THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA

AT KAMPALA

Coram Hon L.E.M Mukasa-Kikonyogo, DCJ
Hon S.G. Engwau, JA
Hon. C.K Byamugisha, JA
Hon. S.B.K Kavuma, JA
Hon. A.S. Nshimye, JA

CONSOLIDATED CONSTITUTIONAL PETITIONS

NUMBERS 12 OF 2005

AND

N0. 3 OF 2006

1. **ANDREW MUJUNI MWENDA**
2. **THE EASTERN AFRICAN MEDIA INSTITUTE (U) LTD** **::::::::: PETITIONERS**

Vs

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::RESPONDENT

JUDGMENT OF THE COURT

The 1st petitioner Andrew Mujuni Mwenda, a journalist, under Constitutional petition N0. 12/2005 came to this Court seeking declarations of nullification of the offences of sedition and promoting sectarianism preferred against him in the Chief Magistrate's Court contending that they were unconstitutional.

Similarly, the 2nd petitioner the Eastern African Media Institution (U) Ltd on it's own and in public interest petitioned this Court seeking declarations of nullification of the same offences of sedition, promoting sectarianism and criminal defamation.

The issues and prayers of both petitioners being similar, sought leave of this Court to consolidate the hearing of their petitions, which leave we granted.

The background to the petitions

The 1st petitioner is a professional journalist. He was formally a Manager of 93.3 KFM Radio Station and Political Editor of Monitor Newspaper. On the said 93.3 KFM he was the host of a program known as "**Tonight with Andrew Mwenda Live**" it used to debate current typical issues prevailing in the country.
He would invite at will prominent persons in the studio who would debate a given topic and then, the listening public would be invited to phone in to react to the debate.

About 1st August 2005, the 1st Vice president of Sudan, the late Lt General John Garanga died in a Uganda Presidential helicopter crash together with a number of officers and men of Uganda Government.

Two Public holidays were declared in Uganda to mourn the deceased.

Allegedly, the President of Uganda a chief mourner, in his speech, warned the 1st petitioner and threatened to close the core business of Monitor publications Ltd, the then employers of the 1st petitioner. Following the President's speech, the 1st petitioner hosted

a debate by prominent Politicians on his above mentioned program entitled:- "***To night is a Public Holiday. What justifies a Public Holiday***?"

Following what was said by the petitioner in the debate, he was with the consent of the DPP, charged before the Chief Magistrate, Nakawa with the offence of sedition contrary to sections 39 (1)(a) and 40(i)(a) of the Penal Code Act.

The particulars of the offence alleged that:-

Andrew Mujuni Mwenda, on the 10th day of August, 2005 at KFM Radio Station, Namuwongo in Kampala District, during alive talk show, uttered the following words with intention to bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution.

> ***"You see these African Presidents. This man went to University, why can't he behave like an educated person? Why does he behave like a villager?'***
>
> ***Museveni can never intimidate me. He can only intimidate himself …… the President is becoming more of a coward and every day importing cars that are armor plated and bullet proof and you know moving in tanks and mambas, you know hiding with a mountain of soldiers surrounding him, he thinks that, that is security. That is not security. That is cowardice"***
>
> ***Actually Museveni's days are numbered if he goes on a collision course with me."***
>
> ***You mismanaged Garang's Security. Are you saying it is Monitor that caused the death of Garang or it is your own mismanagement? Garang's security was put in danger by our own Government putting him first of all on a junk helicopter, second at night, third passing through Imatong Hills where Kony is ?.....Are you aware that your Government killed Garang?"***
>
> ***I can never withdraw it. Police call them, I would say the Government of***

Uganda, out of incompetence led to or caused the death of Garang"

Being aggrieved by the said prosecution, he petitioned this Court alleging that the prosecution was inconsistent with the constitution.

PETITION OF THE 1ST PETITIONER.

"The petition of Andrew Mujuni Mwenda was in part worded as follows:-

1. ***Your petitioner is a person affected by the following matters being inconsistent with the Constitution whereby your petitioner is aggrieved.***

   (a) That the criminal prosecution of your Petitioner under section 39 and 40 of the Penal Code Act for his expression made while moderating a debate on 10th August, 2005 on KFM Radio Station under the theme "Today is a Public Holiday. What justifies a Public Holiday" is inconsistent with and/or is in contravention of the provisions of the Constitution, namely:-

   (i) Article 29(I) (a) of the Constitution in that the expressions were made in the exercise of your petitioner's freedom of expression and the press guaranteed under the said Article;

   (ii) Article 43(2) (c) of the Constitution in that the expressions were made under your petitioner's reasonable belief that expressing oneself is demonstrably justifiable in a free and democratic society.

(b) That sections 39 and 40 of the Penal Code Act (Cap 120) under which your petitioner is charged are inconsistent with the constitution in so far as they limit the enjoyment of the rights and freedoms prescribed in Article 29 (I) (a) and are not demonstrably justifiable in a free and democratic society as provided in Article 43(2) (c) of the Constitution.

(2) Your petitioner was on the 12th day of August, 2005 arrested by Police and detained at Kampala Central Police Station until 15th August, 2005 when he was charged in Nakawa Chief Magistrate's Court under criminal case N0. 417 of 2005 with the offence of sedition contrary to sections 39(1) (a) and 40(1) (a) of the Penal Code Act in respect of a selected part of his expressions or opinion during the said debate as provided in the particulars of the offence.

(3) Your petitioner states that the action of the State in criminally prosecuting your petitioner for his expressions and sections 39 and 40 of the Penal Code are inconsistent with the Constitution for the following reasons:_

(a) That sections 39 and 40 of the Penal Code Act are inconsistent with the provisions of Articles 29(I) (a) and 43 (2) (c) of the Constitution and are therefore null and void;

(4) He prayed for a declaration that the action of the State in criminally prosecuting your petitioner under the provisions of sections 39 and 40 of the Penal Code for his expressions is inconsistent with the provisions of Articles 29(1) (a) and 43(2) (c) of the Constitution and is therefore null and void;

(b) Grant an order that he be freed from criminal prosecution in Chief Magistrate' s Court of Nakawa criminal case N0. 417 of 2005.

(c) A declaration that in view of the declaration (b) above, sections 42, 43 and 44 of the Penal Code Act which directly relate to sedition be

redundant.

(d) That he is entitled to general damages for the unconstitutional prosecution and refer the mater to the High Court to investigate and determine the quantum.

(e) That he is entitled to costs of the petition.

EVIDENCE OF THE FIRST PETITIONER

The petitioner annexed to his petition supportive evidence by way of affidavit. In most material particulars he repeated the facts contained in his petition.

In the like manner the second Petitioner petitioned this Court partly on the following terms.

"PETITION OF THE 2ND PETITIONER

1. Your petitioner is a non governmental organization whose objectives among others are to encourage, promote, and support freedom of speech, human rights and democratic governance. Because of the foregoing your petitioner has great interest in the provisions of the Penal Code Act chapter 120 of the revised laws of Uganda which provisions are inconsistent with the Constitution whereby your petitioner is aggrieved.

(a) Sections 39, 40, 41, 42, 43, 179 of the Penal Code Act are inconsistent with and conflict with the provisions of Articles 29,30,38, 41 and 43 of the Constitution of the Republic of Uganda.

(b) That the above sections of the Penal Code are not justifiable under the free and democratic society and being inconsistent with the provisions of Article 29(a) and (b), 30, 38, 41 and 43 of the Constitution are null and void.

2. ***Your petitioner contends that the above sections of the Penal Code Act creates vague offences, that are unseeable and do not provide adequate guidelines as to how the Public can avoid them and as such contravene Article 29 (a) and (b) of the Constitution.***

3. ***It prayed for grant of a declaration that:-***

   The provisions of sections 39, 40, 41, 43, of the Penal Code Act contravene and are inconsistent with Articles 29 (a) and (b), 30, 38, 41 and 43 of the Constitution of the Republic of Uganda and as such are null and void.

SUPPORTING EVIDENCE OF THE 2ND PETITIONER

"The 2nd petitioner too, attached evidence by way of affidavit sworn by Haruna Kanabi, a founder member and National Coordinator in the petitioner's organization a non-governmental organization, deponing to material facts contained in the petition.

In answer thereof, the Attorney General/Respondent briefly stated:-

1. ***In reply to paragraphs 2 and 3 of the petition, the respondent avers that the criminal prosecution of the petitioner does not contravene article 29(1)(a) and article 43(2)(c) of the constitution. The respondent contends that freedoms of expression and of the press are not absolute but must be enjoyed in accordance with the Constitution and the law.***

2. ***The respondent further avers that sections 39 and 40 of the Penal code act are not inconsistent with articles 29(I) or 43(3) (c) of the Constitution as alleged or at all.***

3. ***In reply to paragraphs 3, 4, and 5 of the petition, the respondent repeats the***

contents of paragraphs 2 and 3 hereinabove and avers that freedom of expression of the press must be enjoyed subject to the rights and freedoms of other people and the public interest, and subject to the security and sovereignty of the State.

4. ***The respondent further avers that in accordance with articles 41 and 43 of the Constitution, the law of sedition is justifiable and not unconstitutional, as the freedoms of expression and of the press are not absolute.***

EVIDENCE OF THE RESPONDENT IN REBUTTAL

The respondent's answer to the petition of the 1st petitioner was also accompanied by supportive evidence by way of affidavit sworn by Robinah Rwakoojo a Principal State Attorney, in the Attorney General's chambers.

Likewise briefly the attorney General responded to the 2nd petitioner's petition as follows:

1) ***In reply to paragraph 1 of the petition, the respondent contends that sections 39, 40, 41, 42, 43, and 179 of the Penal Code Act are not inconsistent with and do not conflict the provisions of Articles 29, 30, 38, 41 and 43 of the Constitution as alleged by the petitioner or at all.***

2) ***The respondent further avers that the above said sections of the Penal Code Act, being consistent with the provisions of Article 41 and 43 of the Constitution, are justifiable and not unconstitutional.***

3) ***That the respondent denies that the above sections of the Penal Code Act create vague offences as alleged in paragraph 3 of the petition, and avers that the said sections conform to the Constitution.***

4) ***In reply to paragraph 4 of the petition, the respondent denies that the above provisions of the Penal Code criminalize freedom of speech and of conscience and avers that freedom of speech and conscience are not absolute but must be enjoyed in accordance with the Constitution, with which the above provisions of the Penal Code comply.***

5) ***In reply to paragraph 5 of the petition, the respondent denies that the above provisions of the Penal Code Act prevent the mere criticism of government or public officials thus contravening Article 29 (a) and (b) of the Constitution, and avers that any person is free to criticize government or public officials, but in doing so, is subject to the limitations provided for in the Constitution and other laws, including the above said provisions of the Penal Code which are consistent with the Constitution.***

The respondent prayed that the petition be dismissed with costs".

SUPPORTING EVIDENCE OF THE RESPONDENT IN REBUTTAL TO THAT OF THE 2ND PETITIONER.

The respondent attached an affidavit in support to his answer,
sworn by Margaret Apinyi, a Senior State Attorney, in the Attorney General's chambers

During conferencing, before the Registrar, the parties agreed on joint issues to be decided by this court namely;

1. ***Whether sections 39, 40, 41 and 179 of the Penal Code Act Cap 120 are inconsistent with and or are in contravention of Article 29 (1)(a) of the Constitution.***

2. ***Whether sections 39, 40, 41, and 179 of the Penal Code Act Cap 120 being limitations of the enjoyment of the freedom of expression are acceptable and demonstrably justifiable in a free and democratic society under Article 43(1) (c) of the Constitution.***

3. ***Whether sections 42-44 of the Penal Code Act Cap 120 which relate to sedition and promoting sectarianism should be declared redundant.***

4. ***Whether sections 180-186 of the Penal Code Act Cap 120 which relate to criminal defamation should be declared redundant.***

5. ***Whether the petitioners are entitled to the declarations, orders and relief's sought in the petitions.***

This Court having pronounced itself on criminal defamation **in Joachim Buwembo & 3 others Vs Attorney General Constitutional reference N0. 1/2008,** that section 179 of the Penal Code Act is not inconsistent with Article 29 (1) (a) of the Constitution and therefore sections 180-186 of the Penal Code Act are not redundant, issue 4 above was abandoned.

Representation

At the hearing of the petitions, both the 1st petitioner and Mr. Haruna Kanabi representing the 2nd petitioner were present. Mr. Nangwala appeared for the 1st petitioner while Mr. Kenneth Kakuru appeared for the 2nd petitioner. M/s Patricia Mutesi a Senior State Attorney appeared for the Attorney General.

Mr. Nangwala submitted that the purpose of the petitions, was to challenge the constitutionality of 2 offences namely **sedition and promoting sectarianism,** contrary to sections 39, 40 and 41 of the Penal Code because they infringe Article 29(a) of the Constitution, which allows freedom of speech, expression, press and other media.

He argued that the burden of proof that there was limitation to the said right was on the state and is heavier than balance of ***prompondenss.*** Among many decided cases, he cited case of **Rangarajan Vs Jagijivan Ram & others; Union of India & others Vs Jagjivan Ram (1990) LRC (Const) 424-427** in which it was held that in a democracy, freedom of expression is to be taken for granted. Governance is by open discussion of ideas by citizens. Be it wise or unwise, foolish or dangerous statements must be tolerated in a democracy.

Counsel compared limitations under the 1967 Constitution and the present one. While there was a derogatory cause in the 1967 Constitution limiting freedoms and rights in the interest of public health, security and economy, there was complete departure in the 1995 Constitution. The 1995 Constitution imposed limitations only on enjoyment of freedoms and rights which prejudiced rights of others and public interest.

The limitation is found in Article 43(1)(2). That is when enjoyment of fundamental freedom prejudices **rights of others** or **public interest**. Public interest, should not include a limitation that is not justifiably acceptable in a democratic society. He cited the judgment of Justice Mulenga (Rtd) in the case of **Charles Onyango Obbo & another Vs Attorney General SCC N0. 2 of 2002** which dealt with this limitation. Even objective 2 of our Constitution empowers and encourages active criticism in the governance of their state by the citizens.

He cited the case of **Regina Vs Oakes 26 DLR (4th) 200** on:-

1. Accommodation of wild beliefs and
2. Participation in state affairs, the case of **Zundel Vs the Queen; Attorney General of Canada (211)** in which their lordships observed that:

   "a free and democratic society is a society based on the recognition of the fundamental rights, including tolerance of expression which does not conform to the views of the majority".

Counsel asserted that unless sedition fits in the principles out lined, it is unconstitutional because sedition criminises speech. It criminises criticism of the President and Government institution. Truth is not a defence. The greater the truth, the greater the offence. Counsel explained that what is criminal is bringing into ridicule, disaffection attracting ill will or hostility mensrea is subjectively presumed.

He outlined the history and objective of sedition from **Zundel Vs The Queen case** Supra page 745. It originated in England. It presumed wisdom of a ruler and mistakes of that ruler were not to be pointed out openly. Truth aggravated the truth. A Nigerian case of **Nwankwo Vs The State (1983) (1) NCR 383,** the Court compared monarchs to elected leaders. The democratically elected President seeks mandate from the people. Seekers go through mudsliming. In Uganda where the President is elected and not born, the actions of the President and activities of the State, administration and justice offices mentioned in section 41 must undergo criticism of the citizens in fulfillment of objective N0. 2. A leader should not cease to tolerate those who elect him, only because he has been elected. He invited us to find that the offence of sedition is unconstitutional.

He argued that It's wordings are too wide. Any criticism of those institutions attract 20 criminal prosecutions. It gives the DPP powers to prosecute critics at his leisure. This offence may be seasonal. During campaigns, candidates criticize each other using very strong inflammatory languages. Rarely prosecution is commenced.

In his view, the law is vague and discretionally. A person may not be able to know whether an utterance may attract prosecution or not.

He cited the case of **Pumbun Vs Attorney General (1993) 2 LCR 323** and the case of **Re Ontario Film and Video Appreciation Society and Ontario Board of Censors 147 DLR (3rd) 67** for the ratio that the law must not be arbitrary. It must provide safe guards against those in authority. It must not be drafted to target every one. The section on sedition is drafted in such a way that it catches every critic and is discretionally. He again cited the case of **Nwanko Vs The State (Supra)** in which it was said corrupt Governments can use it as a tool against critics.

Counsel stated that many jurisdictions have struck out sedition or reformed its wordings. Where it is still in use, incitement to violence and use of force is an integral ingredient. In USA, Canada, Australia, it is treason. He invited us to hold that sedition is a limitation not justifiable in a free and democratic society. Courts must interprete the law as it is. The framers found it fit to give a heavy yard stick to the Republic of Uganda because it is a democratic society.

He prayed that we strike down sections 42-44 of the Penal Code which lead to sedition should be declared redundant.

On promoting sectarianism. Counsel submitted that the principles he had highlighted under sedition were applicable. There is no fundamental freedom, breach of which this law is intended to protect. It is not akin to hate speech which is criminal in Canada and other jurisdictions. The essence of hate speech is found in **The queen Vs James Keegsta [1990] 3SCR 698-9**. It talks about hate propanganda. The Court held it was justifiable limitation. There must be promotion of hatred against an identifiable group. By comparison hate speech excludes private conversation. In hate speech, the publication must have been made willfully. Defences available to promoting sectarianism are vague. The facts in Andrew Mwenda's case are very clear if one looks at the charge sheet. He cited the case of **Islamic Unit Convention Vs the independent broadcasting authority & 4 others case CCT 36/01 (South Africa)** in which the court held that only speech likely to cause hate is justified. Likely to degrade, creates uncertainty and such uncertainty gives courts difficulty in deciding when the offence was committed.

He contended that the offence of promoting sectarianism was subject to abuse by those in authority. It has no foundation in the Constitution which lists down various tribes and ethnic groups. He cited the case of **Surek and Ozdemir Vs Turkey**, **(Applications N0s 23927/94 and 24277/94 (European Court of Human Rights and Lingerns Vs Austria in (Application N0. 9815182**) European Court of Human rights) in paragraph 58 page 22 in which the Court highlighted the role of press. It includes imparting ideas, including invisible ones and the public has a duty to receive such ideas.

In his view the law should not criminise expression. Equally the offence of promoting sectarianism is not justifiable in a democratic society. It requires refinery. It is violence that should be made criminal.

Finally, he prayed that his client's petition be allowed with costs because his, was not a public interest petition. It was brought in the course of prosecution.

Submission of Mr. Kakuru Kenneth for the 2nd Petitioner.

He associated himself with the arguments of Mr. Nangwala. He added that fundamental rights of expression and press are not only in our Constitution but are also universal. Every citizen has a right to enjoy those rights. The rights are not absolute. But the State has a duty to prove that they are justifiable in a free and democratic society. The duty of this court was to look at the provisions of the Penal Code and those of the Constitution and see whether there was justification for criminising the speech. In his view, it was clear from the constitution that this law would not stand. It was colonial law that was intended to protect a feudal set ups. And its intent and purpose was justified in a colonial State, because the colonial State had no legitimacy. It had not been elected.

The colonialists did not want to be criticized. Article 276 provides that all colonial laws must be construed in conformity with the Constitution otherwise they would be unconstitutional. He cited Constitutional Application **6/2000 James Rwanyarare and 11 others Vs Attorney General page 7**. The emphasis of the Constitution is about the power of the people. If they can not talk about their leaders, then that law is unconstitutional.

Counsel argued further, that if we have a law that criminises whatever some one writes against the President, how would Governments change, if people loved their President for ever. If one accepts a high office, one must grow a hard skin to bear criticism. The purpose of the 1995 Constitution was to break away from colonial practice. He concluded that the law in sections 39 and 40 is clearly unconstitutional.

On Sectarianism

Counsel Kakuru invited us to look at the law of sedition all together and to apply his arguments to sectarianism. He associated himself with the prayers of Mr. Nangwala expect that his client's suit is of a public interest suit and will not seek for costs.

Reply by M/s Patricia Mutesi for the Attorney General.

In reply Learned counsel Mutesi proposed to argue sedition and sectarianism separately. She submitted that Section 39 of the Penal Code Act was a restriction to freedom of expression which is allowed under Article 43 of the Constitution as being limitations on rights, in the public interest under Article 43(2)(c) and such limitations are acceptable and justifiable in a free and democratic society.

Sections 39 and 40 have a legislative objective. They are sufficiently important to override the freedom of expression. She also cited the case of **Charles Onyango Obbo. (supra)** The objective is prevention of public disorder and the 2nd one is interest of National security. The offence of sedition has its origin in England where it is a common law offence. The definition is identical to our section 39(1) (2) and (3) which leaves out one provision. According to commentaries on English law, the key elements of the offence are:-

1. Violence
2. Incitement for violence
3. Incitement for public disorder
4. Incitement for subordination of law authority.

She argued that there must have been an intention to create disorder. She cited the case of **Kedar Nath Sing Vs State of Bihar** (Supreme Court of India) which discuses elements of English common law offence and Indian law at page 794.

The Indian Court came up with its interpretation of the Penal Code section 124 A. Only when the words have the tendency of creating public disorder. Law on sedition has the objective of maintaining the security of the State. (Page 809-11) and Article 43(c) has

limitations. Every institution established under the law falls under the Constitution. Sections 39-40 are intended to protect that objective. She submitted that restrictions are not in Uganda alone. She quoted Article 10 of the European convention of Human rights which provides :-

> ***10 (1) Every one has the right to freedom for expression. This right shall include freedom to hold opinions and to receive and impact opinions and to receive and impact information and ideals without interference by public authority and regardless of frontiers.***
>
> ***This Article shall not prevent States from requiring the licensing of broadcasting, television cinema enterprises.***
>
> ***(2) The exercise of these freedoms since it carries with it duties formalities and responsibilities, may be subject to such conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society in the interests of national security, territorial integrity, or public safety, for the prevention of disorder or crime for protection of health or minerals, for the protection of the reputation or rights of others for preventing of the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary"***

She again referred us to the judgment of Justice Mulenga (Rtd) in **Charles Onyango Obbo** that community interest ought not to be in danger by expression. She contended that individual rights can not override community rights or state security. The defences in section 39(2) allow a wide range of criticisms. She cited various statutory provisions of different Countries namely India, Canada, USA, and Australia similar to ours and Articles

19/20 of the International Convention on civil and political rights.

She also drew our attention to the proportional test of the law and objective in **R V Lucas (1998) ISCR, 439 Supreme Court of Canada)** paragraph 52- page 13 of 25 and in **Charles Onyango Obo's** case page 24 Justice Mulenga Judgment. In the case of **Baskaya and Okuogluti & another**, the test is that it should impair the right. The section is worded in such a way that it is too wide. The burden of proof is on the State to prove intent to incite lawlessness or rebellion. Defences are wide in section 39 which talks about the deference between treason and sedition. It talks of stirring up of rebellion against the government or lawful authority. Nearly all countries which are considered free and democratic are still retaining these sedition laws.

She contended further that defences in our law are similar to those in the Indian and Canadian Law. Truth is only a defence. When you are dealing with facts, defence allows good faith. The law is clear and is replica of similar provisions from free and democratic societies in the common wealth. In the case of **Lucas (supra) paragraph 36 of Canada**, it contained a provision of 'Likely to." To establish intent one has to use objective standard. The law of sedition targets the intention of creating disorder. She urged us to consider the circumstances prevailing here that do not prevail in those free and democratic societies. Sedition does not re-occur in settled countries. We are not as settled as those countries. The law of sedition falls within article 43 and is an acceptable limitation, she concluded.

On sectarianism she submitted that the objective is respect of human dignity and protects rights of other people, in disagreement with Mr. Nangwala who said that section 40 does not fall in hate speech. It is intended to protect from attack, or groups of people on account of their ethnicity. The law is for social harmony, cohesion, and maintenance of public order. **The prosecution V Fedinand Nahimana & Case N0. ICTR-99-52-T (judgment of 3rd December 2003)** and the **Queen Vs James Keegstra [1990] 3 SCR 698** safeguard tension, discrimination, and willful intent. The word "likely" found in Canadian- Indian and other legislations on hate speech must have created poisonous environment. Section 41 is a justifiable and acceptable restriction. She prayed that the

petitions be dismissed with costs.

Mr. Nangwala in reply:

Stated that his learned friend dealt with the case of Keder Nath (supra) and agreed with his case. Keder Nath cited the case of King where the interpretation according to common law was rejected because the provision of this statue was clear and unambiguous. Sections 51 of the PC deals with intention of creating violence. The offence of sedition and alleged defence are a contradiction and not applicable. Either a country is democratic or not. It makes no difference that a country is a young democracy .

Mr. Kakuru Kenneth in reply said that the issue of inciting violence and public order cannot be read into the sedition. If that was the intention, the legislature would have been clear. English law on sedition was repealed last year. In 1995, Mr. Kannabi was tried and convicted of sedition. What did that have to do with violence and State security? He wrote that Museveni visited his district in Rwanda and Paul Kagame the RDC welcomed him. Here Mwenda wrote: The then president Garang was killed by incompetence of Government. There is no connection with protecting public order, stopping people from talking. The effect is to create a chilling effect. President has been saying that the country is very stable and democratic.

Consideration of Court.

We have had the benefit of listening to rich submissions from the trio learned counsel. They have comprehensively made reference to useful authorities from here and in the common wealth. Our view is that the Supreme Court case of **Charles Onyango Oboo and Andrew Mwenda** cited by all counsel, considered in depth and is an encyclopedia to the evaluation of cases on rights of speech and expression, media and other press and acceptable Constitutional limitations here and other democratic societies.

It so happens that the 1st petitioner was a 2nd appellant in Charles Onyango Obbo case and Mr. Nangwala who was counsel there is the same counsel here. Cases that have been cited to us are similar and the ones that had a befitting analysis in the lead judgment of Hon Justice Mulenga (Rtd). We may not therefore for the sake of it, repeat what was

stated therein more than following the jurisprudence enunciated therein.

We shall deal with the impugned offence of sedition first .

One Article of the Constitution gives rights. Another creates restrictions on enjoyment of those rights for the good of
other's rights, public interest and security of the state.

Article 29 (1)(a) provides:-

> ***"Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media"***

The above freedom is restricted by Article 43(1) which provides:-

> ***" In the enjoyment of the rights prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.***

(2). Public interest under this Article shall not permit.

- ***(a) Political persecution.***
- ***(b) Detention without trial.***
- ***(c) any limitation of the enjoyment of the rights and freedoms prescribed by this chapter <u>beyond</u> what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution."***

It follows therefore that the limitations of the enjoyment of the rights and freedoms of an individual are those provided in

this Constitution namely:-

> ***(i) Those which prejudice fundamental or other human rights and freedoms of others or***
>
> ***(ii) Public interest beyond***
>
> ***(iii) What is acceptable and demonstrably justifiable in a free and democratic society.***

Both counsel for the petitioners and the State referred us to the case of **Charles Onyango Obbo & another Vs Attorney General (supra)** in which the lead judgment of Justice Mulenga (Rtd) very ably dealt with the issue of limitation similar to the one we have at hand. He had this to say:-

> ***"However the limitation provided for in clause (1) is qualified by clause (2) which in effect introduces a limitation upon limitation".***
>
> ***It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about probale danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger,***
> ***they enacted clause (2) which expressly prohibits the use of political persecution and detention without trial as a means of preventing, or measures to remove, prejudice to public interest.***
>
> ***In addition, they provided in that clause a yard stick, by which to gauge any limitation, imposed on the rights in defence of public interest. The yard stick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.***
>
> ***This is what I have referred to as a limitation upon limitation. The limitation on the enjoyment of a protected right in the defence of public interest is in turn limited to the measure of that yard stick.***

In other words, such limitation, however otherwise rationalized, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society"

In further consideration of the Onyango Obbo's Appeal, the Supreme Court considered and accepted a proposition of the Supreme Court of India in the case of **Rangarajan (supra)** cited to us by counsel Nangwala. It was to the effect that freedom of expression ought not to be suppressed except where allowing its exercise endangers community interest.

Bearing in mind the above decisions, provisions of Article 29 (1)(a) and limitations under Article 43(1)(2), we shall proceed to dispose of the issues as framed.

Issue one

whether sections 39 and 40 of the Penal Code Cap 120 are inconsistent with and/or are in contravention with Article 29(1)(a) of the Constitution. We shall deal with section 41 later.

It suffices to reproduce the above sections of the Penal Code and relate them to above provisions of the Constitution before answering issue one.

" Seditious intention

39 (1) A seditious intention shall be an intention

a) To bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution;

b) To excite any person to attempt to procure the alternation, otherwise

than by lawful means, of any matter in state as by law established;

c) *To bring into hatred or contempt or to excite disaffection against the administration of Justice;*

d) *To subvert or promote the subversion of the Government or administration of a district.*

(2) For purposes of this section, an act, speech or publication shall not be deemed to be seditious by reason only that it intends-

(a) To show that the Government has been misled or mistaken in any of its measures;

(b) To point out errors or defect in the Government or the Constitution or in legislation or in the administration of justice with a view to remedying such error or defects;

(c) to persuade any person to attempt to procure by lawful means the alteration of any matter as by law established

(3) For purposes of this section, in determining whether the intention with which any act was done, any words were spoken or any document was published was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his or her conduct at the time in the circumstances in which he or she was conducting himself or herself.

Section 40 (cap 120) seditious offences

(1) Any person who

(a) does or attempts to do or makes any preparation to do, or conspires with any person to do, any act with a seditious intention,

(b) utters words with a seditious intention;

(c) Prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;

(d) Imports any seditious publication, unless or she has no reason to believe, the proof of which shall lie on him or her, that it is seditious,

Commits an offence and is liable on first conviction to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine, and for a subsequent conviction to imprisonment for a term not exceeding seven years.

(2) Any person who, without lawful excuse, has in his or her possession any seditious publication commits an offence and is liable on first conviction to imprisonment for a term not exceeding three years or to a fine not exceeding thirty thousand shillings or to both such imprisonment and fine and on a subsequent conviction to imprisonment for five years .

(3) Any publication in respect of a conviction under subsection (1) or (2) shall be forfeited to the Government.

(4) It shall be a defence to a charge under subsection (2) that if the person charged did not know that the publication was seditious when it came into his or possession, he or she did , as soon as the nature of the publication became known to him or her, deliver the publication to the nearest administrative officer or the officer in charge of the nearest police station".

The 1st petitioner was charged in the Chief Magistrates Court Nakawa of sedition

contrary to section 39(1)(a) and 40(i)(a) of the Penal Code.

The particulars alleged that during a live talk show, he uttered words with the intention to bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution. When one relates the above particulars to the wording of Article 43(1)(2) one finds that they have to find refuge in one of the limbs of limitations found in the Article namely:

1. ***Enjoyment of a right that prejudices rights of others or***
2. ***Public interest.***

The limb on prejudices of rights of others would on first sight be eliminated because the particulars in the 1st petitioner's charge did not allege so.

Having found the 1st limb irrelevant, we are left with the question whether what the 1st petitioner uttered prejudices Public interest.

The burden of proof was on the respondent to prove that what the 1st petitioner uttered prejudiced community interests and such limitation was justifiably acceptable in a democratic society.

We have perused the only evidence adduced by the respondent. That is the supporting affidavits of M/s Robina Rwakojo and Margaret Apinyi's. Apart from stating the law on freedom of speech and acceptable limitations thereto, there were no averments as to what were the reactions or feelings of the community. For example from political or civil leaders so as to satisfy the element of "***prejudices to public interest***".

Apart from citing some international conventions, M/s Patricia Mutesi counsel for the respondent adduced no evidence that the limitation was justifiably acceptable in a democratic society.

Be it as we have found, the defect in the particulars of the offence as charged, could be amended to bring it in the ambit of Article 43(1).

But that does not solve the fundamental criticism that the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right under 29(I) (a). M/s Nangwala and Kakuru complained that the section does not define what sedition is. It is so wide and it catches every body to the extent that it incriminates a person in the enjoyment of one's right of expression of thought. Our people express their thoughts differently depending on the environment of their birth, upbringing and education. While a child brought up in an elite and God fearing society may know how to address an elder or leader politely, his counterpart brought up in a slum environment may make annoying and impolite comments, honestly believing that, that is how to express him/herself. All these different categories of people in our society enjoy equal rights under the Constitution and the law. And they have equal political power of one vote each. That explains counsel Kakuru's observation that during elections voters make very annoying and character assassinating remarks and yet in most cases false, and yet no prosecutions are preferred against them. The reason is because they have a right to criticize their leaders rightly or wrongly. That is why he suggested, rightly so that leaders should grow hard skins to bear. We find that, the way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in Article 29(1) (a). We answer issue one in affirmative and in favour of the petitioners.

Issue 2

Whether section 39 and 40 of the Penal Code Cap 120 are being limitations of the enjoyment of the freedom of expression are acceptable and demonstrably justifiable in a free and democratic society under Article 43(1)(c) of the Constitution.

We held above that the burden of proof was on the respondent to prove that the two sections complained of fall under acceptable limitations. The respondent failed to discharge that burden of proof. We answer issue 2 in the negative in favour of the petitioners.

Issue 3

Having held as we have under issues 1 and 2, we answer issue 3 in the affirmative only in relation to the offence of sedition.

Sectarianism

We said earlier in our judgment that we would deal with section 41 dealing with sectarianism later. This section criminising sectarianism was made Law on the 7th December 1988 before the 1995 Constitution was promulgated. Article 274 of the Constitution saved existing laws which were in force on coming unto force of the Constitution. It's therefore lawful.

After perusing the relevant provisions of the Constitution and considering, submissions of counsel for the petitioners and respondent together with authorities referred to us, we find nothing unconstitutional about it. We decline to grant the declaration on sectarianism as prayed.

In the result the petitions succeed on sedition and fail on sectarianism.

We make the following declarations.

(i) Sections 39 and 40 of the Penal Code are inconsistent with provisions of the Articles 29(1) (a) and 43(2) (c) of the Constitution and are null and void. They are struck out of the Penal Code.

(ii) Sections 42, 43 & 44 of the Penal Code which relate to sedition are redundant.

(iii) The 1st petitioner be relieved of criminal prosecutions in Chief Magistrate's Court Nakawa Criminal case N0. 417/2005.

(iv) Until our decision, the prosecution was not unconstitutional. We make no order as to

damages and the issue was not seriously pursued in the submissions of counsel.

(v) Petitioners have failed to prove that the offence of promoting sectarianism is inconsistent with the Constitution.

(vi) The 1st petitioner will have ½ of the costs.

Dated at **Kampala** this …**25th** ...day of **August 2010.**

HON. L.E.M MUKASA- KIKONYOGO,
DEPUTY CHIEF JUSTICE.

HON. S.G. ENGWAU
JUSTICE OF APPEAL

HON C. K BYAMUGISHA
JUSTICE OF APPEAL

HON S. B.K KAVUMA
JUSTICE OF APPEAL

HON A.S. NSHIMYE
JUSTICE OF APPEAL