………………………………….

(6) Where a person is arrested in respect of a
810 ***criminal offence:***

(a) The person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;

815 ***(b) In the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been***
820 ***remanded in custody in respect of the offence before trial for one hundred and twenty days.***

(c) In the case of an offence triable only by the High Court, the person shall be released on
825 ***bail on such conditions as the court***

considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

830 ***7………………………………………………..***

8………………………………………………..

9. the right to an order of habeas corpus shall be inviolable and shall not be suspended"

835 The subject of the preservation of personal liberty is so crucial in the Constitution that any derogation from it, where it has to be done as a matter of unavoidable necessity, the Constitution ensures that such derogation is just temporary and not indefinite. The Constitution has a mechanism that
840 enables the enjoyment of the right that has been temporarily interrupted to be reclaimed through the right to the order of habeas corpus which is inviolable and cannot be suspended, as well as through the right to apply for release on bail.

845 Whether or not to grant bail to an accused, except where specifically provided otherwise in the Constitution, is a matter of the judicial exercise of the discretion of the court. The court's principal consideration is whether such release is

likely to prejudice the pending trial. ***IN ATTORNEY GENERAL VS TUMUSHABE (supra) Mulenga, JSC***, with the concurrence of the other members of the court, stated at p.34:-

"It is clear to me that clause 6 of article 23 applies to every person awaiting trial for criminal offence without exception. Under paragraph (a) of that clause, every such person at any time, upon and after being charged, may apply for release on bail, and the court may at its discretion, grant the application irrespective of the class of criminal offence, for which the person is charged."

The above quotation is a manifestation of how much the right to bail is such a fundamental right. Being such, it is the duty of this court to give an interpretation to the constitutional provisions that relate to bail that realizes the full benefit of the guaranteed right: See: ***Supreme Court of Uganda Constitutional Appeal No.1 of 2006: Attorney General Vs Uganda law Society.***

An examination of section **168 (4)** of the Magistrates Courts Act, shows that it commands lapse of bail granted by any court to a person who is being committed for trial by the High Court. The lapse is solely based on the single fact that the person is being committed to the High Court for trial. It is irrelevant whether the committing court is inferior in

hierarchy and jurisdiction to the court that granted the bail to the person being committed. It is also inconsequential that neither the person being committed nor the prosecutor is afforded any opportunity to be heard as to the issue of bail. It would appear there is no provision of law for appeal, Revision or Review of the Order of cancellation of bail made under the section.

To the extent that section **168 (4)** allows an inferior court to cancel the bail granted to an accused by a superior court, such as the High Court, which has unlimited original jurisdiction in all matters and to which decisions of inferior courts go by way of appeal under **Article 139**, is in our view, inconsistent with the said **Article 139**. It is also in contradiction with **section (4)** of the Judicature Act, cap.13.

The automatic lapse of bail may have been justified in the 1970s by the fact that a person accused of a heinous crime such as murder, aggravated robbery or treason, would be tempted to disappear from the court's jurisdiction to avoid trial, after all the evidence against him/her as well as the exhibits implicating him/her in the crime have been read and shown to him/her in the summary of the evidence/of the case at the time of being committed to the High Court for trial. This was before the 1995 Constitution with its comprehensive Bill of Rights came into force.

900 Under **Article 23 (6) (a)** of the Constitution, a person arrested in respect of a criminal offence:

"is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable."
905 ***(emphasis added). Thus the Constitution makes it a right to apply for bail and gives this right to a person arrested in respect of a criminal offence. The Constitution also gives the court to which the person arrested is taken "the power to grant bail".*** These two
910 rights cannot be derogated from, except with express provision to that effect in the Constitution.

The express provisions that provide for derogation are set out in **Article 23 (1) (a-h).** The automatic cancellation of
915 bail, without any right to be heard, based on the mere fact that one is being committed to the High Court for trial, contained in **section 168 (4)** of the Magistrates Courts Act, is not part of the expressly stipulated circumstances of derogation from the right to protection of liberty in the
920 Constitution.

The submission that the derogation inherent in **section 168 (4)** is constitutionally provided for by **Article 23 (1) (h)** which states:-

925 ***" (h) as may be authorized by law, in any other circumstances similar to any of the cases specified in paragraphs (a) to (g) of this clause."*** has no validity. The derogation ***"as may be authorized by law"*** is only in respect of other circumstances similar to those specified in

930 paragraphs **(a) to (g) of Article 23 (1)**. The scenario in **section 168 (4**) is not one of those.

We have already observed that the granting of bail by court to one before court is essentially an act of exercise by court

935 of Judicial discretionary power. **Article 126 (1)** of the Constitution provides that Judicial power is derived from the people and is exercisable by the courts established under the Constitution in the name of the people and in conformity with law and with the values norms and aspirations of the

940 people.

Judicial Discretion is exercised by a court when that court considers all that is before it and reaches a decision without taking into account any reason which is not a legal one. The

945 court acts according to the rules of reason, justice and law,

within the limits and the objects intended by the particular legislation. Judicial discretion is not private opinion, humour, arbitrariness, capriciousness or vague and fanciful considerations: See ***RV Board of Education [1990] 2 KB***
950 ***165.***

Where, therefore, a court of law, in the exercise of its judicious discretion, as part of judicial power, decides to grant bail to a person arrested in respect of a criminal
955 offence, it would be contrary to **Article 126 (1)** of the Constitution, for another court, by the authority of **section 168 (4)** of the Magistrates Courts Act, to override the decision granting bail by automatically lapsing the same on the sole ground that the person, the subject of the bail, is
960 being committed to the High Court for trial.

Further, automatic lapse of bail by the court committing an accused to the High Court for trial has the unconstitutional effect of condemning that person unheard on whether or not
965 he/she should continue to enjoy the right to liberty, restored to him or her when he/she was first granted the bail. It is therefore inconsistent and in contravention of **Article 28 (1)** of the Constitution. That Article is non derogable under **Article 44 (c)** of the Constitution. It is a sacrosanct Article.

970

We have therefore come to the conclusion that **section 168 (4)** rescinds the constitutionally guaranteed power of the court to grant bail, through the court's exercise of its discretion. It acts counter to the fundamental right of an
975 accused person to apply for and receive the discretionary consideration of the court before which such accused person is brought, to maintain the already granted, or to grant bail. Its purpose and effect, if construed in accordance with the 1995 Constitution, results in its being contrary to **Articles**
980 **23 (6) (a) and 28 (1)** of the Constitution.

We hold that pursuant to **Article 274** of the Constitution, **section 168 (4)** of the Magistrate's Courts Act must be construed in such a way as to provide that:

985 ***(i) Bail granted, by a court of competent jurisdiction, to a person arrested in connection of a criminal case does not automatically lapse by reason only of the fact of that person being committed to the***
990 ***High Court for trial.***

(ii) Subject to being competently seized of jurisdiction under the law, the court committing an accused person to the High

> ***Court for trial, has power derived from Article 23 (6) (a) of the Constitution to maintain bail already granted or to grant bail to an accused person, or to cancel bail for sufficient reason, after hearing the parties concerned on the matter.***

The above is the resolution of the third question, framed as issue No2.

(iii) Inconsistency in Articles 128 and 137 of the Constitution.

The 4th question requires this court to resolve whether **Article 137 (5) (b),** is inconsistent with **Article 128** of the Constitution.

Article 137 (5) (b) provides that a court of law, other than a field court martial, handling proceedings where a question as to the interpretation of the Constitution arises, shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of the article.

Article 128 of the Constitution provides for independence of the judiciary. Courts are to be independent and shall not be subject to the control or direction of any person or authority in the

exercise of judicial power. No person or authority is to interfere with the courts or judicial officers in the exercise of their judicial functions. All organs and agencies of the state have to accord to
1020 courts assistance to ensure their effectiveness.

Both the Supreme Court of Uganda and this Court have in a way dealt with this issue. In Constitutional Appeal No.2 of 1998, ***Ismail Serugo Vs Kampala City Council & Attorney General***,
1025 the rest of their Lordships of the Supreme Court, expressed no contrary view to the holding of Wambuzi, CJ, as he then was, that:-

"In my view for the Constitutional Court to have jurisdiction the petition must show, on the face of it, that
1030 ***the interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated."***

Following the above holding, this court in ***Constitutional Reference No.31 of 2010: Uganda Vs Atugonza Francis,***
1035 held that:-

"Article 137 (5) should be read in the proper spirit of the Constitution. ……………………………………………………….

The applicant must go further to show prima facie the violation alleged and its effect before a question could be
1040 ***referred to the Constitutional Court."***

From the above two decisions, it follows, therefore, that in **Article 137 (5) (a) and (b)** the court deciding to make a reference, must first be satisfied that a prima facie case exists or has been made out by the requesting party, that an interpretation of a
1045 provision of the Constitution is required. If the court comes to the conclusion that this is not established prima facie, then no reference should be made to the Constitutional Court whether under **Article 137 (5) (a) or (b).** It cannot therefore be said that **Article 137 (5) (b**) takes away the Independence of the
1050 courts.

We accordingly hold that **Article 137 (5) (b)** is not inconsistent with **Article 128** of the Constitution.

In conclusion, we declare that:-

1055 ***1. The Inspectorate of Government cannot, through the Inspector General of Government, when he/she is the only one in office, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or public office under Article 230 of the***
1060 ***Constitution, when the Inspectorate of Government is not duly constituted in accordance with article 223 (2) of the Constitution and section 3 (2) of the Inspectorate of Government Act No.5 of 2002, which require the Inspectorate to consist of the Inspector***
1065 ***General of Government and two Deputy Inspectors***

General. This declaration is to act prospectively and not retrospectively as from the date of delivery of this Judgement.

2. ***The automatic lapse of bail, in the case of committal proceedings, for trial to the High Court, under section 168 (4) of the Magistrates Court Act, is inconsistent with and in contravention of articles 23 (6) (a), 126 (1) and 28 (1) of the Constitution.***

Accordingly section 168 (4) of the Magistrates Act ought to be construed in such a way as is stated in this judgement so as to bring it in conformity with the 1995 Constitution.

3. ***Article 137 (5) (b) is not inconsistent with Article 128 of the Constitution.***

Constitutional Petition No.46 of 2011, therefore stands allowed.

Questions (1) (iii) and (iv) of the Reference are answered as per the declarations above. Question (ii) of the Reference was abandoned.

The Anti-Corruption Court, Kololo, in ***Criminal Case No.184 of 2011 Uganda Vs Sam Kutesa, John Nasasira and Mwesigwa-Rukutana,*** is hereby directed to act accordingly as

per the declarations given by this court in answer to the

1090 Reference.

As to costs, given the public nature and importance of the issues considered, we order that parties bear their own costs.

We are grateful to all counsel for the respective parties for the

1095 resourcefulness each one provided to court.

We so declare and order.

1100

Dated at Kampala this …**05th**…day of …**April**….2012.

1105 A.E.N. Mpagi-Bahigeine

DEPUTY CHIEF JUSTICE/PRESIDENT
CONSTITUTIONAL COURT

1110

S.B.K. Kavuma

JUSTICE OF APPEAL/CONSTITUTIONAL COURT

1115

A.S. Nshimye
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

1120

M.S. Arach Amoko
JUSTICE OF APPEAL/CONSTITUTIONAL COURT

1125

Remmy. K. Kasule
JUSTICE OF APPEAL/CONSTITUTIONAL COURT