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

CORAM: (S.T. MAYINDO, DCJ, G.M. OKELLO, J. A.E.M. BAHIGEINE, J. J.P.M.
TABARO, J. & F.M.S. EGONDA-NTENDE, J.)

CONSTITUTIONAL CASE NO. 2 OF 1997

BETWEEN

1. SALVATORI ABUKI
2. RICHARD ABUGA PEETITIONERS

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT OF MANYINDO - DCJ

The Petitioner, Salvatori Abuki and one Richard Obuga brought this petition challenging their convictions under the Witchcraft Act. They were tried separately in the Grade II Magistrate's Court of Aduku in Lira District. Salvatori was charged in one count with practising witchcraft on Albatina Agol, Okai Alisandoro and David Ongola contrary to section 3(3) of the Act. He pleaded guilty, was convicted and sentenced to 22 months imprisonment. In addition he was banished from his home for 10 years after serving the sentence of imprisonment. Clearly, he should have been charged in three separate counts, one for each of the complainants.

Richard Obuga was convicted of being in possession of articles used for witchcraft, contrary to section 5(1) of the Act in the first count and with practising witchcraft contrary to section 3(3) of the Act in the second count. He was sentenced to 36 months imprisonment on the first count and 24

months imprisonment on the second count. The sentences were to run concurrently. An exclusion order for 10 years was also made against him. Their appeals to the Chief Magistrate's Court failed.

The two men then brought this petition for declarations:-

“(i) that the witchcraft Act Cap 108 Laws of Uganda ,and

(ii) the convictions sentences and exclusion orders

thereof, are inconsistent with the Constitution Articles 21 (1), 28(1), 28(12), 24, 44, 26 and 29(1) (b) - (c) and 29 (2).”

And for the grant of an order:-

“ quashing the convictions, setting asides the sentences and the exclusion orders and setting the petitioners free OR refer the matter to the High court to investigate and determine an appropriate redress.”

Article 21 (1) states that all persons are equal before the law regardless of their standing in society. Article 24 prohibits the subjection of a person to any form of torture, cruel, inhuman or degrading treatment or punishment. Under Articles 26 every person has a right to own property which must not be taken away from him or her except in specified circumstances and even

then after that person has been fairly and adequately compensated for the loss. Article 28 (1) guarantees a right to a fair hearing before Courts and other tribunals established by law. Article 28 (12) provides that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law. Under Article 29 (1) (b) and (c) freedom of thought, conscience and belief and religion is guaranteed while under Article 29(2) every Ugandan has the right to reside and settle anywhere in Uganda; to have a Passport or other travel document and travel in and out of Uganda.

Finally, Article 44 prohibits derogation from particular human rights and freedoms to wit (a) freedom from torture, cruel, inhuman or degrading treatment or punishment, (b) freedom from slavery or servitude (Article 25 (1), (c) the right to fair hearing and (d) the right to an order of habeas corpus (Article 23 (a)).

The petition which was accompanied by an affidavit sworn by the petitioner on 31/1/97, was amended, with leave of court, on . The grounds of the petition state as follows:-

“1. Your petitioners are persons having interest in or are affected by the following matters being inconsistent with the constitution whereby your petitioners are aggrieved.

(a) that the Witchcraft Act Cap. 108 Volume IV Laws of Uganda, is inconsistent with the constitution for it:-

- (i) creates the offence of practising witchcraft in S. 3 (3) and possession of any article used in witchcraft, 5 (1).
- (ii) Provides for banishment of a convict from his home area for a period of ten (10) years after serving a custodial sentence, and
- (b) that the Magistrate Grade 11 of Aduku Magistrate's court in convicting the Petitioners under the Witchcraft Act, sentencing them, and excluding the petitioners from their home area after serving the sentence, and the Chief Magistrate in dismissing their appeals and confirming the said convictions, sentences and exclusion orders, under the authority of the Witchcraft Act, were both in contravention of the Constitution.
- (c) that the said convictions, sentences and exclusion orders are inconsistent with or in contravention of provisions of the Constitution namely articles 21 (1), 21 (2) 28 (1), 28 (12), 24,44,26,29, (1) (b) - (c), and 29 (2).

2. Your petitioners state that by convicting, sentencing and banishing them from their home areas their constitutional rights are being infringed, in that:-

- (a) their right to a fair hearing, enshrined in article 28(1) was infringed by being charged and tried under a law which is vague and lacked precision.

- (b) they were convicted of a criminal offence which is not defined in contravention of article 28 (12) of the constitution.
- (c) the penalty of exclusion orders placed on them subjects them to inhuman and degrading treatment which is inconsistent with articles 24 and 44 of the Constitution.
- (d) their right to reside and settle in any part of Uganda, enshrined in article 29 (2) of the Constitution is being infringed.
- (e) in breach of article 26 of the Constitution, the petitioners are being deprived of their properties; immovable and moveable without compensation, and the said Witchcraft Act makes no provision for the petitioner's access to court.
- (f) the Witchcraft Act S.5 (1) thereof contravenes the anti-discrimination provisions enshrined in articles 21 (1) of the Constitution.
- (g) the Witchcraft Act violates freedom of thought, conscience and religion guaranteed by article 29 (1) (b) - (c) of the Constitution.

3. WHEREFORE your petitioners pray that the court may:-

- (a) grant a declaration.
 - (i) that the witchcraft Act Cap 108 Laws of Uganda, and
 - (ii) the convictions, sentences and exclusion orders thereof.

Are inconsistent with the Constitution articles 21 (1) 28 (1), 28 (12) 24, 44, 26, and 29 (1) (b) - (c) and 29 (2).

(b) grant an order quashing the convictions, setting aside the sentences and the exclusion orders and setting the petitioners free OR refer the matter to High Court to investigate and determine an appropriate redress.

(c) grant costs of this petition to the Petitioner”.

The respondent’s answer to the petition was (a) that the Witchcraft Act is not inconsistent with the provisions of the Constitution (b) that the exclusion orders are penalties of prescribed offences and therefore do not contravene Articles 29 (2) and 26 (2) of the constitution, (c) that the petitioners have not been deprived of their property without compensation as contemplated under Article 28 (12) of the constitution and (d) that in any case, the petitioners had a right of access to court by way of an appeal against conviction or sentence or both and or should not have come to the constitutional court.

Sadly Richard Obuga passed away at Murchison Bay Prison Luzira a day after the hearing of his petition had started. Accordingly, his petition abated under rule 15 of the Modifications of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions 1996 (Legal Notice No. 4 of 1996).

Counsel for the petitioner framed the following issues which were accepted by the counsel for the respondent:-

- (1) whether the Witchcraft Act and in particular the provision for the exclusion orders in section 7 infringes or is inconsistent with Articles 24, 26 (2), 29 (2) and 44 of the Constitution,
- (2) If the answer to (1) is no, can the conviction of the appellant be maintained in view of the provision in Article 28 (12) of the Constitution?
- (3) whether the petitioner was afforded a fair trial or hearing under Article 28(1) of the Constitution.
- (4) whether the Witchcraft Act infringes Article 21 of the Constitution which Article guarantees to all persons equality and freedom from discrimination.

Mr. Emoru who presented the petitioner's case argued that the offence of witchcraft is not defined in the Witchcraft Act which contravenes Article 28 (12) of the Constitution. According to him only acts of witchcraft are spelt out in section 3 of the Act which states:-

- “3 (1) Any person who directly or indirectly threatens another with death by witchcraft or by any other super natural means shall be guilty of an offence and on conviction shall be liable to imprisonment for life.
- (2) Any person who directly or indirectly threatens to cause disease or any physical harm to another, or to cause disease or harm to any

livestock or harm to any property of whatever sort of another by witchcraft or by other supernatural means shall be guilty of an offence and on conviction shall be liable to imprisonment for a period not exceeding ten years.

(3) Any persons who practices witchcraft ^{or} who holds himself out as a witch, whether on one or more occasions, shall be guilty of an offence and on conviction shall be liable to imprisonment for a period not exceeding five years.”

(4)

In Mr. Emoru’s view, section 3 quoted above is vague - it does not create an offence. It follows that the petitioner was tried on an undefined offence which means that he was not given a fair trial. This contravened Article 28 (1) and (12) of the Constitution.

With regard to the exclusion orders Mr. Emoru contended that the provision for same in section 7 of the Act is inconsistent with Articles 24 and 44 of the Constitution in that banishment is inhuman, cruel and degrading punishment, as it deprives the convict of food and shelter which are essential to life. The person concerned is made homeless and destitute. Yet derogation from the enjoyment of the freedom from cruel, inhuman or degrading treatment of punishment is prohibited by Article 44 of the constitution. Mr. Emoru argued that banishment, which he thought, wrongly in my view, amounted to some form of internal deportation, offends Article 29 (2) (a) of the Constitution which permits every Ugandan to move freely throughout Uganda and to live anywhere in Uganda.

It was also argued that the exclusion order would mean that the petitioner would lose control of his house and other property - it would amount to an indirect deprivation of property without compensation which would violate Article 26 of the Constitution.

A submission under ground 2 (f) of the petition on the basis that the Witchcraft Act was discriminatory in that the offences therein related to men only was abandoned when it occurred to counsel for the petition^{er} that that was not the position. Also the ground alleging violation of thought, conscience and religion by same provisions of the Witchcraft Act was abandoned because under section 2 of the Act witchcraft does not include among others, bonafide spirit worship.

For the respondent it was submitted by Mr. Tumwesige, the Director of Civil litigation in the respondent' chambers that the Witchcraft Act is not inconsistent with any provision of the Constitution. He maintained that the offence of witchcraft is well defined in section 3 of the Act. He referred us to the definition of "witchcraft" in the Shorter Oxford English Dictionary as "the practices of witch or witches; the exercise of supernatural power supposed to be possessed by persons in league with the devil or evil spirits". In his view the exercise of supernatural powers amounts to witchcraft under section 3 (1) and (2) of the witchcraft Act. The details of the witchcraft can only be seen by the trial Court from the evidence to be adduced by the prosecution. The petitioner was therefore properly and fairly tried and convicted of a known offence.

Regarding the exclusion or banishing order, Mr. Tumwesige contended that such an order is part of the sentence and that it does not violate the right to live anywhere in Uganda as that right applies only if one has not committed an offence for which there is a prescribed sentence. Here he relied on Article 23 (1) (a) which provides thus:-

“23 (1) No person shall be deprived of personal liberty except in any of the following cases.

(a) in execution of the sentence or order of a court, whether established for Uganda or another country or of an international court or tribunal in respect of a criminal offence of which that person has been convicted; or of an order of a court punishing the person for contempt of court”.

On the question of deprivation of property, Mr. Tumwesige submitted that the petitioner's property, if he had any, was left intact by the exclusion order. The order merely meant that the petitioner would not enjoy the use of that property during the period of banishment just as he would not use the property during his period of incarceration about which he was not complaining.

As this Court observed in: **Tinyefuza vs Attorney General**, Constitutional Petition No. 1 of 1996, (unreported) the rules applicable to interpretation of statutes apply to construction of Constitutional Provisions but that a Constitution should be given liberal construction, unfettered with technicalities

with regard to human rights and freedom. I find the observation by Lord Diplock in Attorney General of the Gambia vs Modon Jobe (1984) A.C 689 at 700 (Privy Council) ^{to} the point. He said:-

“A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.”

With these principles in ^{mind} ~~the~~ now turn to the issues raised in the grounds of the petition. They can be summarised as follows:-

- (1) whether the petitioner was convicted of a defined offence, carrying a prescribed sentence;
- (2) if the answer to (1) is in the negative, whether the petitioner was denied a fair hearing;
- (3) whether the exclusion order is cruel, inhuman and degrading punishment;
- (4) whether the exclusion order amounted to depriving the petitioner of his property without compensation;
- (5) whether the petitioner is entitled to the declarations sought.

Section 3(3) of the Witchcraft Act under which the petitioner was charged and convicted has been set out above. Clearly the section prescribes the sentence for the offence. The offence carries a maximum sentence of five years imprisonment. Therefore the main question in the issue No. 1 is

whether the offence of witchcraft is a defined offence for the purpose of Article 28(12) of the Constitution. The word offence is not defined in our law. The word seems to me to be of no fixed or technical meaning. It denotes an act contrary to, offending against, and punishable by law but particularly one made by statute rather than by common law, the latter being usually called crimes, and also particularly one punishable on summary conviction. Obviously the distinction between crimes and offences is a matter of common usage of words rather than of legal definition. Thus, the usual terminology is of "road traffic offences."

The word witchcraft is not defined under the Witchcraft Act. Section 2 of the Act which is the interpretation section simply states that for the purposes of the Act, witchcraft does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines. In the Concise Oxford Dictionary witchcraft is defined as "sorcery, the use of magic." And in the Webster Dictionary a witch is defined as "one who practices the black art or magic, one regarded as possessing supernatural or magical power by compact with an evil spirit, especially with the Devil; a sorcerer or sorceress." It seems clear to me from the above that witchcraft is an inherent mysterious power of certain weird and peculiar people to do harm to others.

In the instant case the charge against the petitioner was drawn as follows:-

STATEMENT OF OFFENCE

PRACTICING WITCHCRAFT C/S 3 (3) OF WITCHCRAFT ACT

PARTICULARS OF OFFENCE

SALVATORI ABUKI ON THE 4TH DAY OF DECEMBER 1995 AT AGWENYERE "B" AORNGA PARISH NAM-BIECO SUB-COUNTY, KWANIA COUNTY IN APACH DISTRICT PRACTICED WITCHCRAFT ON ALBATINA AGOL, OKAI ALISANDORO AND DAVID ONGOLO"

In my view the above charge is not different from say that of murder where the indictment usually states as follows:-

"STATEMENT OF OFFENCE

MURDER, Contrary to section 183 of the Penal Code.

PARTICULARS OF OFFENCE

C.D, on the --- day of ---- 199—at x village in the----- District, murdered Y."

For the ingredients of the offence one has to look elsewhere. In the case of witchcraft, I am of the opinion that section 3 has to be read together with section 6 which states:-

"Notwithstanding the provisions of any law or practice to the contrary, where any person is charged with the commission of an offence under the provisions of this Act, evidence may be adduced.

- (a) to show the reputation of such person as a witch;
- (b) to establish that by common repute any substance, means, process or ceremony proved to have been administered, used or performed, or attempted or caused or advised to be administered, used or performed, is commonly administered, used or performed in the practice of witchcraft”.

In the premises I can not agree that the petitioner was convicted of an ~~off~~^{un} defined offence. It may well be that the particulars of offence should have indicated the acts of witchcraft which were practised on the complainants to enable the petitioner fully prepare his defence to the charge but that does not mean that the offence does not exist. What happened in this case is that after hearing the testimony of the three prosecution witness the petitioner changed his plea of not guilty to one of guilty. The prosecutor then relied on the facts as stated by the first witness which showed that the petitioner had practised witchcraft on the complainants with use of a tortoise, goat horns and other substances contained in a pot and a guord. The petitioner accepted those facts as correct whereupon he was convicted and sentenced. In the circumstances I do not see how it can be said that he was not accorded a fair trial. I would therefore answer the first two issues in the negative.

I will consider the third and fourth issues together which relate to the exclusion order. Under section 7(1) of the Act the trial Court may, in addition to or in lieu of the custodial sentence, make an exclusion order in relation to

the convicted person. Here the trial Magistrate made the exclusion order in these terms:-

“As the law stands now, he is to be banned for 10 years from that home after serving his sentence.”

It is clear that the trial Magistrate thought that it was mandatory to make the exclusion order. That is not so. Be that as it may, the order has been attacked on the ground that it is cruel, inhuman and degrading and, therefore, is inconsistent with the Constitution. It is true that this sort of treatment ^{ad or punishment} is generally outlawed under Article 24 of the Constitution. It is a good provision given the sad experience this Country went through when innocent Citizens were subjected to untold suffering of torture and degradation at the hands of fascist and dictatorial regimes. However, Article 24 must be read together with Article 23 which clearly limits or restricts the liberty of an individual in that it permits Courts of law to pass sentences and orders that deprive an individual of such liberty. And so in my view Article 44(a) which provides that there shall be no derogation from the freedom from torture, cruel, inhuman or degrading treatment, must mean that there shall be no derogation from the rights and freedoms specified therein except by a sentence or order of Court.

To hold otherwise would mean that a sentence of death, imprisonment or corporal punishment, among others, would be unconstitutional. This would render certain provisions of the Constitution meaningless. For example, under Article 22(1) a person may be deprived of life in execution of a sen-

tence passed by a competent Court after a fair trial, and after the sentence has been confined by the final Court of Appeal. Article 23(8) envisages a sentence of imprisonment and empowers the trial Court to take into account the period the convict has spent on remand before conviction when assessing sentence. Then there is Article 25 (3) (a) which allows Courts to pass sentences which require the convict to perform forced labour. Finally, there is Article 43 which provides for general limitations of fundamental and other human rights and freedoms. Under that Article the enjoyment of the rights and freedoms prescribed in Chapter 4 of the Constitution may be limited in the public interest provided that the limitation does not go beyond what is acceptable in a free and democratic society, or what is provided in the Constitution.

Clearly the constitution does recognise the fact that it is in the public interest to punish criminals who have been fairly tried and found guilty by the courts. People who commit crimes must not expect to be treated with kid gloves. They must expect to receive sentences that fit the offence they have committed. The sentences may be cruel, inhuman and degrading but they are lawful even under the constitution. Such sentences are accepted even in greater democracies such as the United States of America and the United Kingdom. They are necessary evil. That is why the framers of our constitution retained them. I think the real point is that in the Uganda of to-day no one, except the courts of law, may punish a person in a manner that is cruel, inhuman and degrading.

The exclusion order restricted the petitioner's right, under Article 29 (2) (a) to move freely throughout Uganda and to reside and settle in any part of Uganda. In my view that right can only apply if one has not committed an offence for which there is a prescribed sentence. In the case before us the exclusion order is part of the sentence under the Witchcraft Act. It is therefore lawful under Article 23 of the Constitution.

I do not agree that the order deprived the petitioner of his property without compensation. Under article 26 (2) of the Constitution no person may be compulsorily deprived of property or any interest in or right over property except in circumstances specified in the Article and even then fair and adequate compensation must be paid before the property is taken away. In this case the exclusion order does not and could not take away the petitioner's property. All it does is to temporarily inconvenience him in that he could not live in his house during the pendency of the order. It is a generous order in that it does not when it could, prohibit the petitioner from living elsewhere in the village. He can have access to his food crops if any, through his family or friends since the order does not, when it could prohibit communication between him and such people.

The Witchcraft Act may have outlived its usefulness but in my view it is not inconsistent with the Constitution. In the result I would not grant the declarations sought and instead would declare:-

- (a) that sections 2, 3 and 7 of the Witchcraft Act ^{are} not inconsistent with Articles 21 (1) 24, 26, 28, (1) 28 (12), 29(1) & (2) and 44 of the Constitution.

I would therefore dismiss the petition and order that each party meets its own costs of the petition. But in accordance with the majority opinion, it is ordered that the following declarations shall issue:-

1. The sections interpreting witchcraft, that is sections 2 and 3 of the Witchcraft Act are void for being vague and ambiguous and do not meet the requirements of Article 28 (12) of the constitution. GS
2. As a result of (1) above the petitioner was not afforded a fair trial as the offence was unknown. Articles 28 (12) and 44 (c) of the Constitution were contravened. 10
3. The exclusion order is unconstitutional because it threatens the petitioner's life by depriving him of the means of subsistence and deprives him of access to his property. Hence it is inhuman, as it is a threat to life, and contravenes Articles 24, 44 (a) of the Constitution. By depriving the petitioner of access to his property, the exclusion order contravenes Article 26 of the Constitution as well. 15

4. *The petitioner is entitled to immediate release from custody.*
 It is also ordered that the respondent shall pay the costs of the petitioner.

DATED AT KAMPALA this...^{13th}... Day of *June* 1997 20



S.T. MANYINDO

DEPUTY CHIEF JUSTICE

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

CORAM: (S.T. MANYINDO, DCJ; G.M. OKELLO, J, A.E.M. BAHIGEINE,
J, J.P.M. TABARO J, AND F.M.S. EGONDA-NTENDE, J.)

CONSTITUTIONAL CASE NO. 2 OF 1997

BETWEEN

1. SALVATORI ABUKI)
2. RICHARD OBUGA) ::::::::::::::::::::::: PETITIONERS

AND

THE ATTORNEY ::::::::::::::::::::::: GENERAL

JUDGMENT OF OKELLO J.

This Petition challenges the Constitutionality of the **Witchcraft Act** Cap. 108 in particular section 7 thereof. This section provides for exclusion order.

The Petition was jointly brought by two Petitioners. But the 2nd Petitioner Richard Obuga died before the hearing on the Amended Petition began. His petition naturally abated in terms of rule 15 (1) of the modifications to the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996 (Legal Notice No. 3 of 1996). This judgment is therefore in respect of the Petition of the 1st Petitioner only. He shall hereinafter be referred to as the Petitioner.

The Petitioner Salvatori Abuki hails from Agwenyere 'B' village Aoranga Parish, Nambieco sub-county, Kwania County in Apac District. He was arrested on a date he could not remember on a complaint of witchcraft and was taken to the Gombolola Head

Quarters and detained. On 7/12/95 he was taken before a Magistrate Grade 11 at Aduku where he was charged with practising witchcraft contrary to section 3 (3) of the Witch craft Act. He pleaded not guilty. On 2nd January 1996 in the course of the hearing of his case, the petitioner changed his plea to that of guilty and he was accordingly convicted and was sentenced to 22 months imprisonment. In addition to that sentence he was banished from his home for 10 years after serving the prison sentence. His appeal to the Chief Magistrate court was dismissed. Hence this petition.

The petition alleges that the conviction, sentence and exclusion order are inconsistent with or in contravention of Articles 21 (1) 21 (2), 28 (1) 28 (12), 24 and 44, 26, 29 (1) b-c and 29 (2) of the Constitution of Uganda 1995. In the Petition the following grounds were set:-

- (a) that his right to a fair hearing enshrined in article 28 (1) of the Constitution was infringed by being charged and tried under a law which is vague and lacked precision.
- (b) that he was convicted of a criminal offence which is not defined in contravention of article 28 (12) of the constitution.
- (c) that the exclusion order placed on the petitioner, subjects him to inhuman and degrading treatment which

is inconsistent with articles 24 and 44 of the constitution.

(d) that the petitioner's right to reside and settle in any part of Uganda enshrined in article 29 (2) of the constitution is being infringed.

(e) that the petitioner is being deprived of his properties movable and immovable without compensation and the said witchcraft Act makes no provision for the petitioner's access to court in contravention of article 26 of the constitution.

(f) that the right to non-discrimination enshrined in article 21 (1) of the constitution is infringed by section 5 (1) of the **Witchcraft Act**.

(g) that the right to freedom of thoughts, conscience and Religion guaranteed by Article 29 (1) (b-c) of the constitution is being violated by **Witchcraft Act**.

The petition was supported by the affidavit sworn by the petitioner on 31/1/97. The position taken by the petitioner in that affidavit is that he did not understand the charge under which he was convicted and that he believed the exclusion order made against him deprived him of his 'properties and denied him the right to reside and settle in any part of Uganda.

The Respondent filed an Answer to the petition. In the answer, the Respondent denied that witchcraft Act Cap. 108 is inconsistent with any provision of the constitution or that exclusion order is in contravention of articles 26 (2) and 29 (2) of the Constitution. He contended that exclusion order is consistent with article 28 (12) of the constitution it being part of a penalty prescribed by law.

The answer to the petition was supported by an Affidavit of one Angela Kiryabwire a State Attorney sworn on 20th of February 1997. The affidavit denied that exclusion order contravenes any of the stated articles of the constitution.

At the commencement of the hearing, the following issues were agreed on for determination of the court:-

- (1) whether the Witchcraft Act Cap. 108 especially the provisions relating to exclusion order section 7 thereof infringes:-
 - (a) articles 24 and 44
 - (b) article 29 (2)
 - (c) Article 26 (2) of the Constitution.

- (2) If the answer to 1 ,(a) is in the negative, is section 7 of the Witchcraft Act justified on the basis of Article 28 (12) of the Constitution and or Parliamentary Power to prescribe Penalties.

- (3) Whether the Petitioners were accorded fair trial guaranteed under article 28 (1) of the constitution at the trial.
- (4) whether the witchcraft Act infringes article 21 of the constitution.

During the hearing, counsel for the petitioner did not pursue the ground relating to issue No. 4 and 1 (b).

On whether the **Witchcraft Act** especially section 7 thereof infringes.

- (a) Articles 24 and 44 and
- (b) Article 26 (2) of the Constitution,

Mr. Emoru submitted that the exclusion order subjects the petitioner to inhuman treatment or punishment because it deprives him of shelter, food and other basic necessities for life. By making the petitioner homeless without the state providing for him shelter and food, Emoru argued, the order becomes inhuman and therefore violates articles 24 and 44 of the constitution. He cited constitutional reference by Marobe provincial Government (1983) CRC (Const.) 642. He also sought to rely on Article 25 of the universal protection of human rights adopted and proclaimed by the General Assembly Resolution 217 (111) of 10th December, 1948.

The article states that:-

"Every one has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

He submitted that under section 7 of the Witchcraft Act, once exclusion order takes effect, the petitioner loses food and shelter.

Mr. Emoru further contended that though exclusion order does not expressly order the acquisition or destruction of the petitioner's properties, its effect is to deprive the petitioner of his properties without compensation in violation of article 26 of the constitution. For authority he cited (1) The Queen v. Big M Drug Mark Ltd. (others Intervening) 1986 LRC (Const.) 332; (2) Society United and others vs. Government of Mauritius; Marine Workers Unira and others vs. Mauritius Marine Authority and others (1985) 1 ALL ER 864.

The Respondent's case was that, exclusion order is part of a sentence prescribed by law. It is consistent with article 28 (12) and 23 (1) (a) of the Constitution and therefore is not

inconsistent with articles 24 and 44 of the constitution.

On deprivation of the petitioner of his properties, Mr. Tumwesige contended that exclusion order did not compulsorily deprive the petitioner of his properties and therefore does not infringe article 26 (2) of the constitution.

Our task in this petition is to determine the constitutionality of Witchcraft Act Cap. 108 particularly section 7 thereof. It is therefore relevant at this point to set out the principles applicable to determine whether a statute is unconstitutional. In this connection, it is instructive to refer to other jurisdictions. In Canada, the Supreme court unanimously adopted in The Queen v. Big M Drug Mart Ltd. (Other Intervening) above, the "purpose and effect" principle. Under this principle, court would consider both the purpose and effect of an impugned statute to determine its Constitutionality. If the purpose of the statute infringes a right guaranteed by the Constitution, that statute is declared unconstitutional. Where the purpose of the statute is purportedly within the constitution, court would go further to examine its effects. If the effects violates a right guaranteed by the constitution, that statute is also declared unconstitutional.

In The Queen v. Big M Drug case above, the issue for determination was whether the Lords day Act which prohibited sales on Sundays infringed the right of freedom of conscience and Religion guaranteed by the Canadian Charter of Rights and

Freedoms. The Attorney General of Alberta conceded that the Act was religious in its purpose but contended that it is not the purpose but the effects of the Act alone which are relevant to determine its constitutionality. The Chief Justice who wrote the leading judgment rejected that view in these words.

"I can not agree, In my view both purpose and effects are relevant in determining constitutionality; either unconstitutional purpose or an unconstitutional effect can invalidate legislation".

The learned chief Justice explained his view in the following words:-

"All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced by operation and application of the legislation. Purpose and effect respectively in the sense of the legislations object and its ultimate impact are clearly linked if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus its validity".

Purpose and effects of a statute are indivisible and are both relevant considerations in determining constitutionality of a

statute.

The application of the "purpose and effect" principle also featured in an American case of MCGowan vs. Mary Land 366 US 420 6 LRD 393 (1961). In that case the court was considering whether a statute similar to The Lords Day Act of Canada was unconstitutional. Chief justice Warrant expressed the approach to determine that question in these words,

"We do not hold that Sunday
Legislation may not be a violation of the
"Establishment" clause if it can be demonstrated
that its purpose evidenced either on the face of
the legislation in conjunction with its
legislative history or in its operative effects -
-- is to use the state" coercive power to aid
religion".

That "Purpose and effect" principle to determine the constitutionality of a statute is quite persuasive. I propose to adopt it in this case.

Turning to the case at hand, the petitioner's case was that exclusion order is inhuman and therefore violates articles 24 and 44 of the constitution. Article 24 provides that,

"No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment".

That article prohibits any torture or treatment or punishment which is inhuman or degrading. This aimed at upholding the birth right to dignity and freedom from torture, cruel or inhuman treatment or punishment of citizens as human being.

Article 44 of the constitution provides that,

"Notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedoms:-

(a) freedom from torture cruel, inhuman or degrading treatment or punishment.

(b) freedom from slavery or servitude.

(c) the right to fair hearing.

(d) the right to an order of habeas corpus".

That article noticeably reinforces article 24 by prohibiting derogation of those rights and freedom. That shows the importance the legislature took to ensure the dignity of mankind.

It was submitted by Mr. Emoru that exclusion order is inhuman. What is "inhuman". There is no judicial definition of that word. The shorter Oxford English Dictionary definition of the word

"inhuman" includes not having the qualities proper or natural to human being, destitute of natural kindness or pity, brutal unfeeling. Because of the difficulties in ascertaining the exact meaning of the word, courts in other jurisdictions have resorted to illustrate the meaning by referring to some kinds or modes of punishments which were historically prohibited in England for being inhuman or cruel. They included the use of racks, thumb-screw, stretching limbs etc. Use of rack was also practised in some parts of Uganda to punish witches or Witch-Doctors (Night Dancers). The common features in these punishment is the causing of severe pains and suffering to the victim either physically or mentally. These may include cutting of one hand of a thief and castration which is often called for by some women Rightists in this country to punish Defilers. These are cruel and inhuman punishments. In my view these are the types of punishments which Articles 24 and 44 seek to prohibit. What is the effect of exclusion order? Mr. Emoru submitted that it leaves the petitioner homeless without any shelter, food or any means of livelihood. Under section 7 the Witchcraft, the petitioner is prohibited from having contact with any body in the area from which he was banished. All these are apt to cause the petitioner anguish.

It was argued by the Respondent that exclusion order is a part of a penalty prescribed by law and therefore consistent with articles 28 (12) and 23 (1) (a) of the constitution. Article 23 (1) (a) sets limitation to freedom of personal liberty in execution of the sentence or order of a court established by law.

Article 79 (1) of the constitution gives parliament wide power to make laws on any matter for peace, order, development and good Governance. This includes prescribing crimes and penalties for them. The power given to parliament under that article to prescribe penalties is limited only by article 24 of the constitution. The penalties they prescribe are to uphold the dignity and protection from inhuman or degrading treatment or punishment.

As stated earlier in this judgment, a statute which purports to encroach on a personal or proprietary right of a citizen is to be construed strictly. The effect of exclusion order provided under section 7 of the Witchcraft Act does not conform to the pace set in articles 24 and 44 of the constitution. In the words of Wilson J. in The Queen v. Big M Drug Mart Ltd. at above at page 374.

"So long as a statute has such actual or potential effect on an entrenched right, it does not matter the purpose behind the enactment".

Section 7 of the Witch craft is therefore not in consonance with Articles 24 and 44 of the constitution.

On deprivation of the Petitioner of his properties upon exclusion order, it was submitted for the Respondent that since exclusion order did not include compulsory acquisition of the Petitioner's

properties, it can not violate order 26 (2) of the Constitution.

Article 26 (2) of the constitution states that,

"No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied.

(a) the taking possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality of public health.

(b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for:-

(i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property and

(ii) a right of access to a court of law by any person who has an interest or right over the property.

That article protects an individual against loss of his properties by a coercive act of others except where the conditions prescribed therein are met. This is a provision which protects and entrenches a fundamental rights to property., I have said before. The principle regarding construction of such provisions is that they must be given liberal construction in order to leave the fundamental rights of the citizens intact.

In The Gambia v. Momodou Jobe (1984) AC 689 at 700

Lord Diplock dealing with the constitution of the Gambia said:-

"A constitution, and in particular that part of it which protects and entrenches fundamental Rights and Freedoms to which all persons in the state are to be entitled is to be given a generous and purposive construction".

The instant provision, Article 26 (2) of the Constitution protects and entrenches a fundamental right to properties which all persons in this country are accorded. It therefore deserves a liberal and purposive construction. Mr. Emoru contended that the loss by deprivation as a result of exclusion order is also protected under this Article. I agree. Society United Docks and Others - vrs - Government of Mauritius, Marine workers union and others - vrs - Mauritius Marine Authority and others above are on the point. Those two appeals were consolidated. In that appeal, the appellants where dock companies and stevedores who had over a long period been engaged to handle store and load of

sugar for export by the syndicate of sugar growers and millers who controlled Mauritius sugar export. The appellant used manual labour for loading and their method required sugar to be bagged. For technological advancement, the Government of Mauritius under arrangement with the syndicate of growers and millers, built a mechanised terminal and vested it in a statutory corporation with monopoly of storage and loading of sugar. There was no provision to compensate the Appellants for their resultant loss of business. Both the Government and the syndicate refused to compensate the Appellants. On appeal to the privy council, the Government contended that the Appellant, business was not compulsorily acquired. It was held that in relation to compensation for loss of property right, the constitution was not restricted to providing protection for loss caused by compulsory acquisition but extended to loss caused by deprivation. Accordingly although the appellants business had not been compulsorily acquired, that did not of itself prevent the appellant claiming compensation for loss by deprivation as a result of the statutory order. A similar view was also expressed in the American case of Manitoba Fisheries Ltd. vs. R (1979) 1 SCR 101.

Issue No. 2 is irrelevant in view of my finding in issue No. 1 above.

The next question is whether the Petitioner was accorded fair hearing guaranteed under article 28 (1) of the constitution at the trial. The petitioner had deponed in his affidavit in

support of the petition that he did not understand the charge under which he was convicted. That would be a ground of appeal and not for a constitutional redress. His appeal to the Chief Magistrate's court was dismissed. No further appeal was pursued. Mr Emoru submitted that the petitioner could not have had a fair hearing when he was charged with a vague offence. Witchcraft is not defined in the Act.

Article 2 of the constitution provides for constitutional supremacy. Under clause 2 thereof, the constitution is supreme. Any law or custom which is inconsistent with any provision of the constitution shall to that inconsistency be void.

Article 2 states that:-

"(1) This constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the constitution shall prevail, and that other law or custom shall to that extent of the inconsistency be void".

It is clear from clause 2 above that for any other law or custom to be valid it must pass the test of constitutional validity.

It must be inconsonance with all the provisions of this constitution. Mr. Emoru submitted that because of its vagueness, Witchcraft Act is inconsistent with articles 28 (12) of the constitution because it does not sufficiently define what conduct is prohibited. Similarly that vagueness, counsel submitted, renders the Act inconsistent with article 28 (1) of the constitution because an accused can not be given a fair trial without being clearly informed of his conduct which constituted the offence. For authority Mr. Emoru cited a Canadian case of Canadian PACIFIC LTD. Vs. R (AG) (Others Intervening) (1996) 1 LRC 78 at 103.

Mr. Tumwesige contended for the Respondent that witchcraft Act is not inconsistent with articles 28 (1) and 28 (12) of the Constitution because the offenses created in the Act are defined in sections 3 and 4 thereof. He Contended that the definition of the word Witchcraft can be looked up in a Dictionary since that is an ordinary English word.

Article 28 (12) of the constitution provides that,

Except for contempt of court, no person shall be convicted.

"of a criminal offence unless the offence is defined and the penalty for it prescribed by law".

In short, that article requires an offence to be defined and the

penalty for it prescribed by law. The reasons for these requirements are not hard to find. Firstly, it is to notify the citizens clearly of what conduct which the statute prohibits. This assists a citizen to distinguish the prohibited conduct from the permissible conduct and therefore be able to guard against violation. Secondly, in the event of a charge being labelled against him under the statute, a citizen shall be able to prepare his defence since the ingredients of the offence are known.

In other jurisdictions vagueness was held to constitute ground for declaring a statute unconstitutional. The principle applicable to determine whether or not a statute is unconstitutional for vagueness was discussed in detail in Canadian Pacific Ltd. vs. R. (Ag. and others Intervening above.

In that case the Railway Company had burnt dry grass and weeds on its Railways right of way in a Residential area in order to clear the right of way of combustible material which posed a potential fire hazard. Complaint was raised that the smoke arising from that burning had caused environmental hazard. The Railway Co. was therefore charged with unlawfully discharging or permitting the discharge of a contaminant namely smoke into the natural environment that was likely to cause an adverse effect contrary to a provision of the Ontario Environmental Protection Act 1980. On appeal to the Supreme Court of Ontario, the Railways, Company contended that the section under which he was charged was unconstitutionally vague and over broad and therefore infringed the fundamental right guaranteed under section 7 of the

Canadian Charter of Rights and Freedoms 1982. That it was so vague and broad that it failed to provide an intelligible standard that would enable citizen to regulate their conduct and that it was so open-ended that it constituted a standard less sweep.

The supreme court by majority rejected that argument. It relied on the interpretative approach which was set by the same court in R. vs. Nova Scotia Pharmaceutical Society (1992) 2 SCR 606 at page 643, that,

"a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate".

Lower C.J. explained the rationale behind that legal principle. He said,

"This requirement of Legal precision is founded on two rationales:-

(a) the need to provide fair notice to citizens of prohibited conduct.

(b) the need to prescribed enforcement discretion.'

In undertaking vagueness analysis, court must first develop the

full interpretative context surrounding an impugned provision. This is because the issue facing the court is whether a sufficient basis for distinguishing between permissible conduct or for ascertaining an area of risk was given. The question to be resolved is whether:-

"the law provides sufficient guidance for legal debate as to the scope of the prohibited conduct".

Court must decide whether the impugned statute provides sufficient basis for legal debate as to the scope of the conduct prohibited. Relating that principle to the case at hand, the question that must be answered is does section 3 (3) of the **Witchcraft Act** give sufficient guidance for legal debate?

The purpose of **Witchcraft Act** as contained in the preamble is to prevent witchcraft and to punish persons practising the same. To understand the conduct prohibited by the Act, it is necessary to understand what witchcraft is. Yet the Act does not adequately define it.

Section 2 which is the Interpretation section does not help much. It says that:-

"Witchcraft does not include bonafide spirit worship or bonafide manufacture supply or sale of native medicine".

Mr. Tumwesige submitted that for the definition or meaning of Witchcraft one can look into the Dictionary since that is an ordinary English word. I say the learned counsel was not serious when he made that suggestion. Which Dictionary should one consult? There are many different English Dictionaries that may give varying meanings. I do not accept that suggestion. Article 28 (12) is very clear. It requires that offence must be defined. That definition in my view must be clear enough to enable a citizen to distinguish between the prohibited conduct and the permissible one. Any vague interpretation will not satisfy the requirement of article 28 (12).

Section 3 (3) of **Witchcraft Act** does not specify what conduct constitutes witchcraft. To that extent it does not afford sufficient guidance for legal debate. The ingredients of the offence can not be properly determined because the conduct constituting witchcraft is not known. Without knowing the ingredients of an offence, one can not meaningfully prepare his defence. I would therefore declare as follows:-

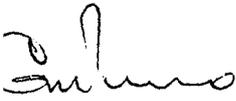
- (1) Sections 2 and 3 (3) of the **Witchcraft Act** are vague. They do not meet the requirements of Article 28 (12) of the Constitution.
- (2) The Petitioner was not accorded a fair hearing as required under article 28 (1) of the constitution.

(3) Exclusion order is unconstitutional for being inconsistent with article 24 and 44 and 26 in that it threatens the petitioner's life and right to property.

(4) Redress: As the trial was a nullity, the Petitioner having been tried of a vague offence, the petitioner would be ordered to be set free.

I Would therefore allow the petition with costs to the petitioner.

Dated at Kampala this^{13th}..... day of ...June.....
1997.


G.M. OKELLO

JUDGE.

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSTITUTIONAL CASE NO. 2 OF 1997

(CORAM: S.T. MANYINDO, DCJ., HON. G.M. OKELLO, J., LADY JUSTICE
A.E.M. BAHIGEINE, J., HON. J.P.M. TABARO, J., & HON.
F.M.S. EGONDA-NTENDE, J.)

1. SALVATORI ABUKI)
2. RICHARD OBUGA) PETITIONERS

VERSUS

ATTORNEY GENERAL RESPONDENT

JUDGMENT OF J.P.M. TABARO - JUDGE.

I have read the judgment of Okello, J. in draft. I am entirely in agreement with it, and would make only a few observations.

Initially there were two petitioners, Richard Obuga and Salvatori Abuki. Richard Obuga has since died in prison and his petition abated. Presently, hence, court is concerned with the petition of Abuki alone.

The petitioner was tried for offences under the Witchcraft Act (Cap 108 Laws of Uganda) before a Magistrate Grade 11 at Aduku, Apac District, in Lira Magisterial Area. He was convicted of practising witchcraft c/s 3 (3) of the Act. According to the record of proceedings after three witnesses testified the accused changed his plea to that of guilty. After conviction he was sentenced to 22 months imprisonment, and in terms of S.7 of the Act the petitioner was banned from access to his home for 10 years, the period to run on completing his sentence. S. 7 (1) of the Act states:-

"7 (1) A Court (including a court which is empowered under S.7 of this Act to try cases under this Act) may, in addition to or in lieu of any other punishment which it is empowered under this Act to impose make an exclusion order in relation to such person".

Under S. 7(2) of the Act an Exclusion Order:-

"shall prohibit, for such periods as may be stated therein, the person in respect of whom it is made from entering and remaining in a specified area including and surrounding the place in which the offence was committed. A court making an exclusion order may impose such other conditions as in the circumstances of the case may seem expedient for the purpose of preventing the person in respect of whom the order is made communicating with persons in the area from which he is excluded".

Mr.

Learned counsel for the petitioner Emoru framed a number of grounds on which he sought to challenge the constitutionality of the legislation in question. I have perused the grounds diligently. In my humble opinion they crystallise basically into three:-

- (1) that the offence of witchcraft or practising witchcraft is not defined sufficiently as required by Article 28 (12) of the Constitution.
- (2) that making an exclusion order is not constitutional because it is inhuman, cruel or degrading and
- (3) deprives the convicted person of access to his or her property.

Under Article 24 of the Constitution it is provided as follows:-

"No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment".

Article 26 is couched in these terms:-

26(1) Every person has a right to own property whether individually or in association with others.

(2) No person shall be compulsorily deprived of property of any interest in or right over property of any description except where the following conditions are satisfied:-

- (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public security or public health, and
- (b) the compulsory taking of possession or occupation of property is made under a law which makes provision for
 - (i) prompt payment and fair adequate compensation prior to the taking of possession or acquisition of the property; and
 - (ii) a right of access to a court of law by any person who has an interest or right over the property.

I agree with my brother Okello, J. that this petition should be granted. It is a cardinal principle of penal law that before one can be punished for a criminal contravention the offence attracting the punishment must be defined, except perhaps for contempt of court. Article 28 (12) of the Constitution enacted that principle. It is stated in these words under the article:-

"28 (12) Except for contempt of Court no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed by law".

Under the legislation in question, that is the Witchcraft Act, (Supra) the nearest provision to a definition attempted is to be found in the interpretation section of the Act.

Therein it is stated:-

"Interpretation (in the marginal note). For purpose of this Act. "witchcraft" does not include bona fide spirit worship or bona fide manufacture of native medicine".

Evidently, the section is singular for stating what witchcraft is not and does not define what it is. As matters are one can be charged with an offence based on anything so long as that thing is not bona fide spirit worship, or bona fide manufacture of native medicine, depending on some people's beliefs, intellectual disposition, or intellectual outlook or philosophical inclinations. I will give an example. In this particular case Obuga the first petitioner was allegedly found in possession of a tortoise. To his accusers this rare animal was proof that Obuga was a witch. Needless to assert, to others a tortoise is no more, or no less, than a pet animal. Hence in the definition section clearly the prosecution and the defence should be able to tell whether possession of a tortoise or any rare or curious object brings the accused within the ambit of the criminal law. Learned Counsel for the petitioner took issue with time at which the legislation in question was enacted and submitted that it is archaic and outdated. The Witchcraft Act was enacted on 28th March, 1957, some five years or so before independence (9th October, 1962). Under the act the following offences are created:-

- (1) Threatening death with the use of witchcraft or other supernatural means.
- (2) Threatening to cause disease to anyone or physical harm to anyone or to any property, using witchcraft.
- (3) Practising witchcraft or holding oneself out as a witch.
- (4) Procuring another person to practise witchcraft.
- (5) Imputing witchcraft to another person and
- (6) Possession of articles used in witchcraft.

In the same year as Uganda's Witchcraft Act was passed the British Parliament repealed its Witchcraft Act of 1735 as well as some sections of the Vagrancy Act, 1824. Northern Ireland continued to administer the Witchcraft Act - for position of the laws in Britain, see the Fraudulent Mediums Act, 1951 available in HALSBURY'S STATUTES OF ENGLAND 3rd Edition Vol. 8 at p.390.

But society is not static. What might have been appropriate in Uganda in 1951 (which is contentious in this particular case with regard to the law in issue) is not necessarily appropriate, presently. Today there are many people in Uganda who will not feel in any way threatened with suggestion that someone has ability to bewitch them. It is no exaggeration to assert that by virtue of skills and understanding of Science (whether social or physical) a big section of Uganda society will pity rather than condemn those who believe in witchcraft. It is no consolation to the legislature to say that witchcraft may be known or understood in an African society, because, needless to emphasise, the test in Article 28 (12) of the Constitution must be met. As the legislation in question is vague and ambiguous, in the sense that witchcraft is understood differently by different people, I would find that it is unconstitutional, in accordance with the case of CANADIAN PACIFIC LTD. VR. 1996 1 LRC 78 at p. 103. Thereat the Canadian Supreme Court observed (GONTHIER J.).

"Thus a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This requirement of legal precision is founded on two rationales: the need to provide for notice to citizens of prohibited conduct and the need to prescribe enforcement discretion.

In undertaking vagueness analysis a court must first develop the full interpretative context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an area of

The Witchcraft Act compounds its vagueness by permitting the prosecution to adduce evidence of reputation that the accused is a witch or that witchcraft articles in issue by common repute are used in the practice of witchcraft, under section 6 of the Act. So under this legislation what is required in evidence is not scientific truth alone but also the subjective beliefs of the public, however unscientific they may be so long as they lead some people to believe generally that so and so practises witchcraft - an art that since 1951 the legislature has been unable or unwilling to define. For proper protection of citizens, I am inclined to hold that the legislation in question is unconstitutional, for lack of sufficient definition.

I wish to next deal with the third ground, for convenience, that is, with Mr. Emoru's submission that the exclusion order offends against Article 26 of the Constitution because it deprives the accused of access to his property. In my humble opinion this issue can be summarily dealt with. In determining the constitutionality of legislation, its purpose and effect must be taken into account - *THE QUEEN V. BIG MART LTD.* [1986] LRC (Const.) 332 at P. 356, decided by the Supreme Court of Canada. At page 356, MCKSON J. delivering the judgment of DICKSON, BEETZ, MCINTYRE, CHOUINARD and LAMER J.J. observed, inter alia:-

"..... In my view both purposes and effect are relevant in determining constitutionality: either an unconstitutional purpose or unconstitutional effect animated by an object the legislation intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked if not invisible. Intended and actual effects have been looked to for guidance in assessing the legislation's object and thus, its validity".

There can be no doubt that the effect of an exclusion order is to deprive the convicted person of access to his or her property - which is prohibited in express terms by the clear provisions of Article 26(2) of the Constitution except where a citizen's property may be acquired or taken possession of, compulsorily in public interest, that is, for public use, interest of defence. Public safety, public order, public morality or public health. I suppose this is the provision that permits the state to nationalise private property in public interest. Needless to say, there are conditions attached to the nationalisation therein; the state shall pay adequate compensation prior to the taking, and the affected citizen shall be accorded a right of access to court, presumably, in connection with the property, for compensation and other matters concerning the affected property.

It is not so with an exclusion order. The convicted person is denied access to his or her property for up to 10 years, after serving a term of imprisonment as in the present case. Let us not forget that the greatest number of consumers of this legislation will come from the peasantry whose only tools of production seldom go beyond the hoe and the panga, men and women whose skills are primarily not developed beyond the needs of a pitiable subsistence economy. Consequently, a person against whom an exclusion order is imposed cannot easily change his or her occupation so as to gainfully engage in any activity for a living once the order has been enforced. He or she would need to acquire land for subsistence in a new area where he or she may not be accepted, or land availed (if it can be afforded after serving a term of employment); the alternative is to look for employment in a country where jobs are scarce by virtue of underdeveloped industry. Since this judgment is not a study in poverty, I need not delve into the question whether even money for travelling outside his or her area of residence might not be difficult to secure, after serving the sentence. Be it as it may, the effect of the exclusion order is void for offending

against Article 26(2) of the Constitution. I do not think the argument that imprisonment is constitutional and that an exclusion order is in the same category is tenable. In prison the state provides means of subsistence, that is food, shelter, clothing and some social amenities. An attempt is made to instruct inmates in skills such as tailoring, carpentry, modern farming etc. in a word, an endeavour is made to rehabilitate the inmate and equip him or her with capacity to lead a meaningful life after discharge. It is not so with an exclusion order. The effected person is left to the vagaries of nature and unknown social environment as he or she is not allowed access to his relatives or neighbours in the traditional area of residence. I must say this exclusion order is antisocial and may serve only to brutalise the offender and deny him or her the opportunity to be rehabilitated which leads me to the final issue, that is whether the exclusion order should be pronounced void for being cruel, inhuman or degrading.

As already indicated the Constitution does not allow anyone to be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment. It is noteworthy that the phraseology is couched in the same terms as in the Universal Declaration of Human Rights (of the United Nations) - see Articles 5 thereof. It is used to be opined that an African has to be severely punished for penal laws to be meaningful. That view can no longer be regarded as enlightened, if ever it was. The myth of Africans requiring harsh punishment has been exploded by the judgment of the South African Supreme Court in the STATE VERSUS T. MAKWANYANE and M. MCHUNU case No. CCT/3/94 delivered on 6th June, 1995, discussing the constitutionality of the death penalty) in which it is shown that African values are based on "need for understanding but not for vengeance, and need for reparation but not retaliation, a need for ubuntu (*italics*) but not for victimization". Of course the concept of "ubuntu", the idea that being human entails humaneness to other people is not confined to South African or any particular

ethnic group in Uganda. It is the whole mark of civilised societies. For application of the concept/^{as} herein explained, see the judgment of MAHOMED J. in Makwanyane case, reported [1995] (5) ECLR 665. It will be recalled that the word "ubuntu" though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda. I would gladly associate myself with the view expressed by MADALA J. in the same case (of Makwanyane (ibid)) that the African concept embodies within itself humaneness, social justice and fairness, and permeates fundamental human rights. LANGA J. in the same case expressed the same ideas when he concluded that the concept carries with it the idea of human dignity and true humanity.

It cannot be contended that deprivation of one's means of subsistence is not a threat to one's life. And of course, as a matter of axion, a threat to life is cruel and inhuman. Once one is deprived of means of subsistence one can only survive by the grace of God as the mercy of His people will no longer be available, except, perhaps, through begging-very degrading indeed.

In his judgment LANGA J. (as before) quoted Mr. Justice Schaefer of the Supreme Court of Illinois as stating:-

"The methods we employ in the enforcement of any criminal law has aptly been called the measures by which the quality of any civilisation may be judged".

Let it be emphasised that an offender is a citizen with human dignity deserving to be protected. How are we to punish offenders - through rehabilitation or retribution? Speaking for myself, I think retribution is base and sordid and is only a euphemism for a primitive instinct in man to revenge whenever wronged. But revenge in form of most cruel punishments imaginable, such as quartering and burning at the stake has never deterred crimes to any demonstrable level. An anecdote is often told of scenes of public hangings of thieves whereat some people went ahead to pick pocket others in attendance to witness the executions.

So, what is the utilitarian value of brutal, harsh punishments? (For discussion of the futility of harsh punishments as a deterrent, see the judgment of CHASKALSON in Makwanyane's case). In a civilised society the jurisprudence of a "tooth for a tooth, and an eye for an eye" has no place. I would quote what WINSTON CHURCHILL said in the House of Commons in 1910 (See the judgment of KENTRIDGE A. J., as representative of enlightened attitude towards offenders in the modern age.

"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing test of the civilisation of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the state - a constant heart-searching by all charged with the duty of punishment - a desire and eagerness to rehabilitate in the world of industry

those who have put their due in the hard coinage of punishment; tireless efforts towards discovery of curative and regenerative processes, unfailing faith that there is a treasure, if you can find it in the heart of every man. These are the symbols, which in the treatment of crime and criminal mark and measure the stored up strength of a nation, and are sign and proof of the living virtue in it".

Clearly, enlightened opinion is in favour of rehabilitation of offenders; punishments that imperil the offender's life have no place in civilised penal institutions. As I am satisfied that an exclusion order endangers the life of the convicted person, I have no difficulty in finding that it is inconsistent with Article 24 of the Constitution and therefore cannot be enforced: it is null and void. It is true that Article 23 of the Constitution allows for deprivation of personal liberty in pursuance of a lawful court order such as imprisonment.

I have already said that imprisonment is generally different as the state provides for the maintenance and rehabilitation of the offender. The article cannot be invoked to justify a cruel, inhuman, degrading or punishment. As regards the question of freedom of movement I think a citizen cannot be deprived of his or her right to move freely throughout the Republic of Uganda unless Article 24 is complied with, that is any court order shall not amount to torture, inhuman, cruel or degrading treatment.

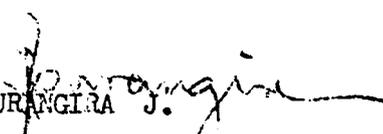
I am in complete agreement with the judgment of Okello J. I would grant this petition with costs.

J.P.M. TABARO

JUDGE.

13/6/1997.

I certify that this is the true copy of the original.


MURANGIRA J.

REGISTRAR COURT OF APPEAL.

THE REPUBLIC OF UGANDAIN THE CONSTITUTIONAL COURT OF UGANDA HOLDEN AT KAMPALA

(CORAM: S.T. MANYINDO - DCJ, G.M. OKELLO - J, A.E.M.
BAHIGEINE - J, J.P.M. TABARO - J AND F.M.S.
EGONDA-NTENDE)

CONSTITUTIONAL PETITION NO. 2/97

BETWEEN

SALAVATORI ABUKI 1ST PETITIONERRICHARD OBUGA.....2ND PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGEMENT OF A.E.M. BAHIGEINE - J

I have had the benefit of reading in draft the judgements of my brothers Okello and Egonda-Ntende JJ. I entirely agree with their observations and would only have a few comments to make.

Constitutional Petition No. 2 of 1997 challenging the validity of the Witchcraft Act (Cap 108) was initially presented by two Petitioners Salvatori Abuki and Richard Obuga as 1st and 2nd Petitioners respectively. Sadly the 2nd Petitioner Richard Obuga passed away at Luzira Prison before the commencement of the actual hearing. Therefore the Petition in respect of him abated under rule 15(1) Notifications to the Fundamental Rights and Enforcement Procedure rules 1992 - Directions 1996 (Legal Notice No.4 of 1996).

Mr. Vincent Emoru represented the Petitioners while the Director of Civil Litigation Mr. Nasa Tumwesige assisted by Mr. James Matsiko State Attorney appeared for the State.

The remaining Petitioner Salvatori Abuki was on 7/12/95 convicted of practising

Witchcraft c/s 3(3) of the Witchcraft Act and sentenced to a twenty-two (22) months prison term by the Magistrate Grade II Aduku, vide Criminal Case No. 109/97. He was also to be banished from his home for ten (10) years on completion of the prison sentence.

The affidavit sworn by the Petitioner dated 31/1/97 in support of the Petition avers that he did not understand the charge as what he had done was not specified in the charge sheet. He also challenged the banishment order as being unconstitutional as it tends to deprive him of his property and denies him his right to settle in any part of Uganda he wishes.

The Grounds for this Petition are contained in Para 2(a)-(g) and in my view substantially crystallize into two:-

- (a) *The offence of witchcraft is not sufficiently defined.*
- (b) *The exclusion order is inhuman and degrading.*

Regarding ground 2(a) that the Petitioner could hardly be said to have had a fair hearing as enshrined in Article 28(1) since he was charged and tried under a law which is vague and lacked precision was argued together with ground (b) which contended the offence was not sufficiently defined and was therefore in contravention of Article 28 (12) of the Constitution, which provides:

"Except for contempt of court, no person shall be convicted of a Criminal offence unless the offence is defined and the penalty for it prescribed by law"

Mr. Emoru submitted the Interpretation section 2 of the Act purports to define witchcraft by elimination. It states:

"For the purposes of this Act, 'witchcraft' does not include bona fide manufacture, supply or sale of native medicines"

Section 3 then goes on to list various offenses in relation to witchcraft:

- (1) *threatening death with witchcraft or by any other supernatural means*
- (2) *threatening to cause harm by witchcraft or by any other supernatural means.*
- (3) *practising witchcraft or holding oneself out as a witch.*
- (4) *imputing the use of witchcraft to another*
..... "

The Director of Civil Litigation contended there was nothing wrong with the Act. Section 3 sufficiently defined the offenses so as to adequately inform the accused of what he was charged with. As regards the banishment order, he stated this was a penalty prescribed by law though it was discretionary. The magistrate could decide not to impose it, or could impose a lesser period than the maximum stipulated.

Mr Vincent Emoru argued that this is a very old Act dating back to 1957. It should be scrapped as circumstances under which it was made have changed. He further pointed out that the banishment order was cruel and inhuman though what is cruel and inhuman has not been defined. Each case depended on its own circumstances. In this case deprived the Petitioner of his property and rendered him destitute.

I think it is clear penal Statutes can be categorized into two;

- (1) *Those that define the crimes/offence and*
- (2) *Those that describe the procedures for determining the existence of a crime/offence.*

The Witchcraft Act no doubt falls under the latter category. But under whatever category any penal statute may fall, it is trite law that there must be "adequate and fair

warning" as to what conduct is criminal or the legislative guidelines for determining the existence of a crime must be clearly defined. Living under a rule of law in modern times entails various suppositions one of which is that all persons are entitled to be informed as to what the state commands or forbids. Statutes must therefore be precise so that their objectives are achieved and their enforcement do not violate fundamental liberties. It is better that a guilty person go free than to approve of the Government's prosecution of activity not specifically articulated in the statute. It has been held that in order to safeguard personal liberty against the intrusion of the state, Courts should strictly construe the words of penal Statutes. If after the ordinary rules of construction have been applied as they must be, there remains any doubt or ambiguity the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt. A man is not to put in peril on an ambiguity. London & North East Rail Co. v Berriman (1946)AC 278 at 313, 314.

With the above in mind, it was submitted by the Director of civil Litigation that the Petitioner half way through the proceedings changed his plea to that of guilty and therefore he must have understood the offence he was admitting. I think it is well established that an admission of liability cannot be called in aid when interpreting an enactment. The court should not find a man guilty of an offence unless he is aware of what the offence is and he has a guilty mind. Brend v Wood (1946)62 TLR 462 D.C at 463. The magistrate relied on the evidence adduced to change the plea to that of guilty, but as is evident opinions would differ as to the purpose and intention of a party regarding the various objects/articles alleged to have been used in witchcraft. While some might condemn them others might consider them quite innocuous.

Looking at the offenses listed under section 3 it becomes clear the legislature purports to define witchcraft as supernatural means when it stipulates:

... "by witchcraft or by other supernatural means ..." ⁱⁿ ~~Having these words~~ their everyday meaning ^{these words connect} ~~which~~ "to make things happen especially bad things" according to Longman dictionary of Contemporary English. But Mozley and Whitley's Law dictionary Ninth Edition by John B. Sanders has the following to say:

"Witchcraft is supposed intercourse with evil spirits; formerly punishable with death under Acts of 1541 and 1603, both of which were repealed in 1735. The last execution for witchcraft in England, that of a woman and her daughter of nine, took place by hanging in 1916. The witchcraft Act 1735 was repealed by the Fraudulent Mediums Act 1951" I think this speaks volumes.

It is clear from the above definitions, witchcraft is shrouded in mystery. It cannot be explained or clearly understood. I should however not be misunderstood to be saying that such powers and practices do not exist. They do and some selfish and malicious people employ such means to traumatise others. Only that the process employed lacks definiteness and might end up netting people who are vaguely undesirable in the eyes of the law. Sections 23 ^{and} ~~and~~ ^{Reserve} cannot be said to be precise enough.

This is certainly dangerous to the liberties of an individual. As I pointed out above it is better that a guilty man go free than to approve of the Government's prosecution of activity not clearly defined. The difficulty with this Act is that it is historically part of our society having been promulgated way back in 1957. Its words are therefore dependent for their meaning upon the social environment in which it was passed, which environs have now changed. In my view the Act violates Article 28 of the Constitution.

Ground (c) of the Petition concerned the banishment order. Mr. Emoru condemned

this as offending Article 24 of the constitution which states:

"No person shall be subjected to any form of torture, cruel inhuman or degrading treatment or punishment."

Article 44 prohibits any derogation from such freedom.

It was submitted by Mr.Emoru that what is cruel and inhuman has not been defined and each case depended on its own facts. He maintained the banishment order infringed the petitioner's right to settle in any part of Uganda as enshrined in Article 29(2). The director of civil Litigation, Mr. Tumwesige argued this was a sentence authorized by law under Article 23(1)(h) which states:-

"No person shall be deprived of personal liberty except

.....

(a+g)

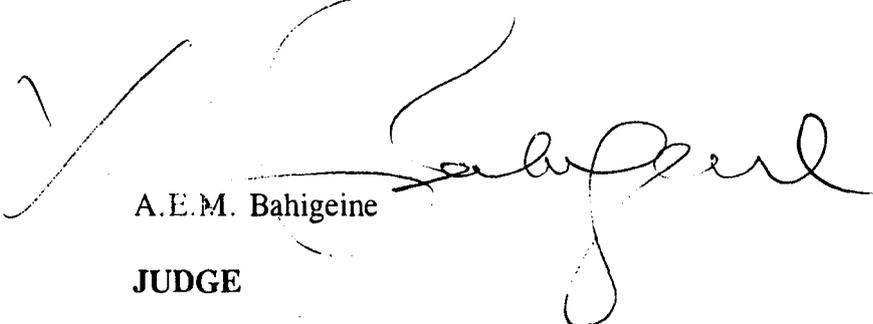
(h) *as may be authorised by law, in any other circumstances similar to any of the cases specified in paragraph (a) to (g) of this clause."*

Section 7 of the Act is unambiguous as the power to make a banishment order is discretionary. The court has the power to exercise any option or none at all. However turning to the question of punishment, once the court has decided to exercise the option, this is by way of punishment whose main objectives are restraint and deterrence. To achieve these objectives there is need for separating and removing the offender from society, so as to protect it from those who would harm others. It has always been emphasized that the punishment should fit the crime. Therefore the state should punish up to, but should not exceed "the point when infliction of pain results in the greatest benefits in deterrence of the crime." The underlying principle being to deter from future criminality and effect reform

where possible but not to exact vengeance of society. By banishing the offender from his locality after the prison term, untold harm is likely to ensue rendering him destitute. The court should not lose sight of the effect of this order on his family and dependants. This is likely to be very frustrating and would eventually turn him into a criminal once again. It would therefore be ruinous and counter productive. As we move into the next millennium we should bear in mind that in different parts of Africa clarion calls can be heard for greater attention to Human rights.

"Human rights are viewed as (morally) prior to and above society and the state, and under the control of individuals who hold them and may exercise them against the state in extreme cases.

I think all in all the Petition ought to succeed. The Witchcraft Act as it stands is unconstitutional. I have not been able to lay my hands on the Fraudulent Mediums Act 1957 of Great Britain which repealed The Witchcraft Act 1735. I would hazard a guess the latter might have been repealed for the same reasons. I would consider it appropriate to borrow a leaf from Britain and come out with a more practical enactment.



A.E.M. Bahigeine

JUDGE

28/5/97

Dated at Kampala this ¹³13th day of June 1997.