**THE REPUBLIC OF UGANDA**

**IN THE CONSTITUTIONAL COURT OF UGANDA**

**HOLDEN AT KAMPALA**

***CORAM:*** ***Twinomujuni, Byamugisha, Nshimye, Arach- Amoko & Kasule JJA***

**CONSTITUTIONAL PETITION NO.036/11 (REFERENCE)**

***[Arising out of HCT-00-ICD- Case No. 02/10]***

**BETWEEN**

**THOMAS KWOYELO ALIAS LATONI……APPLICANT**

**AND**

**UGANDA …….RESPONDENT**

**RULING OF THE COURT**

The constitutional reference before us was sent by the International Crimes Division of the High Court sitting at Gulu. It was sent under the provisions of **Article 137 (5)** of the **Constitutional Court (Petitions and References) Rules, SI No.91/ 05.** Three issues were framed for our determination.

1. **Whether the failure by the Director of Public Prosecutions ( DPP) and the Amnesty Commission to act on the application by the accused person for grant of a certificate of Amnesty , whereas such certificates were granted to other persons in circumstances similar to that of the accused person, is discriminatory, in contravention of, and inconsistent with Articles 1, 2 , 20(2), 21(1) and (3) of the Constitution of the Republic of Uganda.**

2. **Whether indicting the accused person under Article 147 of the Fourth Geneva Convention of 12th August 1949 and section 2(1)(d) and (e) of the Geneva Convention Act, Cap 363 ( Laws of Uganda ) of offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with and in contravention of Articles 1, 2, 8, and 287 of the constitution of the Republic of Uganda, and Directives of 111 and xxviii(b) of the National objectives and Directives Principles of State Policy, contained in the 1995 Constitution of the Republic of Uganda.**

3. **Whether the alleged detention of the accused in a private residence of an unnamed official of the Chieftaincy of Military Intelligence (CMI) is in contravention of and inconsistent with Articles 1, 2, 23(2), (3), 4(b), 24 and 44(a) of the Constitution of the Republic of Uganda.**

When the parties before the Registrar of this Court for directions on 12th August 2011, counsel for the applicant, Mr. Alaka informed him that the applicant had abandoned the second issue which deals with the Geneva Conventions. He suggested some slight amendments to the first issue but it remained basically the same.

Ms Patricia Muteesi Senior Principal State Attorney had no objection to the proposed amendments but raised another issue which had not been framed for our determination. The issue in question is **"WHETHER SECTIONS 2, 3, AND 4 OF THE AMNESTY ACT ARE INCONSISTENT WITH ARTICLES 120 (3) (b) (c) AND (5) (6), 126 (2) (a), 128 (1) AND 287 OF THE CONSTITUTION.**

The applicant filed an affidavit in support of his case. There was no affidavit in reply, although Ms Muteesi applied and she was granted an adjournment for the purpose.

The background to this reference as we could gather it from the record is that for a period of almost twenty years, there was a rebellion in the northern part of this Country. The rebellion was led by an organization called the Lord's Resistance Army (LRA). During the period in question, people lost their lives property was destroyed and children were abducted.

The applicant in his affidavit states that he was abducted by LRA in 1987 at the age of 13 years while on his way to Pabbo Primary School. He remained in captivity and became one of the commanders of LRA until he was captured in Garamba in the Democratic Republic of Congo by the Uganda Peoples' Defence Forces in 2008.

On the 12th January 2010, the applicant, while in detention at Upper Prison Luzira made a declaration renouncing rebellion and seeking amnesty. The declaration was made before one Robert Munanura, the Officer in charge of the prison. The declaration was submitted to the Amnesty Commission for amnesty under the Amnesty Act (Cap 294, Laws of Uganda).

On the 19th March 2010 the Commission forwarded the applicant's application to the Director of the Public Prosecution (DPP) for consideration in accordance with the provisions of the Amnesty Act. The Commission stated that it considered the applicant as one who qualifies to benefit from the amnesty process. To date the DPP has not responded to the letter of the commission.

On 6th September 2010, the DPP charged the applicant before Buganda Road Court with various offences under Article 147 of the 4th Geneva Conventions Act. He was later committed for trial to the International Crimes Division of the High Court.

On 11th July the applicant appeared before the said division on an amended indictment containing over 50 counts. The offences arose out of the applicant's alleged activities during the rebellion.

The applicant through his counsel requested for a constitutional reference contending that he was indicated for offences for which he qualified for amnesty under the Amnesty Act. It was also his contention that other LRA commanders like Kenneth Banya, Sam Kolo and over 26, 000 other rebels, who were captured in similar circumstances, were granted certificated of amnesty by the DPP and the Amnesty Commission.

The main thrust of his complaint as we understand it is that he is being discriminated against and is being deprived of equal protection of the law under **Article 21** of the Constitution with people in similar circumstances.

We shall now comment briefly on our decision in allowing the respondent to argue an issue which was not sent to this court for determination. The issue in question is whether the provisions of the Amnesty Act under which the applicant was seeking amnesty were inconsistent with **Articles 120, 126, 128 and 287 of the Constitution.**

This court in it's ruling in the case of ***Akankwasa Damian v Uganda*** **Constitutional Reference No.05/11** declined to entertain an additional issue whish was framed by counsel for the applicant, outside the issues which were framed by the court which sent the reference. In declining to entertain the additional issues this court said:

***"Rule 20 (supra) allows amendment on issues that had been framed by the lower court for determination. When the Constitutional court is determining a reference, it is exercising special and limited jurisdiction on matters and issues that have arisen in the proceedings before the court which sent the reference. The additional issues which were framed by counsel for the applicant are outside the scope of the reference which was sent to us by lower court. We shall not consider them in this ruling".***

In the matter now before us, we allowed the respondent to raise an issue whish was not framed for our determination by the lower court, because it touched on the legality and constitutionality of an Act of Parliament, under which the applicant was claiming that he had acquired a right to be granted amnesty.

A law which is alleged to be inconsistent with the constitution is null and void to the extent of the inconsistency See **Article 2 (2)** of the constitution. The court could not close its eyes to an alleged illegality and has a duty to investigate the allegation.

Before considering the submissions made by counsel on both sides and the merits of the reference, it is necessary to remind ourselves of some of the principles of constitutional

interpretation which have been laid down over the years in a wealth of authorities by courts of judicature in this country and other jurisdictions which have similar or identical constitutions.

1. ***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 the inconsistency – see Article 2 (2) of the constitution.***
2. ***In determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality of either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve: see Attorney General V Silvatori Abuki – Constitutional Appeal No. 1/ 98 (SC).***
3. ***A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic, progressive and liberal interpretation and culture values so as to extend fully the benefit of the rights which have been guaranteed. See South Dakota v South Carolina 192, US 268, 1940.***
4. ***The entire constitution has to be read together as an integral whole and no particular provision destroying the other, but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountancy of the Constitution See P. K. Ssemwogerere & another v Attorney General – Constitution Appeal No. 1/02(SC).***
5. ***The words of a written Constitution prevail over all unwritten conventions, precedents and practice.***
6. ***No one provision of the Constitution is to be segregated from the other and be considered alone but all the provisions bearing on a particular subject are to be brought into view and be interpreted to effectuate the greater purpose of the instrument.***
7. ***There is a presumption that every legislation is constitutional and the onus of rebutting the presumption rests on the person who is challenging the legislation's status.***

We shall now set out the articles of the constitution which require consideration and the provisions of the impugned sections of the Amnesty Act.

**Articles 20 and 21** of the Constitution are found in Chapter four which deals with the protection and promotion of fundamental and other rights and freedoms.

Some of the freedoms under this chapter are absolute while others are subject to some limitations and qualifications. The rights created under articles 20 and 21 are not absolute. They are subject to limitations and modifications which must be demonstrably justifiable under a free and democratic society.

To justify unequal treatment under the law, there must exist reasonable and objective criteria for such unequal treatment or discrimination. The burden is on the party who is discriminating to explain the reasons for the unequal treatment or discrimination.

**Article 20 states:**

***"(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons".***

Article 21 reads:

***"(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.***

***(2) Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, ethnic origin, tribe, birth, creed or religion or social or economic standing, political opinion or disability.***

***(3) For the purpose of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin tribe, birth, creed or religion or social or economic standing, political opinion or disability."***

**Article 120 (3)** deals with the functions of the Director of Public Prosecutions. It says:

***"(a) to direct the police to investigate any information of a criminal nature and to report to him or her expeditiously;***

***(b) to institute criminal proceedings against any persons or authority in any court with competent jurisdiction other than a court martial."***

***"(5) In exercising his or her powers under this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process".***

***"(6) In the exercise of the functions conferred on him or her under this article, the Director of Public prosecutions shall not be subject to the direction or control of any person or authority."***

Article 126 (1) protects the exercise of judicial power. It states:

***"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 values, norms and aspirations of the people"***

**Article 128** protects the independence of the judiciary. It provides:

***"(1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.***

***(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions."***

**Article 287** which govern international agreements, treaties and conventions provides:

***"Where –***

- ***(a) Any treaty, agreement or convention with any country or international organization was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962 and was still in force immediately before the coming into force of this constitution; or***
- ***(b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the***

***treaty, agreement or convention shall not be affected by the coming into force of this Constitution and Uganda or the Government as the case may be, shall continue to be party to it."***

**Section 2** of the Amnesty Act (Cap 294) states:

***"(1) An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by –***

***(a) Actual participation in combat***

***(b) Collaborating with the perpetrators of the war or armed rebellion;***

***(c) Committing any other crime in furtherance of the war or armed rebellion.***

***(2) A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.***

**Section 3** governs the grant of amnesty. It states:

***(1) A reporter shall be taken to be granted amnesty declared under section 2 if the reporter-***

***a) Reports to the nearest army or police unit, a chief , a member of the executive committee of a local government, a magistrate or religious leader within the locality;***

***b) Renounces and abandons involvement in the war or armed rebellion,***

***c) Surrenders at any such place or to any such authority or person any weapons in his or her possession ; and***

***d) Is issued with a certificated of amnesty as shall be prescribed in regulations to be made by the minister.***

***(2) Where a reporter is a person charged with or is under lawful detention in relation to any offence mentioned in section 2, the reporter shall also be deemed to be granted the amnesty if the reporter-***

***(a) declares to a prison officer or to a judge or a magistrate before whom he or she is being tried that he or she renounced the activity referred to in section 2; and***

***(b) declares his or her intention to apply for the amnesty under this Act.***

***(3) A reporter to whom subsection (2) applies shall not be released from custody until the Director of Public Prosecution has certified that he or she satisfied that –***

***(a) the person falls within the provisions of section 2; and***

***(b) he or she is not charged or detained to be prosecuted for any offence not falling under section 2."***

Counsel for the applicant made oral submissions while counsel for the respondent filed a written submission. She also made some oral arguments. Mr. Caleb Alaka went through the history of his client before he was captured in Garamba after the failure of the peace talks. He pointed out that other officers of LRA like Banya and Kolo who were captured, applied for amnesty and it was granted. He submitted that top commanders of LRA were indicted by the International Criminal Court and the applicant is not one of them. He pointed out that the Amnesty Act provides for exclusion by the issuance of a statutory instrument of persons the Government deems ineligible to be granted amnesty under the Act. The applicant is not one of them and therefore he is eligible for grant of amnesty.

Learned counsel submitted that the applicant had fulfilled the requirements of the law and the DPP had a duty to notify the Amnesty Commission that the applicant had other charges not related to the rebellion. The DPP did not. Instead he went ahead to charge him with offence related to the rebellion.

Counsel further submitted that the Amnesty Act was enacted in public interest and laws are made to address social, economic, political and other issues. He pointed out that the Amnesty Act was enacted to address the war in the northern part of Uganda. He complained that the applicant is being discriminated against. He cited the case of ***Muller & another v Namibia (2002) AHRLR 8 (HRC 2002)*** for his contention.

Learned counsel ended his submission stating that the act of the DPP and the Amnesty Commission is discriminative and amounts to unequal treatment under the law.

Ms Muteesi did not agree. She stated that the applicant cannot derive any legal right to amnesty because the Amnesty Act is unconstitutional and therefore null and void under Article 2 of the Constitution. She stated that this court cannot validly order the Amnesty Commission to act under the Act once it has been brought to its attention that the Act itself is inconsistent with the Constitution.

Learned counsel contended that the Amnesty Act infringes on the constitutional independence of the DPP guaranteed in ***Article 120 (3) (b) (c) (d), (5) and (6)*** of the Constitution.

She contended that in exercising his or her powers whether to prosecute or to discontinue criminal prosecution, the DPP "shall not be subject to the control of any person or authority" including Parliament. She claimed that the Amnesty Act subjects the independence of the DPP to the control of Parliament in the performance of his duties. She further stated that **Article 120 (5)** provides that the DPP in exercising his / her powers shall have regard to public interest, the administration of justice and the need to prevent the abuse of legal process.

She stated that the DPP has discretion which must be guided by these considerations. Learned counsel complained that the Amnesty Act granted blanket amnesty without provision for DPP's consent, denied him the opportunity to consider the facts, circumstances of individual cases, the available evidence and then make an independent decision whether to prosecute or not to prosecute. She pointed out a number of instances which claimed interfered with the discretion of the DPP to determine the prosecution of offences under the Amnesty Act. She mentioned the following instances:

- Whether it was in public interest to consent to an amnesty which Parliament intended to have duration of 6 months, but was still in effect after ten years, in effect allowing amnesty of unlimited duration.
- What were the circumstances of a rebel's renunciation e.g. was it made before or after he was captured in battle with Government troops?

- What level of control and direction the suspect exercised in rebel forces and its actions?
- Who was most responsible for such actions?
- Whether the offences are primarily against the State (e.g. waging war) or offences against civilians, including gross violations of their human rights, and if it is in public interest to prosecute the latter.
- Whether the offences constitute violations for international humanitarian law and whether the suspect was individually responsible for such violations?
- Whether Uganda has any international obligation to prosecute the offences? Is there universal jurisdiction by other states or international tribunals over these offences?
- Uganda's foreign policy supporting the prosecution of international crimes as illustrated by its enactment of the ICC Statute and the establishment of an International Criminal Division of the High Court.

Learned counsel complained that Parliament through the Amnesty Act substituted its discretion for that of the DPP'S in determining that the offences under the Act should be prosecuted.

She cited to us the decision of the Supreme Court in the case of **Attorney General v Susan Kigula & 417 others – Constitutional Appeal No. 3/06 (SC)** regarding the constitutionality of the mandatory death penalty. The Supreme Court held that section 98 of the Trail on Indictments Act and other laws which create mandatory death penalty and prevented the judges from considering mitigating factors in the sentencing process, interfered with the sentencing powers of the court. The said legislations were declared unconstitutional.

The second aspect of Ms Muteesi's submission was that the Amnesty Act infringes on the constitutional independence of the judiciary guaranteed under Articles 126 (2) (a), 128 (1) and (2) (supra). She stated that the law permits private persons to initiate a private prosecution but the DPP has powers to take over such prosecution. However, she pointed out the Amnesty Act

prevents him from continuing such prosecution as long as the person qualifies for amnesty under the Act. In the same way the judge is compelled by law to discontinue the trial since no prosecution can legally proceed.

The third limb of the prosecution's case as presented by the learned Principal State Attorney, was that the Amnesty Act is inconsistent with **Article 287** of the Constitution because it grants amnesty to perpetrators of any war crimes including grave breaches of the Geneva Conventions on the law of war, violates principles of international law which are reflected in treaties assented to by Uganda.

She submitted that Article 287 recognizes the validity of ratified treaties under Ugandan laws like the Geneva Conventions Act, which creates criminal offences and prescribes maximum sentences for grave breaches of such conventions. She claimed that the applicant is being prosecuted for such grave breaches. She further submitted that international law principle obliges any country which is a party to a treaty to observe its obligations. She cited article 26 of the 1969 Vienna Convention on the law of treaties which Uganda ratified. It was also her submission that under Article 27 of the same convention municipal law cannot be used to justify violation of international obligations. She cited the case of ***Barrios Altos v Peru [Inter- American Court of Human Rights] 2001***, to support her argument.

In this case it was held that self amnesty laws of Peru which prevented the investigations and prosecution of state agents who were responsible for the assassination of 15 people and injuring 4 others made Peru violate its obligation under the Inter – American Convention on Human Rights to legislate against such violations.

Another case which Ms Muteesi cited was ***Prosecutor v Morris Kallon & Brima Bazzy Kamara [Special Court of Sierra Leone Cases No. SCSL 2004- 15 AR72 (E) AND SCSL 2004 – 16 AR 72(E).*** It was noted that insurgents are subject to international humanitarian law and are bound to observe the Geneva Conventions.

Learned counsel cited the case of ***Prosecutor v Auto Furundaija [IT- 95-17/1-T]***, a decision of the International Criminal Tribunal for former Yugoslavia, in which the court held that the international community and a state cannot take measures to absolve its perpetrators through amnesty.

She concluded her submission stating that the blanket amnesty which is granted under the Amnesty Act is in violation of Uganda's international law obligations, and the applicant cannot claim an entitlement to amnesty under sections 2 and 3 since the two sections are null and void under Article 2 of the Constitution.

She invited court to order the trial of the applicant to proceed.

Mr. Alaka made a reply. He submitted that under **Article 21 (1)** of the Constitution, all persons are equal before the law and the Amnesty Act granted rights which should be enjoyed equally.

He pointed out that the Act is not unconstitutional because the framers of the Constitution had the turbulent history of this country in mind when enacting it. The Constitution according to counsel was supposed to establish national unity and stability.

He supported the enactment of the Amnesty Act by Parliament because there was a civil war in Northern Uganda and the blanket amnesty was meant to solve the problem which was facing the country. He cited a passage from a case by Supreme Court of India – ***Hamdard Dawakhana (Wakf) Lal Delhi & another v Union of India and others (1960) AIR 554*** where the court said:

***"Therefore, when the constitutionality of an enactment is challenged on ground of violation of any articles in Part 111 of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e.; its subject matter, the area in which it is intended to operate, its purpose and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy…"***

Learned counsel submitted that the Amnesty Act does not take away the powers of the courts or the DPP. He pointed out that in 2006 the Amnesty Act was amended and the Minister was given powers to declare rebels who were ineligible for amnesty.

Mr. Onyango who also represented the applicant supported the constitutionality of the Amnesty Act. He cited the case of ***Azanian Peoples Organization & 7 others v President of South Africa & others (CCT 17/96) [1996] ZACC 16.*** This decision discussed the constitutionality of certain

provisions of the South African Truth and Reconciliation Act which established a commission whose main objective was to promote national unity and reconciliation and to facilitate the granting of amnesty to persons who made full disclosure of all relevant facts relating to acts associated with political objective. The constitutional court of South Africa found that the impugned section of the Truth and Reconciliation Act were constitutional.

Pardon as a plea in criminal prosecution is a creature of the constitution **Article 28 (10)** provides:

***"No person shall be tried for a criminal offence if the person shows that he or she has been pardoned in respect of that offence".***

Pardon is therefore a constitutional protected right which the DPP has not complained about in respect of his independent powers to determine whom to prosecute or not prosecute. This pardon is general in nature and it applies to all criminal offences under the statute books. It operates as a bar in criminal prosecution. It is a constitutional command which has to be obeyed by everyone the DPP and the courts inclusive. The article does not state who can grant a pardon or under what circumstances the pardon may be granted.

There is no dispute that under **Article 79 (1)** of the Constitution Parliament is clothed with powers "to make laws of any matter for the peace, order, development and good governance of Uganda."

When Parliament enacted the Amnesty Act which came into force on 21st January 2000, it was exercising the powers conferred by the article.

The purpose of the Act, according to its preamble, was to provide "for amnesty for Ugandans involved in acts of a war like nature in various parts of the country and for other connected purposes".

The word amnesty is defined in **section 1 (a)** to mean

***"a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the state."***

At the time when the Act was enacted, this country was faced with political rebellion in Northern Uganda. The Act was meant to be used as one of the many possible ways of bringing the

rebellion to come to an end by granting amnesty to those who renounced their activities. There is nothing unconstitutional in our view in the purpose of the Act. The mischief which it was supposed to cure was within the framework of the constitution.

The Act is also in line with national objectives and principles of State policy and our historical past which was characterized by political and constitutional instability. Clause 111 of the national objectives and state policy the framers of the Constitution stated the following:

***"(i) All organs of the state and the people of Uganda shall work towards the promotion of national unity, peace and stability.***

***ii)*** ***Every effort shall be made to integrate all peoples of Uganda while at the same time recognizing the existence of their ethnic, religious, ideological political and cultural diversity.***

***iii)*** ***Everything shall be done in order to promote the culture of co- operation understanding, appreciation, tolerance and respect for each other's custom traditions and beliefs.***

***iv)*** ***There shall be established and nurtured institutions and procedures for the resolution of conflicts fairly and peacefully.***

***v)*** ***The State shall provide a peaceful, secure and stable political environment which is necessary for economic development."***

We would like to point out that the Act did not grant amnesty to any government official or the Uganda Peoples Defence Forces personnel who were directly or indirectly involved in fighting the rebellion and who might have committed criminal offences under the laws of Uganda or international conventions and treaties which Uganda is a party to. The Act as a whole and the institutions that were step up to implement it brings this out. The resettlement packages, demobilization and reintegration programmes were all aimed at reporters or former rebels who renounced rebellion. The Act is not like the South Africa Truth and Reconciliation Act which granted amnesty to all wrong doers within the apartheid government and within the rebel ranks.

In order to implement the provisions of the Act, certain organs like the Amnesty Commission were created. The functions of the Commission are set out in section 8. They are:

***(a) To monitor the programmes of-***

***(i) Demobilization;***

***(ii) Reintegration; and resettlement of reporters;***

***(b) To coordinate a programme of sensitization of the general public on the amnesty law;***

***(c) To consider and promote appropriate reconciliation mechanisms in the affected areas;***

***(d) To promote dialogue and reconciliation with in the spirit of this Act***

***(e) To perform any other function that is associated or connected with the execution of the functions stipulated in this Act."***

What is the role of the DPP under the Act? We have already set out the provisions of the Act spelling out the role of the DPP in the process of granting amnesty to those who renounce rebellion. The first role is to certify that the person who has applied for amnesty fall with in the ambit of **section 2** i.e. that he/ she is not facing any other criminal charges unrelated to the rebellion.

The third role under subsection (4) is to investigate cases of all persons charged with or held in custody for criminal offences and to cause such persons who qualify for amnesty to be released.

We think it is the implementation of this subsection that the learned DPP claims, infringes on his independence under the constitution although he did not swear any affidavit stating so.

We do not think that the Act was enacted to whittle down the prosecutorial powers of the DPP or to interfere with his independence as Ms Muteesi submitted.

The DPP can still prosecute persons who are declared ineligible for amnesty by the minister responsible for Internal Affairs or those who refuse to renounce rebellion. He can also prosecute any government agents who might have committed grave breaches of the Geneva Conventions Act, if any. The Amnesty Act unlike the South African Truth and Reconciliation Act did not immunize all wrong doers. The powers of the DPP to prosecute in our view were not infringed upon by the impugned sections. They are valid.

The decision of the Supreme Court in the case of the **Attorney General v Susan Kigula & others** which Ms Muteesi cited is therefore distinguishable from the facts of this reference.

The other concerns raised by Ms Muteesi about Uganda's obligation under international treaties and conventions which it has ratified and domesticated, we think, her concerns were addressed by the provisions of the Act, in that not all rebels were granted amnesty, since the Minister can declare some ineligible for amnesty.

There is evidence on record contained in the affidavit of the applicant to the effect that top commanders of the LRA were indicted by the International Criminal Court under the Rome Statute. Their indictment clearly shows that Uganda is aware of its international obligations, while at the same time it can use the law of amnesty to solve a domestic problem. We have not come across any uniform international standards or practices which prohibit states from granting amnesty. The learned State Attorney did not cite any either. We accept the submission of Ms Muteesi that insurgents are subject to international law and can be prosecuted for crimes against humanity or genocide.

The record which is before us shows that since 2000, when the Amnesty Act came into force, the DPP has sanctioned the grant of amnesty to 24,066 people.

This number includes 29 people who have been granted amnesty this year (2011).

The applicant applied for amnesty in 2010. In that year 274 people were granted amnesty which was apparently sanctioned by the DPP.

The DPP did not give any objective and reasonable explanation why he did not sanction the application of the applicant for amnesty or pardon under the Amnesty Act, like every one else who renounced rebellion. Indeed in terms of section 3(2) of the Act, the applicant, as a reporter "shall also be deemed to be granted amnesty..." Once he declared to the prison officer that he had renounced rebellion and declared his intention to apply for amnesty under the Act. The DPP on his part shirked his obligations under the Act. We think it is rather late in the day for the learned DPP to claim his constitutional

independence using the applicant. He has failed to furnish any reasonable or objective explanation why the applicant should be denied equal treatment under the Amnesty Act.

We are satisfied that the applicant has made out a case showing that the Amnesty Commission and Director of Public Prosecutions have not accorded him equal treatment under the Amnesty Act. He is entitled to a declaration that their acts are inconsistent with Article 21 (1) (2) of the Constitution and thus null and void. We so find.

We order that the file be returned to the court which sent it with a direction that it must cease the trial of the applicant forthwith.

Dated at Kampala this 22nd day of September, 2011

A. Twinomujuni
Justice of Appeal

C.K.Byamugisha

Justice of Appeal

A.S. Nshimye

Justice of Appeal

S.M. Arach- Amoko

Justice of Appeal

Remmy K. Kasule

Justice of Appeal