

UGANDA / JUDGMENT

Kizito v Attorney General (Constitutional Petition 17 of 2021) [2024] UGCC 7 (23 February 2024) [2024] UGCC 7

COURT

Constitutional Court of Uganda

BEFORE

Egonda-Ntende, JCC, Bamugemereire, JCC,
Mulyagonja, JCC, Monica K. Mugenyi, JCC, Eva K.
Luswata, JA/JCC

CASE / FILE NUMBER

Constitutional Petition 17 of 2021

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

I Coram : Egonda-Ntende, Bamugemereire, Mulyagonia, Mugenyi, & Luswata, JJCq

Constitutional Petition No. 17 of 2021**BETWEEN**

Kizito Fahad Petitioner

AND

Attorney General Respondent

JUDGMENT OF FREDRICK EGONDA-NTENDE JCC**Introduction**

- t1l The Petitioner brings this action seeking a declaration that Section 4 (7) Income Tax Act 340 is unconstitutional in so far it contravenes Articles, 20 (1) & (2); 21 (1) & (2) and 2 (2) of the Constitution of Uganda for being discriminatory of resident tax payers who are in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction

services whose gross turn over does not exceed one hundred and fifty million Uganda shillings in a year of income.

- I2l The petitioner contends that the implementation of Section 4 (7) of the Income Tax Act Cap 340 makes resident tax payers who are in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services pay more business tax on the same quantum of income than other resident tax payers in other businesses.
- t3] The petition was supported by an affidavit sworn by the Petitioner.
- t4] The respondent opposes this petition and in its response to the petition contended that this petition is bad in law, frivolous, prolix and raises no questions for constitutional interpretation. Secondly the respondent contended that the impugned provisions is not inconsistent with Articles 20 (1) & (2); 21 (1) & (2) and 22(2) of the Constitution. Thirdly that implementation of Section 4 (7) of Income Tax Act does not make resident tax payers who are in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services pay more tax on the same quantum than other businesses and is not inconsistent with any articles in the Constitution. The respondent contended that the petitioner is not entitled to any of the declarations sought and the petition should be dismissed with costs.
- t5] The answer to the petition was supported by an affidavit sworn by Ojambo Bichachi, State Attorney, in the Department of Civil Litigation of the respondent.

Legal Representation

- t6] At the hearing the petitioner was unrepresented while Mr. Mark Muwonge, State Attorney, appeared for the respondent. Both parties filed written submissions.
- I7l The petitioner submitted that the petition raises questions for constitutional interpretation in as much as it challenges the constitutionality of Section 4 (7) of the Income Tax Act. He argued that the petition discloses a cause of action as was stipulated in National Council for Higher Education v Anifa Kawooya ¹²⁰ IUGSC 9 and Baku hael Obudra & Anor v Attorney General 2006 UGSC 56.
- t8] The petitioner contended that the impugned provision discriminates resident tax payers who are in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services whose

turn gross over does not exceed one hundred and fifty million shillings in a year of income is in contravention with articles 21(1) & (2); 20(2) & 22(2) of the Constitution.

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- He submitted that court has to consider the purpose and effect of the impugned §[9] statute or section to determine its constitutionality. He relied on *Salvatori Abuki v Attorney General* [1997] UCC 10, where it was held that it is important to take into account the purpose and effect while determining whether the statute is unconstitutional. He contended that the purpose of impugned was to collect more business income from the resident tax payers mentioned in the impugned provision.
- [10] He stated that Section 4 of the Income Tax allows resident tax payers whose gross turn over does not exceed one hundred and fifty million shillings per annum to pay their tax either by presumptive tax regime under schedule 2 or normal tax regime. He argues that a group of resident tax payers mentioned in the impugned provision were excluded from paying tax under the presumptive tax regime and or normal tax regime which is contrary with the right to equality provided under Article 21 of the Constitution.
- The petitioner cited articles 21 (1) & (2); 20 (1) & (2) and 2 (2) of the §[11] Constitution for interpretation and *K. Ssemwogerere and Another V. Attorney General Constitution Appeal No. 11 of 2002 (SC)* on the principles of constitutional interpretation.
- With regard to the effect of the impugned provision, the petitioner submitted §[12] that Section 4 (7) of the Income Tax Act was premised on illegitimate purpose which makes it not to pass the effect test. He argued that the applicability and operation of impugned provision excludes a group of the resident tax payers providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services which is contrary to Articles of 21 (1) & (2); 20 (1) & (2) and 2 (2) the Constitution.
- t13] The petitioner prayed that this court makes declarations as prayed in the petition and award him costs of the petition.
- [14] In reply, counsel for the respondent submitted that the petitioner has a duty to prove to this court that Section 4 (7) of the Income Tax Act contravenes provisions of the constitution. He contended that the Article 137 (1) of the constitution gives unlimited and original jurisdiction to this court to interpret the constitution. He referred to *Mbabali Jude v Edward Kiwanuka Sekandi* t20r4l UGCC 1s.
- t1 5] Counsel for the respondent argued that any person aggrieved with the decision made under the Income Tax Act can apply for review in the Tax Appeal Tribunals. He cited Section 14 of the Tax Appeal Tribunal Act and relied upon *URA V Rabbo Ent rises & Anor* 2017 UGSC 20 where it was held that Tax Appeal Tribunal has original jurisdiction in respect of tax disputes. Counsel for the respondent submitted that the petition does not disclose a cause of action. He contended that matters raised in the petition can be adjudicated upon by the Tax Appeal Tribunal pursuant to Section 14 of the Tax Appeals Act.

- [16] Counsel for the respondent contended that it is an obligation of every Ugandan to pay taxes. He relied on Article 17(1) (g) of the Constitution and *U and a Proiects Implementation & Manaoement Centre v URA* 12009-1 UGCC 2.
- [7] Counsel for the respondent submitted that the definition of discrimination under Article 21(3) of the constitution denotes different treatment to persons attributed only or mainly to their respective description by sex, race, colour, origin, religion, tribe, social or economic status, political opinion or disability which has the effect of nullifying or impairing the enjoyment of all rights and freedoms. He submitted that discrimination does not apply in taxation, where taxes are based on different earnings. He contended that tax is structured in such a way that the tax rate increases as the income increases.
- [18] Counsel for the respondent was of the view that there is no presumptive and equity tax. He relied on *Attorney General V Bugisu Coffee Marketing*

Association Limited (¹⁹⁶³) E. A 38 for his submission. Counsel for the respondent submitted that parliament is charged with the responsibility of enacting laws under Article 21(4) of the Constitution for implementation of policies and programmes aimed at redressing social, economic and other imbalances in the society.

- [19] He contended that the presumptive tax was enacted under the authority of Parliament pursuant to Article 152 of the Constitution to redress economic imbalances in regard of the taxpayers with annual gross turn over less than one hundred and fifty million shillings. He further contended that the presumptive tax was introduced to penetrate the informal sector and ease the administrative burdens associated with tax compliance such as record keeping.
- [20] Further, Counsel submitted that majority of professionals are allowed deduction pursuant to Section 15 of the Income Tax Act and presumptive tax payers pay more because there are no deductions allowed under Section 4(b) of the Income Tax Act. Counsel for the respondent submitted that the right of freedom from discrimination under Article ² (1) & (2) of the Constitution is not an absolute right. It can be derogated under Article 43 of the Constitution. He relied to *Christopher Martin Madrama Izama v Attorney General* [2019] UGSC I for the submission.
- 1211 Counsel for the respondent submitted that section 4 (7) of the Income Tax Act is not inconsistent with the provision of the Constitution. He was of the view that the petition is devoid of merit and does not meet the threshold and bench mark for issuance of the remedies sought.

Issues for determination

1221 Counsel in their written submissions formulated issues to be considered by this court. Firstly, Whether the petition raises questions for constitutional interpretation. Secondly whether Section 4 (7) of the Income Tax Act Cap 340 is in contravention of Articles, 20 (1) & (2); 21 (1) & (2) and 2 (2) of the Constitution of Uganda for being discriminatory of resident tax payers who are in

the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services whose gross tum over does not exceed one hundred and fifty million Uganda shillings in a year of income. Thirdly what are the available remedies to the parties.

Analysis

123) Mwondha, JSC, summarized the principles of constitutional interpretation that this court must bear in mind in interpreting the Constitution in *David Tusinswire v Attorney General*, t201ZIIJGSC1L, as follows:

> '(i) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of its inconsistency (see Article 2 (2) of the Constitution. Also see *Presidential Election Petition No. 2 of the 2006 (SC) Rtd Dr. Col. Kiiza Besigye v. Y. K. Museveni*

> (ii) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining the constitutionality of either effect animated by the object of the legislation intends to achieve. See *Attorney General v. Silvation Abuki Constitutional Appeal No. 1988 (SC)*

> (iii) The entire Constitution has to be read together as an integral whole with no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness (See *P. K. Ssemwogerere and Another V. Attorney General Constitutional Appeal No I of 2002 (SC)* and the *Attorney General of Tanzania v. Rev Christopher Mtikila (2010) EA 13.*)

(iv) A Constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive liberal and flexible interpretation keeping in view the ideals of the people, their social economic and political cultural values so as to extend the benefit of the same to the maximum possible. See *Okello Okello John Livingstone and 6 others v. The Attorney General and Another Constitutional Petition No I of 2005, South Dakota v. South Carolina 192, USA 268. r940.*

(v) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

(vi) Where the language of the Constitution or a statute sought to be interpreted is imprecise or ambiguous a liberal, general or purposeful interpretation should be given to it. (See *Attorney General v Major David Tinyefunza Constitutional Appeal No. I of 1997 (SC)*)

(vii) The history of the country and the legislative history of the Constitution is also relevant and useful guide to Constitutional Interpretation see (*Okello John Livingstone and 6 others v. Attorney General and Another (Supra)*).

(viii) The National objectives and Directive principles of state policy are also a guide in the interpretation of the Constitution. Article 8A of the Constitution is instructive for applicability of the objectives.'

- 124I I shall be guided by the foregoing principles of constitutional interpretation.
- [25] Secondly the burden of proof rests with the petitioner to raise a prima facie case that a fundamental right or freedom has been contravened. Once this is established the burden shifts to the state or respondent to rebut or justify the limitation. See *Charles Onvanso Obbo and Anor v Attorney General*. [2004] UGSC 81.

126I Thirdly where article 43 of the Constitution is called in aid to allow the limitation to the fundamental right the court must engage in a limitation analysis starting with the criteria laid down therein. Does the enjoyment of the fundamental right or freedom prejudice the fundamental rights and freedoms of other person or the public interest? If the answer is in the affirmative, is the limitation acceptable and demonstrably justifiable in a free and democratic society, or is it provided by the Constitution? Mulenga JSC, in *Charles Onvanso Obbo and Anor v Attorney General* (supra) formulated the limitation analysis in the following words,

> 'Similarly, under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the court must be guided by the values and principles essential to a free and democratic society. In *Mark Gova & Another vs. Minister of Home Affairs & Another*, [S. C. 3612000: Civil Application No. 156/99], the Supreme Court of Zimbabwe formulated the following summary of criteria, with which I agree, for justification of law imposing limitation on guaranteed rights-

- . 'the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding ^a fundamental right:
- . the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations :
- . the means used to impair the right or freedom must be no more than necessary to accomplish the objective. '
- 127I Any limitation analysis that I may have to engage in shall be guided by the foregoing principles which I am obliged to follow.

Issue I

Are there any questions for constitutional interpretation?

[28] The petitioner seeks a declaration that section 4 (7) of the Income Tax act is in contravention or inconsistent with Articles of 21 (1) & (2); 20 (1) & (2)

and 2 (2) the Constitution. On the face of it this is a contention that falls within the provisions of Article 137(1) and (2) of the Constitution. I shall out the relevant provisions below.

> '137. Questions as to the interpretation of the Constitution

> (I) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.

> (2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that-

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of this Constitution,

may petition the constitutional court for a declaration to that effect, and for redress where appropriate.'

[29] It is clear from the foregoing provisions that any person who alleges that any provision of the law is inconsistent with the Constitution, as the petitioner has done, would fit squarely under article 137 (3) of the Constitution to petition this court for interpretation of the Constitution, and receive an answer from this court. See *Seruso Ismail v Kampala City Council & Another* [1999] UGSC 23.

[30] The petition therefore raises a question for constitutional interpretation.

Issue No. 2

Whether section 4 (7) of the Income Tax Act Cap 340 is in contravention of Articles, 20 (1) & (2); 21 (1) & (2) and 2 (2) of the Constitution of Uganda for being discriminatory of resident tax payers who are in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services whose gross turn over does not exceed one hundred and fifty million Uganda shillings in a year of income.

- [3 ^I] The petitioner contended that the Section 4 (7) Income Tax Act ³⁴⁰ contravenes Articles, 20 (I) & (2); 21 (1) & (2) and 2 (2) of the Constitution. The petitioner contends in para 4 of the petition that the impugned section 'was enacted on an illegitimate purpose.' Unfortunately, this illegitimate purpose is not disclosed either on the petition or the supporting affidavit. Clearly the attack on section 4 (7) of the Income Tax based on the claim that it was enacted for an illegitimate purpose is not substantiated. It is not enough to allege, an illegitimate purpose, without more, and hope that you have reached the threshold.

- 132) I shall now consider whether or not the effect of the impugned provisions is discriminatory so as to be unconstitutional.
- [33] Section 4 (5) and (7) of the income tax provides that;
 - (5) Subject to subsection (7), where the gross turnover of ^a resident taxpayer for a year of income derived from carrying on a business or businesses is less than fifty million shillings, the income tax payable by the taxpayer for the year of income shall be determined in accordance with the Second Schedule to this Act, unless the taxpayer elects by notice in writing to the commissioner for subsection (2) to apply; and
 - (a) the tax shall be a final tax on the business income of the taxpayer;
 - (b) no deductions shall be allowed under this Act for expenditures or losses incurred in the production of the business income; and
 - (c) no tax credits allowed under this Act shall be used to reduce the tax payable on the business income of the taxpayer, except as provided in the Second Schedule to this Act.
 - (7) Subsection (5) does not apply to a resident taxpayer who is in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services.
- [34] The petitioner contends that impugned provision discriminates resident tax payers who are in the business of providing medical, dental, architectural, engineering, accounting, legal or other professional services, public entertainment services, public utility services or construction services which is contrary to Article 21(1) & (2) of the Constitution. The supporting affidavit does not adduce any evidence to support the discrimination against the group of resident taxpayers excluded from paying presumptive tax. Secondly, the assertions set out in the affidavit are general statements, which can hardly amount to proof of the matter of discrimination. No affidavit was sworn by anyone from the affected group of resident taxpayers to back the assertions set out in the petition.
- [35] In his address to us the petitioner contended that the group of professionals engaged in business that are not allowed to pay presumptive tax are disadvantaged as they end up paying higher taxes than the businesses that pay presumptive tax. This is neither substantiated on the petition nor on the supporting affidavit.
- [36] I find that no case has been made out to show that the impugned provisions contravene Article 21 (1) and (2) of the Constitution.
- [37] The petitioner further contends under this issue that the impugned provision contravenes Article 20 (1) and (2) and 2 (2) of the Constitution.

- [38] Article 20 (1) of the Constitution recognises that fundamental human rights and freedoms inhere in individuals and are not a gift from the state or even this Constitution. Article 20 (2) compels all organs and agencies of government and all persons to respect, uphold and promote enshrined in Chapter 4 of the Constitution. I am unable to see how the impugned provision is contrary to or inconsistent with article 20 of the Constitution.
- [39] In conclusion I would hold that the petitioner is not entitled to any of the declarations or remedies sought. In the result, I would dismiss the petition.

Decision

[40] As Bamugemereire, Mulyagonja Mugenyi, and Luswata, JJCC, agree this petition is dismissed for lack of merit. Each party shall bear its costs.

It is Dated, signed and delivered at Kampala this 8th day of February 2024

Chief Justice of Constitutional Court

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: Egonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi & Luswata, JJCC

CONSTITUTIONAL PETITION NO 17 OF 2021

BETWEEN

KIZITO FAHAD:.....

AND

ATTORNEY GENERAL:.....

JUDGMENT OF EVA K. LUSWATA, JCC

I have had the opportunity to read in draft the judgment of my learned brother Hon. Justice Fredrick Egonda-Ntende, JCC.

I agree with him and have nothing useful to add.

Dated, signed and delivered at Kampala this

..... EVA K. LUSWATA JUSTICE OF APPEAL CONSTITUTIONAL COURT

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi & Luswata, JJCC)

CONSTITUTIONAL PETITION NO. 17 OF 2021

KIZITO FAHAD

VERSUS

ATTORNEY GENERAL

 $\mathbf{1}$ **J MENT FM NICA K. M E**

I have had the benefit of reading in draft the lead Judgment of Ntende, JCC in this matter.

I agree with the decision and orders therein for the reasons ad

Dated and delivered at Kampala this "Jday of .f e*2 2024.

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Monica K. Mugenyi Justice of the Constitutional Court

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram:

fEgonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi, &Luswata, JJCQ

Constitutional Petition No. 17 of 2021**BETWEEN**

Kizito F Petitioner

AND

Attorney General Respondent

JUDGMENT OF CATHERINE BAMUGEMEREIRE. JCC

I have had the opportunity to study, in draft, the Judgment of my learned brother Fredrick Egonda-Ntende JCC. I agree with his reasoning, findings and conclusions and would dismiss this petition in the terms spelt out in his judgment.

Catherine Bamugemereire Justice of the Constitutional Court

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IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Bamugemereire, Mulyagonja, Mugenyi & *Luswata, JJCC*

Constitutional Petition No. 17 of 2021**BETWEEN**

KIZITO FAHAD:.....

AND

ATTORNEY GENERAL:.....

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my brother, Egonda-Ntende, JCC. I agree that the petition ought to be dismissed for the reasons that he has given.

| Dated at Kampala this | $\mathcal{L}$ day of | 2024. |

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Irene Mulyagonja JUSTICE OF THE CONSTITUTIONAL COURT

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