

**THE REPUBLIC OF UGANDA**

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

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**CORAM: HON. JUSTICE A.E.N. MPAGI BAHIGEINE, JA  
HON. JUSTICE S.G. ENGWAU, JA  
HON. JUSTICE A. TWINOMUJUNI, JA  
HON. JUSTICE C.K. BYAMUGISHA, JA  
HON. JUSTICE A.S. NSHIMYE, JA**

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**CONSTITUTIONAL PETITION NO.07 OF 2007**

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**B E T W E E N**

**DR. KIZZA BESIGYE & OTHERS.....PETITIONERS**

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**AND**

**THE ATTORNEY GENERAL .....RESPONDENT**

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**JUDGMENT OF THE COURT:**

**[1] INTRODUCTION:**

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The petitioners who are Ugandan citizens from diverse parts of Uganda filed this petition in which they made the following averments and sought consequential declarations and orders:-

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**“1. Your Petitioners are adult male Ugandan of sound mind who have suffered and continue to suffer the infringement of their fundamental rights and freedoms guaranteed under the Constitution of the Republic of Uganda as a result of acts of various persons and authorities which are inconsistent with or in contravention of various provisions of the Constitution and by reason whereof your petitioners are aggrieved and seek declarations and orders of redress based on the following facts:-**

(a) **THAT the petitioners are civilians who are accused of alleged acts of treason and misprision of treason committed between 2001 and 2004. The petitioners, together with 12 (twelve) co-accused who have since been discharged (hereinafter referred to as “the Discharged Co-Accused”) after applying for amnesty, were committed to the High Court for trial in High Court Criminal Case No.955 of 2005 (hereinafter referred to as “the Treason Trial”);**

(b) **THAT on the 16<sup>th</sup> November 2005, the High Court granted the 2<sup>nd</sup> to 9<sup>th</sup> petitioners (hereinafter referred to as “the Bailed Petitioners”) and 6 (six) of the Discharged Co-Accused conditional bail in the Treason Trial;**

(c) **THAT in an effort to prevent the release of the Bailed Petitioners on bail as ordered by the High Court, various officials, authorities and agencies of the State have deliberately and systematically committed acts which contravene several provisions of the Constitution and which are severally and cumulatively calculated to gravely prejudice the petitioners’ joint and several rights to a fair trial on any charges arising out of or in any way connected with the allegation of a plot to overthrow the Government of Uganda by force of arms between 2001 and 2004.**

**(d) THAT the acts of the officials, authorities and agencies of the State complained of paragraph (c) above include, but are not limited to:**

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- (i) Carrying out 2(two) armed sieges and invasions of the High Court of the Republic of Uganda – on the 16<sup>th</sup> of November 2005 (hereinafter referred to as “the First Court Siege”) and on the 1<sup>st</sup> March 2007 (hereinafter referred to as “the Second Court Siege”);
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- (ii) Charging the petitioners with terrorism and unlawful possession of firearms in Criminal Case No.UPDF/GCM/075/2005 before the General Court Martial (“hereinafter referred to as the First GCM Proceedings”) and the 2<sup>nd</sup> to 11<sup>th</sup> petitioners with unlawful possession of firearms in Criminal Case No.UPDF/GCM/065/06 in the General Court Martial (hereinafter referred to as “the Second GCM Proceedings”);
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- (iii) Detaining the Bailed Petitioners in Luzira Maximum Security Prison and continuing the First GCM Proceedings between the 31<sup>st</sup> January 2006 and the 12<sup>th</sup> January 2007 in disregard of the declaration of this Honourable Court in *Constitutional Petition No.18 of 2005 The Uganda Law Society v The Attorney General*;
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- (iv) Detaining the Bailed Petitioners in Luzira Maximum Security Prison between the 12<sup>th</sup> January 2007 and the 1<sup>st</sup> March 2007 in disregard of the declaration and order of this Honourable Court in *Constitutional Petition No.12 of 2006 Kizza Besigye and 22 Others*.
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- (v) Disobeying production warrants in respect of the Bailed Petitioners issued by this Honourable Court on the 11<sup>th</sup> January and issued by the High Court on the 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> days of January 2007 and ignoring summons to
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the Commissioner for Prisons issued by the High Court on the 16<sup>th</sup> January 2007;

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- (vi) Through high ranking State officials, issuing statements that presuppose that the petitioners are guilty of grave offences;
- (vii) Through high ranking State officials, issuing statements that are unfairly critical of the Judiciary and individual members thereof; and
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- (viii) Charging the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> petitioners with the murder of one John Byarugaba in Imaramagambo Forest on the 17<sup>th</sup> July 2002 before a Magistrate Grade 1 in Bushenyi Criminal Case No.0028/2007 (hereinafter referred to as “the Bushenyi Murder Charges”) and the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Petitioners with the murder of one
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- Lt. Mawa at Alube in Koboko on the 21<sup>st</sup> of July 2003 before a Magistrate Grade 1 in Arua Criminal Case No.0032/2007 (hereinafter referred to as “the Arua Murder Charges”), which charges relate to acts allegedly done in furtherance of the alleged plot to overthrow the Government by force of arms which
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- constitutes the charge of treason in the Treason Trial.

2. Whereof the petitioners bring this petition as aggrieved persons and in the public interest and pray that this Honourable Court may be pleased to grant the following declarations and orders:

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- (i) A declaration that the acts of security personnel at and around the premises of the High Court of the Republic of Uganda on the 1<sup>st</sup> March 2007 contravened Articles 23(1), 23(6), 24, 28(1), 28(3), 44(a), 44(c), 126(1), 128(1), 128(2) and 128(3) of the Constitution.
- (ii) A declaration that the conduct of the State in splitting, sequentially initiating and then simultaneously

prosecuting the Treason Trial, the First GCM Proceedings, the Second GCM Proceedings, the Bushenyi Murder Charges and the Arua Murder Charges contravenes Articles 24, 28(1), 28(3), 44(a) and 44(c) of the Constitution;

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(iii) A declaration that the conduct of the State in initiating the Bushenyi Murder Charges and the Arua Murder Charges against the 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> petitioners and the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> petitioners respectively, on the 2<sup>nd</sup> March 2007 contravened Articles 120(5), 126(1), 128(1) 128(2) and 128(3) of the Constitution;

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(iv) A declaration that the cumulative effect of the conduct of the State towards the Judiciary and petitioners in matters connected with the Treason Trial contravenes Articles 28(1), 28(3) and 44(c) of the Constitution;

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(v) An order permanently staying the proceedings against the Petitioners in: (a) the Treason Trial; (b) the First GCM Proceedings; (c) the second GCM Proceedings; (d) the Bushenyi Murder Charges; and (e) the Arua Murder Charges and directing the respective courts seized of the said Proceedings and Charges to immediately discharge the Petitioners;

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(vi) An order permanently prohibiting the State from using the processes of any courts (whether civilian or military) so as to initiate and prosecute the Petitioners for any charges whatsoever arising out of or in connection with an alleged plot to overthrow the Government of Uganda by force of arms between 2001 and December 2004.

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The petition is supported by the affidavits of the following witnesses:-

(1) RTD Col. Kizza Besigye who is the first petitioner whose evidence covers the complaints of almost all other petitioners.

5 (2) Mr. Kiyemba Mutala who is an advocate who has defended the petitioners in the cases that have been brought to courts against the petitioners.

(3) Mr. Robert Tweyambe who is the 4<sup>th</sup> petitioner in the instant petition.

10 The respondent filed an answer to the petition in which he denied all averrements of the petitioners. The answer is supported by the affidavit of Ms Robina Rwakoojo who is a Principal State Attorney in the respondent's chambers.

[2] **BACKGROUND TO THE PETITION:**

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The events that constitute the background to this petition are quite involved, long and dramatic. Since they form the basis of the petitioners complaints against the State, we consider it fair that the reader gets the picture first hand from the affidavit of Mr. Kiyemba Mutale who has been their counsel throughout the duration of these events. We therefore take liberty to produce in full his affidavit in support of the petition deponed to on 10<sup>th</sup> April 2007:-

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**“I TITUS KIYEMBA MUTALE of C/o P. O. Box 1520 Kampala solemnly make oath and state a follows:-**

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**1. THAT I am an adult male Ugandan of sound mind and an Advocate of the High Court of Uganda duly instructed to represent the petitioners in High Court Criminal Case No.955 of 2005 and related court cases and I am duly authorised by each of the petitioners to swear this affidavit in support of the petitioners' petition to the Constitutional Court.**

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2. **THAT the petitioners were arrested on diverse dates and from diverse places and accused of being members of the shadowy People’s Redemption Army (“the PRA”). They were charged with treason and concealment of treason and committed to the High Court to stand trial in the High Court Criminal Case No.955 of 2005 (hereinafter referred to as “the Treason Trial”). The Treason Trial commenced on the 4<sup>th</sup> of April 2006 and is still pending before the Honourable Mr. Justice Vincent Kagaba. A copy of the Amended Indictment is annexed hereto marked “A”.**

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3. **THAT on diverse dates between the 10<sup>th</sup> January 2007 and the date of filing this petition, 12 (twelve) of the Petitioners’ Co-accused (hereinafter referred to as “the Discharged Co-Accused”) have been discharged after applying for amnesty under the Amnesty Act.**

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4. **THAT on the 16<sup>th</sup> day of November 2005, I together with other counsel made bail applications for and on behalf of the 2<sup>nd</sup> to 9<sup>th</sup> petitioners (hereinafter referred to as the “Bailed Petitioners”) as well as 6 (six) of the Discharged Co-Accused before the Honourable Mr. Justice Edmund Ssempe Lugayizi, who was then the trial judge for the**

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**Treason Trial.**

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5. **THAT the said learned judge granted the said petitioners conditional bail on that day but the petitioners were not released on bail because armed men from the Joint Anti-Terrorism Task Force Urban Hit Squad, a security agency of the Government of the Republic of Uganda, invaded the High Court and interfered with the preparation of the bail papers intimidated the said petitioners’ sureties and ensured that the said petitioners were taken back to Luzira**

Maximum Security Prison (hereinafter referred to as “the First Court Siege”).

5 6. THAT on the 24<sup>th</sup> November 2005 the State commenced Criminal Case No.UPDF/GCM/075/2005 (hereinafter referred to as “the First GCM Proceedings”) wherein the petitioners and the Discharged Co-Accused, were with the offences of Terrorism contrary to the Anti-Terrorism Act No.12 of 2002 and Unlawful Possession of Firearms contrary to the Firearms Act Cap. 299 in the General Court Martial holden at Makindye Military Barracks. A copy of the Amended Charge Sheet dated the 24<sup>th</sup> November 2005 is annexed hereto marked “B”.

10 7. THAT the acts of State in staging the first Court siege and initiating the First GCM Proceedings against civilians prompted the Uganda Law Society to bring a public interest petition to the Constitutional Court in the form of *Constitutional Petition No.18 of 2005, Uganda Law Society v. Attorney General* (“the ULS Petition”). On 31<sup>st</sup> of January 2006 the Constitutional Court delivered its judgment in the ULS Petition holding, *inter alia*, that the trial of the petitioners in the First GCM Proceedings on charges of terrorism and unlawful possession of firearms contravenes the Constitution of the Republic of Uganda.

15 8. THAT in disregard of the declarations of the Constitutional Court in the ULS Petition, the Sate continued to detain the Bailed Petitioners in Luzira Maximum Security and they were regularly presented to the General Court Martial in Makindye to be further “remanded”.

20 9. THAT when the Treason Trial commenced in the High Court, the Bailed Petitioners and the Discharged Co-

Accused (six of whom had also been granted bail) were always brought to the High Court in extraordinarily tightened security (involving Prisons officers, Military Police and Police escorts) and the roads around and leading to the High Court in Kampala would be sealed off by the Police and the Police would turn away ordinary court users as well as the petitioners' and Discharged Co-Accused's families and friends from the Court itself. This despite the fact that throughout the time that the Bailed Petitioners were being presented to Buganda Road Magistrate's Court, prior to their committal, security was ordinary.

10. THAT on the 15<sup>th</sup> May 2006 the petitioners and the Discharged Co-Accused petitioned the Constitutional Court in *Constitutional Petition No.12 of 2006 Col. (Rtd) Dr. Kizza Besigye and 22 Others v Attorney General* (hereinafter referred to as "Petition No.12 of 2006") seeking, *inter alia*, orders of relief in respect of the continued detention of the said Bailed Petitioners.

11. THAT following the filing of Petition No.12 of 2006 and service thereof on the Attorney General, on the 2<sup>nd</sup> of June 2006 the State purported to amend the charges in the First GCM Proceedings: dropping the 1<sup>st</sup> petitioner as an accused person; dropping the charge of Terrorism; and purporting to charge the petitioners with Unlawful Possession of Firearms contrary to the Firearms Act Cap. 299. A copy of the Amended Charge Sheet of the 2<sup>nd</sup> June 2006 is annexed hereto marked "C".

12. THAT Petition No.12 of 2006 was heard by this Constitutional Court on the 10<sup>th</sup> and 16<sup>th</sup> days of October 2006 and judgment was reserved.

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13. THAT on the 9<sup>th</sup> November 2006 the State commenced the Criminal Case No. UPDF/GCM/065/06 (hereinafter referred to as: the Second GCM Proceedings”) wherein the 2<sup>nd</sup> to 11<sup>th</sup> Petitioners and the Discharged Co-Accused, were charged with the offence of Unlawful Possession of Firearms contrary to the Firearms Act Cap. 299 in the General Court Martial holden at Makindye Military Barracks. A copy of the charge sheet in the Second GCM Proceedings is annexed hereto marked “D”.

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14. THAT the charge sheet in the Second GCM Proceedings had the defects that the Constitutional Court held rendered the First GCM Proceedings unconstitutional and also purported to charge the petitioners with an offence that was not defined in 2001 when it was allegedly committed.

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15. THAT on the 12<sup>th</sup> January 2007 the Constitutional Court delivered its judgment in petition No.12 of 2006 declaring that the continued detention of the Bailed Petitioners and the 6 Discharged Co-Accused who had also been granted bail was unconstitutional and that the continuation of the Treason Trial whilst the illegal detention continued was also unconstitutional. The Constitutional Court also ordered that the Bailed Petitioners and the 6 Discharged Co-Accused who were on bail be released forthwith.

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16. THAT in disregard of a production warrant of the Constitution Court dated the 11<sup>th</sup> January 2007 the Uganda Prisons Service did not produce the Bailed Petitioners and the 6 Discharged Co-Accused to the Constitutional Court on the 12th January 2007. A copy of the production warrant dated the 11<sup>th</sup> January 2007 is annexed hereto marked “E”.

5 17. THAT although M/s A.F. Mpanga, advocates extracted a decree out of the judgment of the Constitutional Court and served it on the Solicitor General Chambers for approval on the 12<sup>th</sup> January 2007, the State declined to approve of the decree and therefore the Bailed Petitioners and the 6 Discharged Co-Accused could not be released on the 12<sup>th</sup> January 2007 as ordered by the Court.

10 18. THAT in a bid to secure the release of the Bailed Petitioners and 6 Discharged Co-Accused as ordered, Counsel sought and obtained production warrants from the High Court dated the 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> days of January 2007 but although these warrants were served on the Uganda Prisons Service, the Bailed Petitioners were never  
15 produced to the high Court. Copies of the said production warrants are annexed hereto marked “F”, “G” and “H” respectively.

20 19. THAT on the 16<sup>th</sup> January 2007, the Uganda Prisons Service sent its Assistant Superintendent Sam Edotu to refer the Deputy Registrar of the High Court to an article in the day’s edition of *The Daily Monitor* for the “official” explanation of the Uganda Prisons Service’s failure to comply with the said production warrants. On the same  
25 day the High Court issued summons to the Commissioner of Prisons to explain the contumelious flouting of the production warrants but on the return date of that summons, the 17<sup>th</sup> January 2007, the Assistant  
30 Commissioner of Prisons W.J. Kururagyire attended Court to say that the Prisons Service was still “consulting” with the Solicitor General as to whether to comply with the production warrants of the High Court of the Republic of Uganda.

5 20. THAT on the 24<sup>th</sup> January 2007, the Attorney General and the Director of Public Prosecutions filed *Civil Miscellaneous Application No.20 of 2007 Attorney General & Director of Public Prosecutions v Patrick Okiring & Others* (hereinafter referred to as “the Civil Application”) seeking a review of the order of the High Court of the 16<sup>th</sup> November 2005 granting the Bailed Petitioners and the 6 Discharged Co-Accused bail under Ord. 46 rr 1 & \* of the Civil Procedure Rules S.I. 71-1.

10 21. THAT on the 31<sup>st</sup> January 2007 when the Civil Application came up for hearing, the Bailed Petitioners were not represented by Counsel and the Honourable Mr. Justice E. Mwangusya adjourned the application to the 1<sup>st</sup> March 2007 and “remanded” the Bailed Petitioners in custody.

15 22. THAT on the 1<sup>st</sup> March 2007 the Civil Application came up for hearing again and counsel for the Bailed Petitioners raised preliminary objections to it. The Solicitor General, appearing for the Attorney General and the DPP, asked for and was granted a week in which to prepare a response to the preliminary objection but his application for a further “remand” of the Bailed Petitioners was denied when he failed upon challenge by counsel for the Bailed Petitioners to cite any legal provision under which a respondent to a civil application may be remanded in custody. The Honourable Mr. Justice E. Muwagusya directed that the Bailed Petitioners should be released on bail as per the order of the High Court of the 16<sup>th</sup> November 2005.

20 23. THAT the Bailed Petitioners were taken to the Criminal Registry of the High Court to have their bail papers processed but an armed siege of the Registry ensued, with heavily armed security personnel taking control of the

corridor leading to the Registry and deploying within the Registry itself and elsewhere in the Court premises (hereinafter referred to as “the Second Court Siege”).

5                   24.   **THAT** tension began to mount as security personnel attempted to seize all of the Bailed Petitioners, including those who had complied with the conditions of bail from the Chambers of the Asst. Registrar (Crime). This assault was led by Asst. Superintendent Sam Edotu. Tension further  
10                   escalated when security personnel led by the same Sam Edotu later seized and handcuffed the 4<sup>th</sup> respondent, when he tried to go to the toilet to ease himself. Scuffles began to erupt between members of the public and journalists on the one hand and security personnel on the other.

15                   25.   **THAT** at no time were the Bailed Petitioners or their counsel, who were present, told of why they were being re-arrested or where they were to be taken. The security personnel simply insisted that they had orders not to permit  
20                   the Bailed Petitioners to go out on bail as ordered by the Court.

25                   26.   **THAT** counsel for the Bailed Petitioners were summoned to an emergency meeting in the Chambers of the Deputy Chief Justice. In the said meeting the senior members of the  
30                   Judiciary present gave directions intended to bring the stand-off to and end. Amongst other practical steps directed by the Judiciary, Counsel for the Bailed Petitioners were supposed to assist the Police by requesting members of the general public to vacate the Criminal Registry and adjacent areas.

27.   **THAT** as I setting about the implementation of the said directions with my colleagues in the corridor outside the

Criminal Registry, security personnel set upon a journalist and started molesting him, when I tried to intervene to stop this unwarranted attack, I was set upon by security personnel myself. I was hit about the head with a communication device (walkie-talkie) and pushed into a glass-panned door. I sustained a deep cut to my forehead which required several stitches. A copy of a photograph that was taken immediately after I was assaulted is attached hereto marked "I".

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28. THAT after receiving emergency treatment at Case Clinic, I returned to the premises of the High Court. I found that, contrary to the Judiciary's explicit directions, the presence of security personnel had been beefed up. It was getting dark and I saw that the security personnel were now using vicious guard dogs to clear the Court premises. Members of the public, court staff and journalists were being chased off the premises with dogs. I found that the Criminal Registry was occupied by a group of about 20 well built security personnel wearing Police uniform. Only the 1<sup>st</sup> petitioner and a couple of other people were sitting between the said personnel and the door leading to the Chambers of the Asst. Registrar (Crime) where the Bailed Petitioners were still sitting.

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29. THAT at about 8.30 p.m. the security personnel withdrew from the Criminal Registry under the arrangement brokered by the Judiciary and the 6 Bailed Petitioners who had complied with the conditions of their bail were escorted downstairs by the Principal Judge, the Chief Registrar and senior Registrars to be handed over to their Counsel and sureties.

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30. THAT no sooner had the Principal Judge handed over the Bailed Petitioners to Counsel than a group of about 20 to 30 plain clothed security personnel pounced on the Bailed Petitioners and beat them up mercilessly in a scene that can only be described as reminiscent to mob justice. I was quite scared myself and fled to safety of the veranda of the High Court, where I was joined by the other counsel and Registrars, who were also obviously concerned for their personal safety.

31. THAT after being beaten up on the premises of the High Court, the Bailed Petitioners were thrown onto a Police pick up, with security personnel, sitting or stepping on them and were driven out of the premises through the gate that faces the Central Police Station.

32. THAT on the 2<sup>nd</sup> March 2007 I learnt that the 2<sup>nd</sup> to 11<sup>th</sup> Petitioners had been transferred to up-country courts to face new charges of murder. Eventually I learnt that the 2<sup>nd</sup> to 4<sup>th</sup> petitioners were jointly charged with murder in Bushenyi (hereinafter referred to as the ‘Bushenyi Murder Charges’) whilst the 5<sup>th</sup> to 11<sup>th</sup> petitioners were jointly charged with murder in Arua (hereinafter referred to as the ‘Arua Murder Charges’). Copies of the charge sheets in respect of the Bushenyi and Arua Murder Charges are annexed hereto marked “J” and “K” respectively).

33. THAT I have spoken to the petitioners over the period that I have been representing them in the Treason Trial, the first GCM Proceedings, the Civil Application, and in Petitions before the Constitutional Court I have observed them to have become increasingly despondent and despairing about their plight and they have expressed their disgust and fear about the fact that the State appears to be

willing to go to any lengths and to do anything to deny them a fair trial on the central allegation of plotting to overthrow the Government of Uganda by force of arms between 2001 and 2004.

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34. THAT the petitioners are all concerned about the apparent pre-judgment of their case and alarmed that the State is willing to split the Treason charges into various alleged overt acts of the alleged treason plot and to charge those overt acts separately in different civilian and military courts and the State's convenience.

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35. THAT the treatment of the petitioners above described interferes with their right to a fair trial, unlawfully deprives them of their liberty and actually amounts to mental torture and is inhuman and degrading because every time the petitioners seem to have alight at the end of the tunnel their hopes are dashed by the State manipulating the system in bad faith.

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36. THAT, further, the treatment of the petitioners above described interferes with and undermines the functioning and independence of the judiciary and the Courts.

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37. THAT the strain that this case is placing on top cadre of High Court Judges is evident from the number of judges who have at one time or other been seized with the Treason Trial of applications coming under it – namely:- Lugayizi, Katutsi, Kagaba, Okello, Akiiki-Kizza and Mwagusya JJ as well as Ogoola, PJ. The Honourable Mr. Justice Katutsi is on record as excusing himself from hearing the Treason Trial because of allegations from certain quarters accusing him of bias. A copy of the transcript of proceedings of the 3<sup>rd</sup> February 2006 is annexed hereto marked "L".

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**38. THAT the foregoing conduct gives every indication that unless expressly prohibited or restrained, the State will continue to manipulate the process of civilian and military courts in order to deprive the petitioners their rights to liberty and to a fair trial.**

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**39. THAT the contents of this affidavit are true to the best of my knowledge.”**

As we have already stated, these averments, allegations and opinions are not accepted by the respondent. We herebelow reproduce the affidavit in full of Ms Robina Rwakoojo which is the only affidavit on record in support of the respondents answer to the petition.

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**“I, Robina Rwakoojo of . O. BOX 7183 Kampala do hereby make oath and solemnly state as follows:-**

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**1. That I am an adult female Ugandan of sound mind and I am a Principal State Attorney in Attorney General’s Chambers and I am competent and authorised to swear this affidavit.**

**2. That I have read and understood the petition and its accompanying affidavit and in reply thereto I deponed as hereunder.**

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**3. That there is no evidence of armed sieges or invasions of the High Court on the 16<sup>th</sup> November 2005 or on the 1<sup>st</sup> March 2007, as alleged by the petitioners.**

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**4. That on 16<sup>th</sup> November 2005, the bailed petitioners were re-arrested at the High Court to avert their escape and to ensure that they appear before the General Court Martial where they faced charges of terrorism and unlawful possession of firearms.**

**5. That on the 1<sup>st</sup> March 2007, they were re-arrested for the purposes of producing them before Chief Magistrates’ Courts to answer to charges of murder.**

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6. That there is no evidence of any servant or agent of the respondent denying the petitioners their right to a fair trial as alleged in the petition.
7. That the detention of the bailed petitioners between 31<sup>st</sup> January 2006 and 1<sup>st</sup> March 2007, was not in disobedience of any Court Order.
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8. That the said detention was on the basis of lawfully issued remand warrants and when on 1<sup>st</sup> March 2007, the High Court Ordered that the bailed petitioners be allowed to complete their bail formalities, they were allowed and freed in respect of the offences for which they were granted bail.
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9. That the petitioners are accused of having committed the offences of treason, misprision of treason and murder and no Government official has pronounced them as being guilty, as the trial for the said offences is not complete.
10. That the allegation that Government officials have unfairly criticized the judiciary is not supported by evidence and I know of no such unfair criticism.
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11. That the murder charges brought before the Magistrates Courts in Bushenyi and Arua are proper and lawful.
12. That the petition is misconceived as the complaints raised therein are for enforcement of rights and freedoms allegedly breached, and this Court is not the proper forum for enforcement of those rights and freedoms.
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13. That I swear this affidavit in support of the respondent's answer to the petition.
14. That what is stated herein is true to the best of my knowledge."

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In order to complete the picture regarding the background facts behind the petition, we reproduce here below the facts which were agreed by both parties to this petition at the scheduling conference conducted by the Registrar of this Court before trial began:-

**“JOINT CONFERENCING NOTES**

## **1.0 Brief Facts**

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- 1.1 The petitioners were arrested on diverse dates and charged with treason in Criminal Case No.955 of 2004.
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- 1.2 On the 16<sup>th</sup> November 2005 the 2<sup>nd</sup> to 9<sup>th</sup> petitioners were granted conditional bail by Lugayizi , J in the High Court but they were all re-arrested on the High Court premises.
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- 1.3 On the 24<sup>th</sup> November 2005 the 1<sup>st</sup> petitioner was granted conditional bail by Ogoola, PJ in the High Court but he was kept in custody on account of having been charged, together with the other petitioners, with terrorism and unlawful possession of firearms in the General Court Martial on the same day.
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- 1.4 On the 2<sup>nd</sup> January 2006 the 1<sup>st</sup> petitioner was released from custody following a ruling on a *habeas corpus* application by Katutsi, J in the High Court.
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- 1.5 On the 31<sup>st</sup> January 2006 the Constitutional Court delivered its judgement in *Constitutional Petition No.18 of 2005 Uganda Law Society v the Attorney General of the Republic of Uganda*.
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- 1.6 The Treason Trial, the First GCM proceedings (with charges amended to drop the terrorism charge and the 1<sup>st</sup> petitioner as an accused person) as well as the Second GCM Proceedings were all commenced and are simultaneously pending before the High court and the General court martial.
- 1.7 On the 12<sup>th</sup> January 2007 the Constitutional Court delivered its judgment in *Constitutional Petition No.12 of 2006 Kizza Besigye & Others v. The Attorney General of the Republic of Uganda* and ordered that

the Bailed Petitioners be released on bail as ordered by the High Court forthwith.

5 1.8 Production warrants issued by the High Court on 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> days of January 2007 for the purposes of production of the bailed Petitioners in order that they may be released as ordered by the Constitutional Court were not honoured.

10 1.9 On the 24<sup>th</sup> January 2007, the Attorney General of the Republic of Uganda and the Director of Public Prosecutions filed *Civil Miscellaneous Application No.20 of 2007 Attorney General & Director Public Prosecutions v Patrick Okiring & Others* in the High Court wherein they sought a review of the order of the High Court of the 16<sup>th</sup> November 2005, under which the Bailed Petitioners were granted bail.

15 1.10 On the 31<sup>st</sup> January 2007, the said Civil Application came up for hearing before Mwangusya, J and was adjourned to the 1<sup>st</sup> March 2007. In adjourning the application Mwangusya, J “remanded” the Bailed Petitioners in custody until the 1<sup>st</sup> March 2007.

20 1.11 On the 1<sup>st</sup> March 2007, the Civil Application came up for hearing, the Attorney General and the DPP were not ready to proceed and Mwangusya, J directed that the Bailed Petitioners be released as ordered by the Constitutional Court. The High Court processed the release of the Bailed Petitioners but the Bailed Petitioners were re-arrested on the premises of the High Court.

25 1.12 On the 2<sup>nd</sup> March 2007 the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners were charged with murder in Bushenyi Magistrates Court and the 5<sup>th</sup> to 11<sup>th</sup> petitioners were charged with murder in Arua Magistrates Court.

30 [3] THE ISSUES:

At the trial before us, the following four issues were agreed and argued:-

- 5 1. Whether the security personnel's conduct towards the petitioners in and around the premises of the High Court of Uganda on the 1<sup>st</sup> March 2007 contravened Article 23(1), Article 23(6), Article 24, Article 28(1), Article 28(3), Article 44(a), Article 44(c), Article 126, Article 28(1) – (3) of the Constitution.
- 10 2. Whether the commencement of the Bushenyi Murder Charges and the Arua Murder Charges against the Petitioners 2 – 4 and 5 – 11, respectively, on 2<sup>nd</sup> March 2007 contravened articles 120(5) Article 126(1) and Article 128(1) – (3) of the Constitution.
- 15 3. Whether the sequential commencement and simultaneous prosecution by the State of the Treason Trial, the First GCM Proceedings, the Second GCM Proceedings, and the Bushenyi Murder Charges and the Arua Murder Charges contravened Article 24, Article 28(1), Article 28(3), Article 44(a) and article 44(c) of the Constitution.
- 20 4. Whether the cumulative effect of the conduct of the State towards the Judiciary and the Petitioners in matters connected with the Treason Trial contravened Article 28(1), Article 28(3) and Article 44(c).

**[4] THE EVIDENCE:**

25 As already stated above, the petition relies on the evidence of three main witnesses, namely,

30 The evidence of these three witnesses is a harrowing account of the arrest and detention of the petitioners, their struggle to obtain bail from the High Court the General Court Martial and the Constitutional Court, their experience with two military sieges of the High Court and their still pending trials in some of those courts. Their evidence is largely not challenged. There is the affidavit evidence of two State Attorneys namely, Mrs Robina Rwakoojo and Mrs Joan Kagezi. None of their affidavits mentions any matters of fact. They both say that they knew the law and know that the petitioners are receiving a fair trial.

None of them claims to have ever represented the respondent in the trials against the petitioners. None of them claims to have been in the High Court the two sieges when the petitioners were violently denied bail. We think that their evidence does not in any way challenge the evidence of three main witnesses in support of the petitioner's case. This court is therefore entitled to believe the petitioners evidence on being truthful on matters they deponed to.

The gist of their evidence is that:-

- 10 (1) They were arrested and charged at different times and in different courts, of Treason, unlawful possession of firearms, Terrorism, rape and murder.
- (2) Though after a protracted struggle, they managed to obtain bail from the High Court, the State always violently intervened to re-arrest them and re-charge and re-detain them.
- 15 (3) Despite several orders of the High Court and the Constitutional Court that they should be released on bail, most of them were still unlawfully on remand at the time this petition was filed.
- (4) That their lengthy unlawful detention and treatment by the agents of the State has caused them physical and psychological torture of the degree that is prohibited by the Constitution of Uganda.
- 20 (5) That the cumulative effect of the conduct of the State towards the petitioners and the Judiciary has left the petitioners with a very strong apprehension that they may never receive a fair trial in all the cases now still pending against them.
- 25
- (1) Mr. Kiyemba Mutale, counsel for the petitioners, who has been involved in the defence of the petitioners in most proceedings they have been involved in our courts. He gives a first hand and eye witness account of what the petitioners have gone through from the time they were arrested up to March 30 2007 when they were arrested at the High Court of Uganda in Kampala after being granted bail. Due to the detailed nature of his evidence, we have reproduced his affidavit in full in the earlier part of this judgment.

5 (2) Col. (Rtd) Dr. Kizza Besigye gave evidence by affidavit sworn on 11<sup>th</sup> April 2007. He narrates a personal account of what he has gone through since 2001 when he stood for Presidential elections against President Museveni, his escape from Uganda to South Africa for security reasons, his return to Uganda, his arrest and numerous prosecutions on allegations of rape and treason. Many of those charges are still pending in court against him.

10 Dr. Besigye also swore a supplementary affidavit dated 10<sup>th</sup> May 2007 in which he narrates his experience and that of some of the petitioners who were arrested at the High Court on 1-3.2007 and taken to Bushenyi where they were charged with murder.

15 (3) Mr. Robert Darius Baguma Tweyambe who is the fourth petitioner was arrested on 14<sup>th</sup> December 2004, was denied bail till 1<sup>st</sup> March 2007, he was arrested in the High Court and driven to Bushenyi where he was charged with murder.

[5] **CONSIDERATION AND DETERMINATION OF ISSUE:**

20 **ISSUE NO.1**

25 Whether the security personnel's conduct towards the petitioners in and around the High Court of Uganda on 1<sup>st</sup> March 2007 contravened Articles 23(1), 23(6), 24, 28(1), 28(3), 44(a), 44(c), 126 and 28(1)(3) of the Constitution.

30 A similar issue on similar facts was considered by this court in **Constitutional Petition No.18 of 2005 Uganda Law Society vs Attorney General**. In that case the security forces of Uganda Government, on 16<sup>th</sup> November 2005 besieged the High Court of Uganda in order to re-arrest prisoners, including some in this petition, and beat them up after which they were re-arrested and driven back to detention centres in Kampala. This court held that such conduct contravened articles 23(1) and (6), 28(1), 128(1)(2) and (3) of the Constitution.

In this petition, Mr. F.K. Mpanga who appeared for the petitioners submitted that the siege of the High Court on 1<sup>st</sup> march 2007 was similar but much worse because, in his own words,

5

**“It was in bad faith, effectively in contempt of this courts declaration in Constitutional Petition No.18 of 2005 and involved physical assaults of the petitioners and counsel Kiyemba Mutala. Hence additionally contravened article 24 of the Constitution which prohibits torture or cruel, inhuman and degrading treatment.”**

10

In learned counsel’s view, this court is bound by the earlier precedents to make some findings where similar acts have been committed in and around the premises of the High Court.

15

We agree. What happened on 3<sup>rd</sup> march 2007 has been described in detail in some of the affidavits recorded in this judgment and in many others that have found no space herein. The incident was recorded in poetic language by the Principal Judge of Uganda, Hon. James Ogoola in his book **“SONGS OF PARADISE.”** As will be recalled from deponed affidavits on record, Hon. Ogoola was an eye witness to the second siege of the High Court on 1<sup>st</sup> march 2007. Though he did not give evidence or depone to any affidavit, but he describes what happened in his book in chapter 42 entitled: **THE RAPE OF THE TEMPLE.** Here we give him space to speak out his on his experience that day:-

20

25

***“1. From thin air they came, bedecked in black camouflage. Like a swarm of angry wasps, the Praetorian Guard descended on holy ground their ferocious fangs unfurled, their vicious sting darting – ready to strike.***

30

***2. Warlike, they came; wearing; the bellicose face of terror, the malevolent mask of horror. Wildlike, they charged; wielding***

*awesome weapons o war; AK-47s cocked, ready to discharge the crackling cartridge; Uzi guns waving ominously in the air, ready to vomit their lethal venom.*

5                   3.     *With wrath and fury, they came: their hapless prey to snatch. They laid siege to the fortress of justice. Like warmongers, they darted here and they darted there: their prey to seize and abduct. They turned the Temple of serenity into a theatre of war.*

10  
*They transformed the Shrine of refuge, into a treacherous den of vipers! The prisoner on trial, seeking justice from the Temple, they sought to pick and to pluck from the very arms of the goddess of the Temple.*

15  
4.     *The goddess, blindfolded and balancing the scales of justice in her hands stood still, holding her breath, stunned, horrified. Gripped in grief and disbelief, at the invaders' heretical effrontery, the goddess was heard to lament in torment; 'It is abominable! This is sacrilege! To strip me thus before my own family, to expose my bare nakedness before my own flock!'" Like mystic monks in mourning, dressed in black gowns. The Temple scribes stood, distressed. Their heads, bearded in grey wigs, they shook in anguish. From their numbed lips, a gasp of moaning issued forth: bewailing the disgrace! Bemoaning the debauchery! Be crying the desecration!*

20  
25  
30  
5.     *Obvious to the sanctity of the Temple, blind to the Congregation's reverence for the purity of the shrine, the serpentine reptiles plunge into a frenzied rampage. Obstinate, the swaggering warlords trample unholy boots on holy ground. With guns ready to rumble, they go on the Rambo.*

- 5
6. *Straight for the goddess they dash, into the inner sanctum of the Shrine. Discarding all discretion to the four winds, they charge: menacingly, disgracefully they strip her- like a harlot in a harem; unshamefacedly, unfeelingly, they prostrate her – like a common prostitute*
- 10
7. *There, in broad daylight; there under the wide open skies with high heaven looking on – The Black mambas commit abominable iniquity, with abnormal impunity. There, in spite of the Congregation of an august Assembly of visiting Ambassadors; learned Advocates; the Accused; their Accomplices; the Temple’s own administrators; and the elect members of the Tribe’s Supreme Council of Meditation – there, under the very eye of the High Priest himself duly seated on the*
- 15
- Judgment Seat – the Black Mambas commit the vile deed: the abomination of desolation!*
- 20
8. *Such unutterable trespass, such unrequited transgression had not been seen before – not since the sacrilegious execution of the Chief Priest, Kiwanuka He was snatched, hauled and carted away from this very shrine. Like a common thief, the infidels of the military ilk dragged him.. From the sanctum of the shrine, to the place of the skull, they led him. There, in the slaughterhouse, in the hall of the holocaust, they butchered and*
- 25
- quartered him: a martyr for judicial independence!*
- 30
9. *In no other shrine: anywhere, anytime – was ever so callous a calamity committed. Not on this side of the Equator; nor on the other. Not in these times; nor in earlier ones – indeed, not since the Age of Darkness. The more the pity, to see horrific history re-enacted!*
10. *In the aftermath of the vile defilement of the goddess, the voice of one, a sage and a knight brave, from the high priesthood of the Temple, broke forth, shattering the still silence. In*

*anguished rumination, in righteous rage, the shrill voice rung out: “The Rape of the Temple! What a day! A fateful day of woe! A day of infamy!”*

5                   11. *Abruptly, the prophetic voice of the poetic knight stirred up a torrent of popular protest. Fellow knights, the Temple scribes, the zealots, the Pharisees, and the elders – all from the learned fraternity, and all kindred souls – at home and abroad: joined and swelled the public protest. They rose as one. As one they*  
10 *spoke in unity and in solidarity. They demanded: Independence for the Temple, and for the Shrine: virginity – the true bedrock and lynchpin of the divine trinity on which rests the three venerable virtues of: The Reign of Justice; the Rule of Reason; and the Assurance of Equality.*

15                   12. *Perhaps, just perhaps: there could be a silver lining on the Black mambas’ dark cloud of terror.*  
                      13. *Perhaps, the horror and the trauma of the ravishing of the shrine would so powerfully and indelibly be inscribed on the*  
20 *heard and the common conscience of the Tribe, as to awaken the Elders’ sensitivity to the sanctity of the Temple of Justice.*

We now consider whether the provisions of the Constitution cited in this issue were contravened by the above conduct of the respondent.

25

Articles 23, 23(6) and 128(1) – (3) of the constitution:

The decision of the Constitutional Court as confirmed by the Supreme Court in **Attorney General vs Uganda law Society is final**: The conduct of the  
30 respondent at the high court of Uganda on 16<sup>th</sup> November 2005 which is similar to the conduct of the same respondent at the same place on 1<sup>st</sup> March 2007 was declared to have contravened the above articles of the Constitution. We hold that the conduct of the respondent in the instant violated the above provisions of the Constitution.

Articles 24 and 44(a) of the constitution:

5 On 1<sup>st</sup> march 2007, not only were the petitioner severally beaten and tortured but their lawyer was also badly beaten to the extent that constainted torture. The word torture is not defined in our Constitution. However, the International Convention against Torture and Other Cruel or degrading Treatment or Punishment defines “torture” to mean:-

10 **“Any act which causes severe pain or suffering, whether physical or mental, is intentionally inflicted on a person or such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any kind, when such pain or suffering is**  
15 **inflicted by or at the instigation of or with the consent or a acquiescence of a public official or other person acting in an official capacity. (Emphasis added)”**

20 In our view, the petitioners had gone to court to seek justice but instead they were subjected, in court premises, inside the Temple of Justice, to humiliating, cruel and degrading treatment that is prohibited by articles 24 and 44(a) of our Constitution. We hold that the conduct of the respondent on 1<sup>st</sup> march 2007 violated the two above articles of the constitution.

25 Article 28(3) and Article 44(c):

30 Article 28(3)(a) provides that every person charged with a criminal offence shall be presumed innocent until proved guilty or until that person has pleaded guilty. Article 44(c) of the constitution prohibits any derogation from the right to a fair hearing. The petitioners had gone to court to seek bail which was their constitutional right. They had been convicted of any offence. They were entitled to the benefit of the presumption of innocence. Instead, the State invaded high Court where they were in the process of getting that bail. They were beaten, tortured, arrested and taken for continued detention. That

conduct was clearly a negation of the petitioner's right to bail and the right to be presumed innocent till they are proved guilty or they plead guilty. They were denied in the process the right to a fair trial guaranteed under the two articles of our constitution. The actions of the State violated those two articles of the Constitution.

Article 126 of the Constitution:

This article provides:-

**Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.”**

In the exercise of this judicial power, the Courts are Independent and are not subject to the Control or direction of any person or authority. The Executive has no role in that process except such a role that it may be assigned by the judiciary. The Constitution (article 28(2)) prohibits all forms of interference with Courts or judicial officers from any person or authority. Judicial power is derived ONLY from the people and is exercised by ONLY THE COURTS established under the Constitution. The acts of the State on 1<sup>st</sup> march 2007 at the premises of the High Court of Uganda in Kampala grossly interfered with the exercise of judicial power in contravention of article 126 and 128 of the Constitution. We therefore answer the first issue in the affirmative.

ISSUE NO.2 AND 3:

2. Whether the commencement of the Bushenyi Murder Charges and the Arua Murder Charges against petitioners 2-4 and 5-11, respectively, on 2<sup>nd</sup> March 2007 contravened articles 120(5), 126(1) and 128(1) – (3) of the Constitution.
3. Whether the sequential commencement and simultaneous prosecution by the State of the Treason trial, the first GCM proceedings the second

GCM, THE Bushenyi Murder Charges and the Arua Municipal Charges contravened Articles 24, 28(1), 28(3) 44(a) and 44(c).

5 We propose to deal with these two issues together Mr. Mpanga who represented the petitioners in submitting on these grounds stated that the complaint here is that the State in its effort to prevent the petitioners who had been granted bail by the High Court from being released, filed all these charges. He stated that all the charges are founded on similar facts – a plot to overthrow the government of 10 Uganda by force of arms. He pointed out that evidence to prove the allegations is contained in the affidavits of Kiyemba Mutala paragraphs 5, 6, 13 and 32 and Robert Tweyambe paragraphs 8, 11, 16 and 33. He also referred to paragraph 6 of Rugugunga’s statement (annexture C) to Kizza Besigye’s affidavit. He claimed that the manipulation of the system by the State is violation of the inherent 15 protections provided in Articles 28(1), 28(3), 28(9) and 44©. He also cited the decision of the Supreme Court in **Constitutional Appeal No.1/06 – Attorney General v Uganda Law Society** in particular the judgement of Mulenga JSC at page 10-11. The learned justice said:-

20 **“I also agree with the majority holding of the Constitutional Court that the concurrent proceedings in the two courts were inconsistent with the principle underlying the provisions of Article 28(9) of the Constitution which prohibits the trial of a person for an offence of which he or she has been convicted or acquitted. In effect that provision is an aspect of the protection of the right to fair hearing, namely the right not to be tried more than once on the same facts or for the same actus reus. The principle being that right originates from an old English Common Law Maxim that ‘no man is to be brought in jeopardy of life or limb more than once for the same offence.’ I agree with the proposition invoked by Okello J.A (as he then was) that a constitutional provision which relates to a fundamental right must be given an interpretation that realizes the full benefit of the guaranteed right. Article 28(9) is such**

**provisions that must be give such interpretation, and not the narrow interpretation urged by the appellant.**

5 **Subject to the rule of misjoinder, the prosecution has the liberty to join in the same charge sheet or indictment against an accused person all possible offences arising from the same facts in order that the offences are tried together. The law also empowers the court in appropriate circumstances to convict an accused person of an offence established by the adduced evidence instead of the**  
10 **offence stated in the charge sheet or indictment. All this is in recognition of the principle that an accused person should be subjected to trial on the same facts only once. Needless to say, concurrent criminal proceedings in respect of the same facts entail trial more than once.”**

15 He further submitted that the first and second General Court martial proceedings against the petitioners are void *ab initio*. It was counsel’s contention that the evidence of the petitioners was not contradicted and in the premises the court is bound to hold that there were violations of the petitioners  
20 protected rights.

Mr. Oluka did not agree. He submitted that concurrent proceedings in the High Court and the murder charges in Bushenyi and Arua do not contravene any of the articles in the constitution. He stated that the offences with which  
25 they were charged are a creature of the Penal Code act and the DPP can institute a multiple set of proceedings relating to the same events under section 31 of the Trail on Indictments Act. He dismissed the argument by counsel for the petitioners that the treason and murder charges contravene Article 28 of the constitution.

30 There is no dispute that the petitioners were charged in civilian and military courts with various offences under the penal code Act and the Firearms Act. At the time of hearing the petition counsel for the petitioners informed us that the Bushenyi and murder charges against some of the petitioners had been

with drawn by the DPP. However, the charges in the General court martial and the High Court are still pending. The complaint by the petitioners' complaint is that the State is manipulating the process and this has the effect of violating inherent protection in Articles 28(3), 28(1) 29(9) and 44(c).

5

(a) These articles read:

Article 28(1) "*In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.*"

10

Article 28(3) reads:

**"Every person who is charged with a criminal offence shall-**

15

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

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

20

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

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

25

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

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

30

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

Article 28(9) says:



people in different courts with offences which arise out of similar facts, of the instant petition. We reiterate that principle and grant the declaration sought.

#### ISSUE NO. FOUR

5

Whether the cumulative effect of the conduct of the State towards the judiciary and the petitioners in the matter connected with the Treason Trial contravened articles 28(1), 28(3) and 44(c) of the Constitution.

10

We have already discussed the nature and content of the evidence that was adduced in this petition. The evidence is not challenged or contradicted in any way. The evidence shows clearly that the petitioners were arrested in 1995 for alleged treason and misprision of treason committed between the years 2001 and 2004. In November 2005 they were committed for trial to the High Court.

15

They subsequently applied for bail pending trial and when the High Court showed inclination to release them on bail, the security and other State agencies started doing everything thinkable and unthinkable to ensure that they do not get released. To begin with, they charged them for exactly the same offences in the General Court Martial while they were waiting for trial in the High Court, they amended charges against the petition to include an offence of Terrorism though clearly the General Court Martial had no jurisdiction to try that crime. The other activities carried out by State agencies in order to prevent the petitioners from being released on bail are enumerated in paragraph (1)(d) of the petitioners as hereunder:-

25

(i) Carrying out 2 (two) armed sieges and invasions of the High Court of the Republic of Uganda – on the 16<sup>th</sup> of November 2005 (hereinafter referred to as “the First Court Siege”) and on the 1<sup>st</sup> March 2007 (hereinafter referred to as “the Second Court Siege”);

30

(ii) Charging the petitioners with terrorism and unlawful possession of firearms in Criminal Case No. UPDF/GCM/075/2005 before the General Court Martial (“hereinafter referred to as the First GCM Proceedings”) and 2<sup>nd</sup> to 11<sup>th</sup> petitioners with unlawful possession of

firearms in Criminal Case No.UPDF/GCM/065/06 in the General Court Martial (hereinafter referred to as “the Second GCM Proceedings”);

5 (iii) Detaining the Bailed Petitioners in Luzira Maximum Security Prison and continuing the First GCM Proceedings between the 31<sup>st</sup> January 2006 and the 12<sup>th</sup> January 2007 in disregard of declaration of this Honourable Court in **Constitutional Petition No. 18 Of 2005 The Uganda Law Society v The Attorney General;**

10

(iv) Detaining the Bailed Petitioner in Luzira Maximum Security Prison between 12<sup>th</sup> January 2007 in disregard of the declaration and order of this Honourable Court in **Constitutional Petition No.12 of 2006 Kizza Besigye and 22 Others;**

15

(v) Disobeying production warrants in respect of the Bailed Petitioners issued by this Honourable Court on the 11<sup>th</sup> January 2007 and issued by the High Court on the 15<sup>th</sup> and 17<sup>th</sup> days of January 2007 and ignoring summons to the Commissioner for Prisons issued by the High Court on the 16<sup>th</sup> January 2007;

20

(vi) Through high ranking State officials, issuing statements that presuppose that the petitioners are guilty of grave offences;

25

(vii) Through high ranking State officials, issuing statements that are unfairly critical of the Judiciary and individual members thereof; and

30

(viii) Charging the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners with the murder of one John Byarugaba in Imaramagambo Forest on the 17<sup>th</sup> July 2002 before a Magistrate Grade 1 in Bushenyi Criminal Case No.0028/2007 (hereinafter referred to as “the Bushenyi Murder Charges”) and the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> petitioners with the murder of one Lt. Mawa at Alube in Koboko on the 21<sup>st</sup> of July 2003 before a Magistrate

Grade 1 in Arua Criminal Case No.0032/2007 (hereinafter referred to as “the Arua Murder Charges”), which charges relate to acts allegedly done in furtherance of the alleged plot to overthrow the Government by force of arms which constitutes the charge of treason in the Treason Trial.”

5

The climax of these activities was the rape of the Temple that took place at the High Court building on the 16<sup>th</sup> March 2007. The brutal siege of the High Court building shocked the entire nation. It was unprecedented. It violated all the cardinal principles of constitutionalism enshrined in the 1995 Constitution such as”-

10

- (a) Naked denial of a fair trial,
- (b) Presumption of Innocence,
- (c) Separation of Powers,
- (d) The Independence of the Judiciary e.t.c.

15

In fact it almost tore the 1995 Constitution into shreds. The judiciary protested vehemently. The legal profession joined the judiciary in protesting the discretion of the Temple of Justice. Numerous legislator, the press, Civil Society and academia expressed in one way or the other their shock and disgusted over the Siege of the High Court which was in fact the second such a Siege in only two years. The issue raised by these events is whether the petitioners will ever be able to receive a fair trial on the charges which are still pending in the Magistrates Courts and the High Courts of this country? Can any trial resulting from tainted proceedings as has been described in this petition be fair within the meaning of article 28 and 44(c) of the Constitution? The petitioners believe that the events of 1<sup>st</sup> March 2007 which included the shedding of blood in the premises of the High Court, brutal assaults on prisoners who had been released on bail, violent arrest and manhandling prisoners as they were thrown on lorries as if they were sacks of potatoes, unlawful confinement of the Deputy Chief Justice, the Principal Judge and other frightened Judges and Registrars who were confined and besieged for over six hours in the High Court buildings and the unrepentant attitude of the

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Executive Arm of this Republic, all point in one direction that they will never receive a fair trial from the legal system of this country for the offences now pending against them.

5 We have anxiously examined the evidence from which petitioners draw this conclusion. We have painfully arrived at a similar conclusion that no trial arising from proceedings bearing a history like the one described in this petition can ever be said to be fair within the meaning of articles 28 and 44 of the Constitution of Uganda of 1995. We fortified in this belief by the decision  
10 of the Supreme Court of Uganda in **Attorney General vs Uganda Law Society** (supra) in which that court held that the siege of the High Court of Uganda on 16<sup>th</sup> November 2005 in which the same petitioners were arrested after being granted bail contravened article 28 and other articles of the Constitution.

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**[6] DECLARATIONS:**

The declarations sought in this petition are stated in paragraph 2 of the petition [Please see the petition produced verbatim at the beginning of this judgment.]

20

The petitioners have proved their case with mathematical accuracy. They are seeking for four declarations all stated in paragraph 2(i), (ii), (iii), (iv) of the petition. The declarations sought logically follow from the findings of fact and law during the determination of issues considered above. We do hereby grant all the declarations sought in the petition.

25

**[7] ORDERS:**

The petitioners also sought for two orders stated in paragraph 2(v) and (vi) of the petition (supra). The first order sought is for a stay of all criminal proceedings in all the courts (High Court at Kampala, General Court Martial and the Chief Magistrates' Courts of Arua and Bushenyi) and a direction to each of the said courts to discharge the petitioners. We have found that what the security and other State agencies did at the premises of and Headquarters  
30 of the third organ of State (Judiciary) was an outrageous affront to the

Constitution, constitutionalism and the Rule of Law in Uganda. We have also found that all other activities that the State has engaged in order to prevent the courts from granting bail to the petition and the petitioners from benefiting their constitutional rights to bail violated their constitutional rights to:-

5

(a) be tried in an Independent and Impartial tribunal – Article 28(1) of the Constitution.

(b) be presumed innocent till proved guilty or until they plead guilty – Article 28(3)(a) of the Constitution.

10

(c) bail – article 23(6)(a) of the Constitution.

(d) protected from torture or cruel, inhuman or degrading treatment or punishment. – Articles 24 and 44(a) of the Constitution.

(e) a fair hearing – Articles 28 and 44(c) of the Constitution.

15

This court cannot suction any continued prosecution of the petitioners where during the proceedings, the human rights of the petitioners has been violated to the extent described above. No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process. There is dicta and holdings from cases in the Republic of Kenya and the United Kingdom which provide persuasive guidance to this court this court in determining whether it has power to issue such an order and when such an order may be issued. In the case of **Albanus Mwasia Mutua vs Republic (Kenya) Criminal Appeal No.120 of 2004** the Court of Appeal of Kenya held:-

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**“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”**

30

In **Republic vs Amos Karuga Karatu (Kenya) High Court Cr. Case No.12 of 2006** the court per Makhandia, J categorically sated:

5                   **“The time is near for the judiciary to rise to the occasion and  
reclaim its mantle by scrupulously applying the law that seeks to  
secure, enhance and protect the fundamental rights and freedoms  
of an accused person. A prosecution mounted in breach of the law  
is a violation of the rights of the accused and is therefore a nullity.  
It matters not the nature of the violation. ...it matters not the  
10                   evidence available against him is overwhelming. As long as [there  
is a violation of the rights of the accused person] the prosecution  
remains a nullity.”**

15                   This call is very relevant to courts in Uganda because in the process of  
producing and presetting suspects in our courts, the police and the prosecution  
do violate numerous constitutional rights of accused persons, yet even where  
such violations are brought to the notice of the courts, the prosecutions go a  
head as if nothing has gone a miss. We think it is high time the judiciary  
reclaimed its mantle and apply the law to protect fundamental rights and  
20                   freedoms our people as the Constitution requires.

The British authorities on this matter are also extremely instructive. In **Lord Griffiths in R vs Horseferry Road Magistrates Ex parte Bennet [1994] 1 A.C. 42** the House of Lords stated:

25                   **“.....the Judiciary accept a responsibility for the  
maintenance of the rule of law that embraces a willingness to  
oversee executive action and to refuse to countenance behaviour  
that threatens either basic human rights or the rule of law. ...  
30                   [Authorities in the field of administrative law contend] that it is the  
function of the High Court to ensure that the executive action is  
exercised responsibly and as Parliament intended. So also it  
should be in the field of criminal law and if it comes to the  
attention of the court that there has been a serious abuse of power**

5                   it should, in my view, express its disapproval by refusing to act upon it. ... The Courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.”

10                   In case the House of Lords held that:-

15                   “.....the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court’s conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that  
20                   the Court’s process has been abused.”

25                   These authorities are not binding on Uganda courts but they are highly persuasive. The situation their Lordships were dealing with in Kenya and in Britain is very to the situation we are dealing with in this petition. We cannot stand by and watch prosecutions mounted and conducted in the midst of such flagrant, egregious and malafide violations of the Constitution and must act to protect the constitutional rights of the petitioners in particular and the citizens of Uganda in general as well as the Rule of Law in Uganda by ordering all the tainted proceedings against the petitioners to stop forthwith and directing the  
30                   respective courts to discharge the petitioners.

                  The proceedings in the First and Second General Court Martial were declared null and void by the Supreme Court. The proceedings of the Treason Trial, the Arua and Bushenyi Murder Charges are equally null and void.

The last order sought in this petition is contained in paragraph 2(vi) of the petitions. It seeks for an order permanently prohibiting the State from using the process of any court, military or civilian so as to initiate and prosecute the petitioners in connection of the alleged plot to overthrow the Government of Uganda by force of arms between December 2001 and December 2004. This order will be granted because of the reasons we have given above and on the strength of the authorities cited from Commonwealth jurisdictions in Kenya and United Kingdom.

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By a unanimous decision of this court, the petition succeeds. Each party will bear its own costs.

Dated at Kampala this ...**12<sup>th</sup>** ...day of ...**October**.....2010.

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Hon. Justice A.E.N. Mpagi-Bahigeine  
**JUSITCE OF APPEAL.**

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Hon. Justice S.G. Engwau  
**JUSTICE OF APPEAL.**

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Hon. Justice A. Twinomujuni

**JUSITCE OF APPEAL.**

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Hon. Justice C.K. Byamugisha

**JUSITCE OF APPEAL.**

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Hon. Justice A.S. Nshimye

**JUSITCE OF APPEAL.**

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