

THE REPUBLIC OF UGANDA  
PETITION FOR DECLARATIONS UNDER ARTICLE 137 OF THE  
CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

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CORAM: HON. JUSTICE L. E. M. MUKASA-KIKONYOGO, DCJ  
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA  
HON. JUSTICE J.P. BERKO JA  
HON. JUSTICE A. TWINOMUJUNI JA  
HON. JUSTICE C. N. B. KITUMBA JA

CONSTITUTIONAL CAUSE NO. 01 OF 2003  
AND

20

THE FUNDAMENTAL RIGHTS AND FREEDOMS (ENFORCEMENT  
PROCEDURE)  
RULES, 1992 DIRECTIONS 1996

- 1. DIMANCHE SHARON
- 2. MOREIKA GILPHINE
- 3. NANSEREKO LUCK.....PETITIONERS

VERSUS

THE MAKERERE UNIVERSITY ..... RESPONDENT

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JUDGMENT OF L. E. M. MUKASA-KIKONYOGO DEPUTY CHIEF JUSTICE

This petition is filed by three Makerere Seventh Day Adventist students whom I shall refer to as the petitioners. It is brought against Makerere University (hereinafter to be referred to as the respondent or University.) The petitioners are seeking a declaration under **Article 137 of the Constitution of Uganda** that the respondent's policy and regulations of scheduling lectures, mandatory tests and examination on the Sabbath Day are inconsistent with and are in contravention of **Articles 20, 29(1) (c), 30 and 37** of the **Constitution** in respect of petitioners who practise the Seventh Day Adventist Christian Faith.

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The petitioners had also sought a declaration to the effect that Rule 4 (1) of the **Fundamental Rights and Freedoms Rules 1992 Directions 1996** was inconsistent and in contravention of **Article 137 of the Constitution** but it was abandoned together with the corresponding parts of the pleadings and affidavits of both sides.

Finally the petitioners are praying for an order awarding them exemplary damages for infringement of their constitutional rights and costs of the petition.

The petition is supported by the affidavits of the three petitioners namely Dimanche Sharon, Gilphine Moreika, Nansereko Luck and in addition those deponed to by Deborah Nassanga, Fred Lulinaki, Dr. John B. Kakembo a pastor and counsellor in the Seventh Day Adventist Christian Faith and several others.

The Respondent entered appearance and put in an answer to the petition which was supported by several affidavits including that of Professor J. Ssebuwufu, the Vice Chancellor and Jane Frances Nabawanuuka, Assistant Secretary (Legal ) both of the Respondent and others.

The Attorney General was duly served with the petition but apart from accepting service on 25/02/03, did nothing more. He had no representation at the hearing which proceeded in his absence.

In the petition the petitioners allege, inter alia, as follows:

- "1. Your Petitioners are all adults of sound mind, and students at Makerere University. They are members of the Seventh Day Adventist Christian Church and practice (sic) their faith and religion in accordance with their beliefs and the doctrine and dictates of the Seventh Day Adventist Christian faith. They have an interest in and are affected and by the following matters being inconsistent with**

and in contravention of the Constitution of the Republic of Uganda, where by your Petitioners are aggrieved.

10 (a) The Makerere University policies and regulations made under the authority of the University and Other Tertiary Institutions Act (Act 7 of 2001), which policies and regulations require students to attend classes, and take mandatory tests and examinations on any day of the week (including the Sabbath Day in the case of your Petitioners who practice the Seventh Day Adventist Christian faith), irrespective of the students' religious affiliations is inconsistent with and in contravention of Articles: 20, 29 (1) (c), 30 and 37 of the Constitution of Uganda.

20 (b) The time limit of 30 days within which a Petition can be presented to this Honourable Court for interpretation of the Constitution under Article 137 of the Constitution, which is set out in Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996, is inconsistent with and in contravention of Article 137 of the Constitution of Uganda.

30 (c) Makerere University scheduled the taking of mandatory examinations for the subject of "Introducing Law" (for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners) and "Legal Aspects of Planning" ( for the 3<sup>rd</sup> Petitioner) on Saturday, the 25<sup>th</sup> of January 2003, which is the Sabbath Day for your Petitioners and on which day they cannot by reason of their faith and beliefs under the Seventh Day Adventist Christian Faith, take examinations. For the same reason, the 3<sup>rd</sup> Petitioner was forced to miss a scheduled examination in the course of "Civil Procedure" in 2002 and therefore could not graduate, and was on this basis required to repeat the year. By reason of the foregoing, your Petitioners have suffered tremendous hardship and injustice and are entitled to legal redress.

40 2. Your Petitioners state the following reasons in support of this Petition namely:

(i) Makerere University is a Public Institution, and is obliged under Article 20 of the Constitution of Uganda to respect and uphold the inherent and fundamental rights and freedoms (which include the religious freedoms ) of the Petitioners as established under the Constitution.

50 (ii) The Makerere university Policy of scheduling mandatory classes, test and examinations on the Sabbath day infringes on the fundamental rights and freedoms of the Petitioners to practice their religion and manifest their Sabbath practice, and the participation in their beliefs of the Seventh Day Adventist Christian Faith as guaranteed under Article 29(1) ( C ) of the Constitution.

(iii) The effect of these polices of Makerere University of scheduling mandatory classes, tests (sic) and examinations on the Sabbath day, imposes an unconstitutional burden on your Petitioners, by virtue of their faith and undermines their constitutionally guaranteed right to Education under Article 30 of the Constitution.

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(iv) University policy of scheduling classes, mandatory tests and examinations on the Sabbath day, imposes an unconstitutional burden and hardship on your Petitioners' constitutionally guaranteed right to practice, (sic) profess, maintain and promote your Petitioners' religion in community with others under Article 37 of the Constitution of Uganda.

(v) .....

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(vi) .....

(vii) The inflexible conduct and attitude of Makerere University with regard to your Petitioners who practice (sic) the Seventh Day Adventist Christian Faith, has occasioned severe hardship, loss and detriment to your petitioners, for which harm they are entitled to declarations, legal redress and appropriate compensation in damages.

Therefore your petitioners pray that this Honourable Court may:

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(a) Grant the following declarations :-

1. The Makerere university policies and regulations of scheduling lectures, mandatory tests and examinations on the Sabbath day, is inconsistent with and in contravention of Articles 20, 29(1) (c), 30 and 37 of the Constitution in the case of your Petitioners who practice (sic) the Seventh Day Adventist Christian Faith.

2. ....

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3. Makerere University violated the petitioners' constitutional guaranteed rights under Articles 20, 29 (1) (c), 30 and 37 of the Constitution.

(b) Grant an order of Redress that:-

1. Your Petitioners are awarded general and exemplary damages for the infringement of their Constitutional rights and Costs of this Petition."

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The background of the petition is clearly spelt out in the petition reproduced above. I need not repeat it. I, therefore, propose to proceed with the evaluation of the issues framed and agreed upon by both sides which read as follows:-

- 10   **"1. Whether the respondent's regulations are inconsistent with and in contravention of Articles 20, 29 (1) (c), 30, and 37 of the Constitution of Uganda in the case of your petitioners (sic)**
- 2. Whether the respondent is entitled to claim lawful derogation under Article 43 of the Constitution of Uganda.**
- 3. Whether Rule 4(1) of the Fundamental Freedoms (Enforcement Procedure) Rules 1992, Directions 1996 are inconsistent with Article 137 of the Constitution of the Republic of Uganda.**

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          However, this issue was subsequently abandoned.

1.     **What remedies are the petitioners entitled to"**

On the first issue, in my view, the summary of the petitioners' concerns subsequently elaborated by Mr. Kakembo Katende, their learned counsel, are as stated below. Firstly the respondent as a public institution is obliged under **Article 20 of the Constitution** to respect and uphold the inherent and fundamental rights and freedoms which include the religious freedoms of the petitioners as established under the Constitution but which it violated.

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Article 20, reads as follows:

**"Fundamental rights and freedoms of the individual are inherent and not granted by the state "**

Secondly, the respondent's policy and regulations complained of in the Petition infringe on the fundamental rights and freedoms of the petitioners to practise their religion and manifest their Sabbath Day Adventist Christian Faith as guaranteed under Article 29 (1) ( c ) which provides as follows:-

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**"Every person shall have a right to**

a.....

b. ....

10 c. **Freedom to practise any religion and manifest such practice which shall include a right to belong and participate in the practices of any religious body or organisation in a manner consistent with this Constitution."**

Thirdly, it was strongly submitted on behalf of the petitioners that the effect of the respondent's offensive policy and regulations impose an unconstitutional burden on the petitioners by virtue of their faith and undermine their constitutionally guaranteed right to education under **Article 30 of the Constitution** which states as follows:-

**"All persons have a right to education"**

20 Fourthly, the petitioners insist that the offensive respondent's policy, imposes an unconstitutional burden and hardship- on their constitutionally guaranteed right to practise, profess maintain and promote their religion in community with others under **Article 37 of the Constitution** of Uganda which provides as follows:-

**"Every person has a right as applicable, to belong to, to enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others"**

30 Fifthly, the petitioners allege that the respondent's inflexible conduct and attitude have occasioned severe hardship, loss and detriment to them which entitles them to the declarations, and other appropriate redress including exemplary damages as stated in their petition (supra).

In his submissions, Mr. J. Kakembo Katende, emphasised to court that the cardinal tenet of the Seventh Day Adventist Christian Faith is that believers cannot engage in any form of work on the Sabbath Day which is a blessed and sacred day to their faith. He, further, explained that the history of their belief emanates from the Bible and is discussed in the affidavit of Dr. John B.

Kakembo dated 21<sup>st</sup> February, 2003. The said Dr. Kakembo is both a pastor and an Executive Director of the Seventh Day Adventist Christian Faith. He is also a qualified PHD Theologian and also a student's counsellor. In that capacity, in paragraph 6 of his affidavit, he deponed as follows:-

10 **"That according to the Seventh Day Adventists Christians the Sabbath is one of the ten commandments. This is spelt out in the Book of Exodus Chapter 20 verses 8-11 of the Bible (N.I.V) where it is stated that we are to remember the Sabbath by keeping it holy. In six days we are to labour and do all our work. The seventh day is a Sabbath to the Lord God on which we are to rest from our work"**

A copy of the Book of Exodus chapter 20 verses 8-11 is annexed thereto as "A"

20 Members of the faith also believe that they would be condemned if they disobeyed that commandment apart from an emergency which to the petitioners did not extend to the respondent's policy and regulations. Disobedience leads to hell. The petitioners are, therefore, unable to attend mandatory lectures, exams or tests scheduled on the Sabbath Day as can be seen from Dr. Kakembo's affidavit in paragraph 19 of his affidavit where he states as follows:

30 **"The Sabbath commences on Friday evening and ends on Saturday at Sundown. To ask a Seventh Day Adventist Student to sit for exams on a Sabbath, therefore, violates their freedom of religion, which fundamental freedom includes the right to observe the Sabbath according to our faith"**

Relying on **Constitutional Petition No. 6 of 1999 Zachary Olum and Another vs Attorney General**; the **Canadian Case The Queen vs Big m. Drug Mart Ltd (others intervening ) (1986) LR C. 332 and Attorney General vs Salvatori Abuki Constitutional Appeal No. 1 of 1998**, Mr. Kakembo submitted that in determining a constitutional matter, the court has to consider both the purpose and the effect of the act or law in question. However, it appears to counsel that the court has to consider each  
40 one of them separately.

He conceded that the purpose of the respondent's policy is clearly articulated in paragraphs 3 and 4 of Prof. Sebuwufu's affidavit dated 21<sup>st</sup> February 2003. It explains the rationale behind the policy, which was to avail access to education to more people. However, he was not suggesting that the respondent's policy was intended to undermine or violate the petitioners' rights but it is the effect of implementing that policy that infringes other's rights. It is on that basis that the petitioners are claiming an exemption from the respondent's policy and regulations.

With regard to Article 20 of the Constitution, counsel argued that neither the state nor the university can take away any person's inalienable rights for **Article 20 (2) of the Constitution** provides:

**"The rights and freedoms of the individual and groups enshrined in the chapter shall be respected and upheld and promoted by all organs and agencies of government and all persons"**

Further counsel submitted that the respondent's policy to force the petitioners to participate in the respondent's educational programmes on Sabbath Day was unconstitutional and inconsistent with **Articles 29(1) ( c) and 37 of the Constitution (supra)**. On **Article 37 (1) (c)** the petitioners' concern is restricted to the religious rights supplementary to **Article 29 (1) ( c)**.

**Article 37** reads inter alia:-

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**"Every person has a right as applicable, to belong to enjoy, practice, profess.... creed or religion in the community with others"**

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For the meaning of **"Freedom of religion"** Counsel relied on the **Canadian case of Queen vs Big M. Drug Mart Ltd, (Supra)** at page 359 paragraphs F.G. In short he submitted that it meant the right to entertain religious beliefs as such a person chooses. It includes rights to **"declare those beliefs openly and without fear or hindrance or reprisal and the right to manifest religious beliefs of worship and practice or by teaching or dissemination. But the concept means more than that"**



The freedom must generally be characterised by absence of coercion and constraint. On the other hand that means that nobody can be forced to pursue a course of action which otherwise he would not have taken. He cannot be taken to be acting on his own volition and cannot be said to be free.

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Applying the aforesaid principles, Mr. Kakembo Katende, argued that the petitioners were entitled to believe in the dictates of their faith to which they subscribe without fear or hindrance or any kind of restriction mentioned in the **Canadian Case of Queen vs Big ..** (supra) In addition counsel argued that the effect of the implementation of the respondent's policy is to impede the observance of the petitioners' religious principles. The policy forces them to go against their conscience and to violate their freedom or religious beliefs, which counsel submitted was inconsistent with **Articles 29 (1) ( c ) and 37**

20 **of the Constitution.** He referred this court to the case of **Sherbert vs Verner 374 US 398 US SC. (Vol 83 A page 1790)** where it was held that if the purpose or the effect of the law was to impede the observance of one's religion or to discriminate in religions, that law would be constitutionally invalid even though the burden characterised is indirect. Although counsel conceded that the aforesaid authority was overturned it was followed in many subsequent cases. He further argued that although the petitioners had a choice, in the context of this petition it was to forego their religious convictions, which he submitted imposed an unconstitutional burden on them.

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30 The dilemma facing the petitioners and other students or members of their faith, therefore, is that if they are to take full benefit of what is offered by the respondent, they are required to give up or forego a cardinal tenet of their religious belief that they cannot work on Sabbath Day.

On the other hand, if they were to work on the dictates of their religion and conscience they would be threatened with academic detriment and their

progress and futures are affected accordingly. This, counsel argued, imposed an unconstitutional burden on the petitioners as was held in the case of **Sherbet vs Verner** (supra)

10 It is the position of the petitioners that denial of the exemption requested for is a denial by the respondent of their right to exercise their guaranteed religious freedom. The only reason they suffer is because of their firm religious conviction. For the aforesaid reason, Mr. Kakembo, submitted that the petitioners were entitled to a constitutional exemption from the respondent's policy. He further relied on the case of **Re Chikweche (1995) 2 LRC 93.**

20 Mr. Kakembo also submitted there was no justification for sacrificing the rights of the minority 150 seventh Day Adventists to that of the majority population of 31,000 students. It must be conceded that the religious rights in issue are peculiar to Seventh Day Adventist Christians and they are entitled to them. As it was held in the case of **Chikweche** the concern of the court is not validity but **sincerity** which characterises the petitioners' religious convictions, which is the reason for their suffering. It appears they are not understood by the respondent. Mr. Kakembo emphasised his prayer that the objective of the petitioners is to seek exemption and accommodation from the respondent's policy but not an abolition of the policy to hold educational programmes on Saturday.

30 On **Article 30**, Mr. Kakembo, submitted that under the said Article all persons have a constitutional right to education. However, it is contended by him that informing the petitioners of the terms of admission at the time of admission means that in essence the petitioners were admitted on condition to forego their religious convictions or scruples in order to attend the University. To him this was unconstitutional and in contravention of **Article 30 of The Constitution**. He referred this court to **The Universities and other Tertiary Institutions Act, No. 7 of 2001 Section 28** which

prohibits discrimination. For example **S 28 (2)** of the Act makes provisions for admission of non citizens without discrimination. The petitioners are challenging the limitation imposed by the respondent on the right to education at admission of the Seventh Day Adventist students. Their argument is that the right to education is more than a right to be admitted and gives right to enjoyment of a favourable environment in which the students can attain their educational aspiration. It must also give every individual such opportunity to enable him or her to succeed in his or her endeavour. Counsel submitted that the respondent's policy makes it unreasonably difficult and onerous for the petitioners and members of their faith to attain their educational aspiration guaranteed under **Article 30 (supra)**

In reply Mr. Wamala who was part of the respondent's defence team, followed the same approach adopted by Mr. Kakembo. On issue No. 1 relating to the legality and constitutionality of the respondent's policy and regulations, he agreed with Mr. Kakembo on the definition of the legal standard in the constitutional interpretation. However, he emphasised that the court has to consider both the purpose and effect together but not in isolation. Further he submitted that all provisions of the Constitution concerning an issue has to be considered. The Constitution must be looked at and read as an integrated whole. No one particular provision should destroy another but should support each other. Counsel also relied on **Constitution Petition No. 6 of 1996 Zachary Olum and Others vs Attorney General (supra)** In the present petition Articles 20, 29 (1) ( c), 30 and 37 should be considered jointly but not in isolation.

Further he argued that the other principle to be taken into account is the chapter on the **National Objectives and Directives of the State Policy**. He submitted that the respondent's policy was formulated in accordance with the aforesaid principles. He also asked court to look at both the positive and negative effects of the policy to determine the validity of the respondent's

policy. He relied on paragraph 6 of Professor Ssebuwufu's affidavit in support of the answer by the respondent which, inter alia, reads as follows:-

10 **"As a result of the implementation of the said policy the university has been able to improve the quality of education and accommodate more students as hereunder.**

- a) **number of students increased.**
- b) **The university has been able to sufficiently provide University Education**
- c) **the said policy has enabled University to increase its intake in respect of privately sponsored students on the day program from 1920 during 1997/1998 Academic year to 6288..... This category includes those students who are available to attend lectures during week days but do not qualify for government sponsorship.**
- d) **As a result of the implementation of the said policy the University has increased the number and variety of courses offered at the University from 43 courses offered during the 1997/1998 Academic year to 129 to 2000/2003 Academic year**
- e) **..... the policy further enabled the University to offer better quality education by employing many better qualified lecturers.**
- 30 f) **University ..... to generate more revenue from private students..."**

It was contended that the respondent's policy is in conformity with the National Objectives and Directive Principles. I agree.

40 Relying on the South African constitutional burden principle, it was the submission of counsel for the respondent that in determining whether a policy negatively impacts on a provision of the Constitution to the standard of reducing it to an unconstitutional burden, the test should be whether it substantially burdens religious freedom. The test should be substantial but not anything else. See **Christian Education S. A. vs Minister of Education of the Government of RSA 1999 (9) BCL R 951 (SE)** It was the submission of counsel for the respondent that the policy requiring utilisation by the petitioners and other students on Saturday does not

constitute a substantial burden to justify granting the petitioners an exemption. The standard is the inconvenience caused. I agree.

I heard the submissions of counsel on either side and I have carefully considered the arguments advanced. I also had a careful perusal of the petition and the affidavit evidence adduced by both parties in support of the petition and answer to the petition and all documentary evidence annexed thereto and I have the following observations to make.

On **Article 20 of the Constitution** I appreciate the submissions of counsel on the effect of the petitioners' rights. It is true the respondent has a duty to accommodate the Seventh Day Adventists students minority but on condition that the policy on the petitioners' rights under **Article 20 of the Constitution** is not prejudicial to other people's rights in the University.

**Article 20(2)** imposes an affirmative constitutional duty on the respondent to respect, uphold and promote the religious beliefs of the petitioners and other members of their faith. I do not agree that on the evidence on record the respondent forced the petitioners to participate in the respondent's educational programmes on Sabbath Day. The petitioners should not have accepted the offer of admission since the terms and conditions were clear in the **Freshers Joining Instructions** for every academic year a copy of which was annexed as annexure A to the answer on the petition.

In paragraph 3 of Professor Ssebuwufu's affidavit, he depones as follows:-

" It is correct that it is University Ruling that university programmes including lectures and examination may run for seven days a week including Saturdays. It has also been correct that the University has been requiring students to take examinations and or attend lectures between 7.a.m and 10. a.m. on Saturdays and on any other day of the week. The said Policy was communicated to all students including the petitioners at the time of admission to the University."

Clearly, the petitioners had a choice not to join the respondent. I agree, like all persons, under Article 30 they are guaranteed right to education but it is not confined to the respondent. There are many Universities and other tertiary institutions in Uganda, including Bugema University established by the Seventh Day Adventist Church and in other countries including Kenya. The  
10 petitioners did not have to chose the respondent as it was not compulsory. Besides, University education is not compulsory. Having voluntarily joined the respondent, the petitioners cannot be heard to demand from the respondent what according to Professor P. Ssebuwufu is not affordable. In his affidavit dated 7<sup>th</sup> May 2003 in paragraph 9 – Prof. Ssebuwufu depones as follows:-

20 **"The University cannot offer special examinations to those students who are unable to attend examinations on particular days due to religious considerations or for any other reason because such practice would create a variance in academic standards and further lead to an increase in the cost of education. The University may not be able to organize examinations within the available period and the policy of special examinations would lead to difficulties in synchronising examination results."**

In the premises the petitioners should have turned down the offer of admission as they had been notified of the respondent's policy and regulations complained of.

30 It is correct, as observed by counsel for the petitioners, that the justification for the respondent's policy is that the respondent is a public and secular institution and as such it has no duty to accommodate some beliefs based on religious tenements. It is nowhere stated in the respondent's policy and regulations that the petitioners should give up their religious convictions and become secular. In my view, the respondent's policy is not inconsistent with **Articles 20 and 30 of the Constitution**. The case of **Sherbert vs Verner, (supra)** relied on by counsel is not relevant to this petition.

I also do not subscribe to Mr. Kakembo's submission that the respondent's policy forced the petitioners to pursue a course of action which they would not have taken. They were free to participate or not in the respondent's educational programmes held on Sabbath. The respondent did not prevent them or any member of their faith to believe in the dictates of their faith to which they subscribe. In agreement with counsel for the Respondent in this petition court has to consider both the purpose and effect of the policy together. In my view, it is not true, as contended by him, that its effect was to impede observance of the petitioners' religious principles. The said policy does not force them to go against their conscience and does not violate their freedom of religious beliefs in contravention of **Article 29(1) ( c) and 37 of the Constitution.**

The purpose and the effect of the policy as clearly indicated by the affidavit evidence in support of the answer to the petition, was inter alia, to improve quality of education, enhance accessibility to education by more people and reduce the cost of education. It was not discriminatory as it was suggested by the petitioners. It was applicable to all the students many of whom had similar religious beliefs and convictions but accepted the programme. In this observation I am fortified by affidavit evidence deposed to on behalf of the respondent by Professor Ssebuwufu in paragraph 3 (**supra**). There is no dilemma or constitutional burden facing the petitioners as submitted by their learned counsel. They are not required to give up or forego their cardinal tenet of their religious belief that they must not work on Sabbath.

The respondent even gave them alternatives of taking the educational programmes when fixed on other days than Sabbath. They had that option but not to give up their religious beliefs. They had so many choices including transferring to other Universities or institutions. No evidence of reprisal is adduced to prove that allegation and in my view it is not correct, as contended by Mr. Kakembo Katende, that the petitioners are suffering because of their firm religious conviction.

If anything other students or groups may be experiencing similar problems. The respondent has students and staff from various religious background and it is admitted it may not meet the interest of a particular group particularly in the critical areas of attendance of lectures and or examinations.

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Further I bear in mind the affidavit evidence deponed to in the affidavit of Esther Irakunda dated 22 May 2003 in paragraph 5 (a) of her affidavit reading as follows:-

**“That I attended two tutorials in my second year between 1995/96 academic year while in Makerere University that were held on two separate Sundays and I never heard a complaint from other students on the ground that Sundays was a religious prescribed as a rest day”**

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That, in my view, was no evidence to show that the problem of Sabbath was only peculiar to the Seventh Day Adventists students.

With regard to counsel’s complaint that there was no justification to sacrifice the rights of the minority of 150 Seventh Day Adventists students to that of the majority population, the issue of sacrifice did not arise. The policy was applicable to all students and groups of various time. The Policy was not intentionally directed at the petitioners but to benefit the majority student population. Moreover, it is trite that human rights and freedoms must be enjoyed within limits as provided under Article 43 of the Constitution.

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Article 43 (1) provides:

**“ In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other Human Rights and freedoms of others or the public interest”**

Human rights, hence, are not absolute but enforceable within reasonable limits. It is worthwhile noting that the respondent has to plan and cater for all religious denominations based on different tenets. The university would



find it difficult to implement its objectives if it were to give exemptions to all of them. Hence Professor Ssebuwufu in his affidavit evidence in paragraph (9) (**supra**) which has not been controverted deponed, inter alia, that the university cannot grant the petitioners' request which includes offering

10 **"special examinations to those students who are unable to attend examinations on particular days due to religious considerations or for any reason because such practice would create a variance in academic standards and further lead to an increase in the cost of education....."**

With regard to the suggestion for confinement, that proposal, as shown by paragraph 10 of Prof. Ssebuwufu's affidavit is not practicable. It reads:-

20 **"Furthermore the University is not in position to implement the Makerere Seventh Day Adventists Students Associations' recommendation to confine Seventh Day Adventists students in a particular place for a specified period of time on Saturdays on which examinations are held and to offer the said examinations to such students after their Sabbath as such act may be construed as sectarian, torturous, impractical, high handed and unconstitutional. The University would also be compelled to offer the same treatment to various religious groups, e.g. Muslims, Catholics, Anglicans, Bahais, Hindus and all whose members attend the University".**

30 In conclusion, in agreement with counsel for the respondent, the policy and regulations of the respondent did not violate the petitioners human rights under **Articles 20, 29 (1) ( c), 30 and 37 of the Constitution of Uganda**. They did not impose on the petitioners an unconstitutional burden by virtue of their faith. For the aforesaid reasons they did not undermine the petitioners' constitutionally guaranteed right to education under **Article 30 (supra)**.

40 I wish to emphasize that, the provisions of **Article 30** notwithstanding, University education is not compulsory and is not obtainable only from the respondent. The petitioners had an option to join other Universities and other tertiary institutions. With regard to the alleged unconstitutional burden, the respondent's policy did not prohibit the petitioners or hinder them from practising, or believing or participating in any religious activities. The policy

did not hinder any promotion of their creed or religion in Community with others under **Article 37 (supra)**.

I am unable to agree, as suggested by the petitioners, that they have suffered any damage as a result of the respondent's inflexible conduct. On the other hand, the respondent has had a dialogue with the petitioners and other members of their faith on the policy, with view of finding a possible solution to the respondents' problem, but the petitioners did not consider the alternatives offered to them satisfactory.

The respondent's policy complained of by the petitioners was fair and its students including the petitioners voluntarily joined the University. As it was rightly pointed out by counsel for the respondent, the provisions of the Constitution allegedly violated by the respondent, must be considered as whole. The petitioners' rights had to be considered together with those of the rest of the students population. The effect of the respondent's policy did not impede the observance of the petitioners religious principles. There was no threat or academic detriment to the petitioners as suggested by their counsel. If any it was self imposed because the petitioners had a choice it was up to them to take the offer or reject it. In my view, the petitioners have no justification to challenge the respondent's terms and conditions of admission. As an institution, the respondent must have Regulations and Terms of Admission if it is to maintain a high academic standard and discipline, which in my opinion, are the key to success.

I agree with counsel for the respondent that the policy requiring utilisation by the petitioners and other students on a Saturday does not constitute a substantial unconstitutional burden to justify granting the petitioners the exemption prayed for. In the result I find that there was no contravention of the petitioners' rights under **Articles 20, 29 (1) ( c) 30 and 37**. On that finding alone the petition must fail.

There is no need for me to consider the remaining two issues on derogation and remedies.

I would dismiss the petition and order each party to bear its own costs.

10 Since, the other four justices on the coram have a similar view, the petition is dismissed. No order is made as to costs.

Dated at Kampala this *24<sup>th</sup>* day of *Sept.* 2003

  
**L. E. M. MUKASA-KIKONYOGO**  
**DEPUTY CHIEF JUSTICE**

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THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

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CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ ✓  
HON. JUSTICE A.E.N. MPAGI BAHIGEINE, JA  
HON. JUSTICE J.P. BERKO, JA  
HON. JUSTICE A. TWINOMUJUNI, JA  
10 HON. JUSTICE C.N.B. KITUMBA, JA

CONSTITUTIONAL CAUSE NO. 01 OF 2003.

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1. DIMANCHE SHARON ]  
2. MOREIKA GILPHINE ]  
3. NANSEREKO LUCK ].....PETITIONERS

20 V E R S U S

THE MAKERERE UNIVERSITY .....RESPONDENT

25 JUDGMENT OF TWINOMUJUNI, JA

INTRODUCTION:

30 The petitioners, all of whom are students of Makerere University, petitioned  
against the University for declarations that:

“(a) Makerere University policies and regulations of scheduling  
lectures, mandatory tests and examinations on the Sabbath Day,  
are inconsistent with and in contravention of articles 20, 29(1)(c),

30 and 37 of the Constitution in the case of your petitioners who practice the Seventh Day Adventist christian faith.

(b)The time limitation of 30 days introduced under rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996 is in contravention of article 137 of the Constitution.

(c)Makerere University violated the petitioners' constitutionally guaranteed rights under articles 20, 29(1)(c), 30 and 37 of the Constitution.

(d)The respondent pays general and exemplary damages for infringement of the petitioners constitutional rights and the costs of the petition."

The petition is supported by affidavits of the three petitioners and several other witnesses who practice the Seventh Day Adventist christian faith, to which the petitioners subscribe. The respondent filed an answer to the petition supported by affidavits of a number of employees of the University in which they oppose the petition and demand that it be dismissed with costs.

#### THE FACTS:

Makerere University is the oldest and probably the largest University in East Africa. It is currently operating under the authority of the **Universities and Other Tertiary Institutions Act (Act 7 of 2001)**. Under the authority of that Act, it has made policies and regulations one of which is introduced to its students as follows: -

“Students are informed that the University Programmes may run seven days a week. Since the University has students and members of staff from various religious backgrounds, the University may not meet the interests of a particular group, particularly in the crucial areas of attendance of lectures and/or examinations. You are therefore urged to respond to the academic work in your academic unit even if it takes place on the respective days of worship.”

This information is printed in bold letters in a document entitled:

“**FRESHERS’ JOINING INSTRUCTIONS**” issued to all new students to the University by the Academic Registrar. On the front of the document, there is printed a request stating: **“NOTE: PLEASE DO READ THIS DOCUMENT AND UNDERSTAND ITS CONTENTS VERY WELL.”**

The petitioners are all members of the Seventh Day Adventist christian faith. The Cardinal tenet of their faith is based on the forth Commandment of God to be found in EXODUS 20:8 which states:-

**“Remember the Sabbath Day by keeping it holy. Six days you shall labour and do all your work, but the Seventh Day is a Sabbath to the Lord your God. On it you shall not do any work, neither you, nor your son or daughter, nor your man-servant nor your maid-servant, nor your animals nor the alien within your gates. For six days the**

Lord made the heavens and the earth, the sea and all that is in them, but he rested on the Seventh day. Therefore, the Lord blessed the Sabbath Day and made it holy.”

5 The Seventh Day Adventists further believe that the Sabbath is a day  
“of rest, worship, and ministry in harmony with the  
teaching and practice of Jesus, the Lord of Sabbath. The  
Sabbath is a day of delightful communication with God  
and one another. It is a symbol of our redemption in  
10 Christ, a sign of our sanctification, a token of our  
allegence and a foretaste of our external future in God’s  
Kingdom. The Sabbath is God’s perpetual sign of his  
internal covenant between Him and His people. Joyful  
observance of this holy time from evening to evening,  
15 sunset to sunset, is a celebration of God’s creative and  
redemptive acts.”

The petitioners contend that as a result of the University regulation quoted  
above, they are required to attend classes and take mandatory tests and  
20 examinations on any day of the week, including the Sabbath Day which is  
contrary to their beliefs and contravenes articles 20, 29(1)(c), 30 and 37 of  
the Constitution of the Republic of Uganda. Hence the prayer that the  
regulation be declared null and void.

25 For sometime now, Makerere University Seventh Day Association  
(MUSDAA), in which the petitioners are members, has been engaged in  
negotiations with the University with a view to finding a solution to this

problem. In July 2001, the Association wrote to the Vice Chancellor as follows:-

*“July, 2001.*

5 *THE VICE CHANCELLOR,  
MAKERERE UNIVERSITY,  
P.O. BOX 7062 KAMPALA.*

10 *Dear Sir,*

*RE: REQUEST FOR AN ADDOMODATIVE ACADEMIC  
SHCHEDULE FOR SEVENTH-DAY ADVENTIST  
STUDENTS.*

15 *We the S.D.A. students are members of the aforementioned  
association of Makerere University.*

20 *This association is based on the doctrines of the Seventh-  
Day Adventist church, which are Biblically founded and  
bear Biblical authority and authenticity. These doctrines  
include inter alia the observance of the Sabbath day, which  
is generally known as Saturday, through religious  
convocation and not doing secular work, which includes  
attending lectures, tests and examinations on the day herein  
mentioned.*

25 *In this we accord it all its divine attributes of blessing, rest  
and sanctity, for God rested on it, sanctified it and blessed  
it, and bade human beings do the same.*

30 *The doctrines are also recognised under article 29(1)(c) of  
the 1995 Constitution of the Republic of Uganda, which  
states that, “Every person shall have a right to freedom to  
practice any religion and manifest such practice which  
shall include the right to belong and participate in the  
practices of any religious body or organisation in a  
manner consistent with this constitution.” And the  
35 *doctrines of the church are consistent with the constitution  
[that is why the Seventh-Day Adventist church is recognised  
by the government of Uganda]. We would like to bring it to  
your attention that our rights that are provided for under**



5 the constitution, are being infringed upon in that the  
University academic programme does not accommodate us,  
Seventh-Day Adventist students in that examinations, tests  
and lectures are scheduled on Saturdays and we end up  
10 missing and retaking which has proved detrimental to our  
subject grades, Grade Point Averages (G.P.A.s), and  
Cumulative Grade Point Averages (C.G.P.A.s). Some of us  
have as a result been suspended, some made to study for  
more years than necessary, some forced to withdraw, while  
15 others have been expelled all on religious grounds. More  
over the University regulations are forcing us to attend  
these lectures, tests and examinations on Sabbath against  
our consciences and beliefs, contrary to article 29(1)(b) of  
The 1995 Constitution of Uganda, which inter alia provides  
for academic freedom.

We therefore recommend:

20 That the University academic programmes be  
formulated/structured in such a way as to accommodate  
Seventh-Day Adventist students, by scheduling tests and  
examinations, which affect Seventh-Day Adventist students,  
on Sabbath (Saturdays); And alternatively, if they are  
scheduled for Sabbath,

25 That special tests and examinations be set and given to  
Seventh-Day Adventist students on days other than the  
Sabbath day (Saturday) – and on this that special  
examinations be set and given to those finalists who have  
30 missed tests and examinations because they were scheduled  
for Sabbath (Saturdays); For it is our right to worship God  
and not to attend lectures, (do) tests and examinations on  
Sabbath, and your (the University's) corresponding duty to  
accommodate, as a university that is governed subject to  
35 The 1995 Constitution of the Republic of Uganda.

As we look forward to your expeditious reply, may God  
bless and guide.

40

*For and on behalf of MUSDAA,*

*IZALE BENJAMIN  
CHAIRMAN.*

5

In July 2002 the Vice Chancellor made the following response:

*"July 15,2002*

10

*Dr. John B. Kakembo  
The Executive Secretary  
Seventh Day Adventist Church  
Uganda Union  
P.O. Box 64434  
KAMPALA*

15

*Dear Dr. Kakembo*

20

*RE: SEVENTH DAY ADVENTIST STUDENTS AND  
ACADEMIC ACTIVITIES ON SATURDAYS*

*Thank you very much for your letter dated June 18,2002  
regarding scheduling of examinations on Saturday.*

25

*Prior to 1997, the University authorities used to try hard to  
ensure that examinations were not scheduled at times, or on  
days, of worship for the various religious denominations.  
Even then, in a few academic units, for example, in the  
Faculty of Medicine, tests and some clinical had to be  
conducted on Saturdays and Sundays purely because of the  
nature of such academic programmes.*

30

35

*The University has since 1997 witnessed many positive  
developments including a big increase in the number of  
students admitted and the introduction of a wide variety of  
courses and programmes of study. The University now  
runs not only day classes but also afternoon, external and  
evening classes.*

5            *With such a complex system, many practices, norms and patterns of the University life have had to change to suit the new circumstances and realities in which the University has to operate. The University Senate and Management have, therefore, agreed that whilst individual religious beliefs have to be respected, academic activities can be scheduled on any or all the seven days of the week. The University Senate and Management have also agreed that academic activities can be scheduled from 7.00 a.m. to 10.00 p.m. on any day.*

15           *If for religious or any other reason a student is unable to study or sit for examinations, he/she is free to request to withdraw from the University or to retake a particular course when such a course would be offered again. Under the Semester system which the University now operates, special or supplementary examinations are not administered. In the circumstances, any Seventh Day Adventist student who may not have sat for a particular examination, may apply to the respective Dean/Director to retake the course for such examination when it will be next offered again.*

25           *On its part, the University Management will continue to respect individual religious beliefs and the freedom of worship but where there are constraint, it is hoped that students and the general public will understand and support the University so that in the end "We Build for the Future".*

30           *Yours sincerely*

*Professor P J M Ssebuwufu, Ed.D.(hc),D.Phil.(hc)*  
**VICE-CHANCELLOR**

35           Not satisfied with this explanation, the petitioners decided to petition the Constitutional Court.

## THE ISSUES.

At the trial, the parties framed and agreed on the following issues:-

- 5 (1) Whether the respondent's regulations are inconsistent with and in contravention of articles 20, 29(1)(c), 37 and 30 of the Constitution of Uganda in the case of your petitioners?
- (2) Whether the respondent is entitled to claim a lawful derogation under article 43 of the Constitution of Uganda?
- 10 (3) Whether rule 4(1) of the Fundamental Freedoms (Enforcement Procedure) Rules 1992, 1996 are inconsistent with article 137 of the Constitution of the Republic of Uganda?
- (4) What remedies are the petitioners entitled to, if any?

15 However, since no one was raising the provisions of rule 4(1) of the Fundamental Freedoms (Enforcement Procedure) Rules 1992,1996 as a bar to this petition, the parties agreed to drop and abandon this issue together with its corresponding declaration. The trial proceeded on the remaining three issues, to whose merits I now turn.

20

### ISSUE NO.1

This is whether the disputed Makerere University regulation contravenes articles 20, 29(1)(c), 30 and 37 of the Constitution. I reproduce the articles  
25 of the Constitution:-

Article 20:

“(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.

5

(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 29(1)(c):

“(1) Every person shall have the right to-

10

(a).....

(b).....

15

(c) Freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution; .....

Article 30:

“all persons have a right to education.”

Article 37

20

“Every person has a right as a applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.”

25

Mr. Kakembo Katende, learned counsel for the petitioners, submitted that this court should apply the test of “purpose and effect” to determine the constitutionality of the Makerere regulation vis-avis the cited provisions of

he Constitution. This test was applied in the famous Canadian Case of The Queen vs. Big M. Drugmart Ltd [1986] LRC (Const.) 33. It has also been applied by this court in the case of Zachary Olum & Anor vs. The Attorney General Constitutional Petition No.6/99. Learned counsel  
5 conceded that he was satisfied with the explanation given by the Vice-Chancellor that the purpose of the regulation was not unlawful or unconstitutional but in his view the effect of implementing the regulation was unconstitutional as it infringed the constitutional rights of the petitioners. Mr. Kakembo Katende cited the cases of Sherbert vs. Verner  
10 373 US 398 USSC (vol.83A Raga 1790) and Re Chikweche [1995] 2 LRC 93 in support of his submission that the effect of the Makerere regulation in question violated the constitutional rights of the petitioners and should be declared null and void.

15 Mr. Denise Wamala, learned counsel for the respondent, held a contrary view. He submitted that Makerere University was a secular institution which had a statutory obligation to provide high quality education to as many people as possible. The regulation was necessary to enable the University utilise all the time available to achieve this objective. The  
20 regulation was brought to the attention of all students at the time of admission and all students had the option to opt out of Makerere University if they felt that the regulation was oppressive. There existed in Uganda many other Universities that did not have the regulation to which objectors could go and one of them was founded by the Seventh Day Adventist  
25 Church. He submitted that the constitution of Uganda permitted any one or organisation to set up a University. In his view, this was an option which the

petitioners and members of their church could take up in order to ensure that their religious beliefs are not tempered with..

Finally, Mr. Wamala submitted that the 4<sup>th</sup> commandment that provided the  
5 fundamental principle of the SDA Church was not absolute because Jesus indicated in his teachings that for a good reason, a believer could do work on the Sabbath. He invited this court to answer the first issue in the negative.

The first matter to be resolved is whether Makerere University has enacted a  
10 regulation that infringes on the petitioners constitutional rights and freedoms of religion and education. Does the regulation in issue have an unconstitutional purpose or effect? Has the regulation stopped or hindered the petitioners right to religion and education? From the testimony of the petitioners themselves, it is clear that the petitioners are free to practice their  
15 religion freely without interference from the University. Whether they choose to worship their God on Mondays or Saturdays is not a problem to the University. The University is a secular institution. It has a student and staff population of over thirty thousand people practicing numerous religions and beliefs. It has a statutory function to perform. It conducts over 180  
20 programmes to a student population of thirty one thousand. In order to be able to do that, time must be used optimally. To such an institution, time is an extremely scarce product and they cannot afford to set aside time to accommodate all religions and beliefs on the campus. Whether one chooses to worship God on Saturday instead of doing an examination or attending a  
25 lecture is a matter of individual choice. This matter is clearly brought to the attention of the students on the first day they enter the University. The

students enter the University well knowing that it will conduct its programmes seven-day a week.

Those who do not like the condition need not enter the University. There are  
5 many Universities in this country and abroad from which an intending  
student could choose a suitable alternative. It would be against the spirit of  
the constitution if the University was forced to change its internal  
programmes in order to conform with individual whims of their students.  
The affidavits sworn by Prof. Ssebuwufu, the Vice-Chancellor of Makerere  
10 University clearly explain why the regulation had to be instituted and why it  
is practically impossible to accommodate individual religious needs of the  
students into the University programme.

I agree with the submission of Mr. Wamala, learned counsel for the  
15 respondent that there are exceptions to God's commandment on Sabbath.  
According to the Gospel of Mark Chapter 3:23, Jesus is quoted as having  
taught as follows:-

**"LORD OF SABBATH**

**One Sabbath Jesus was going through the cornfields, and  
20 as his disciples walked along, they began to pick some  
ears of corn. The Pharisee said to him. 'Look why are  
they doing what is unlawful on the Sabbath?'**

**He answered 'Have you never read what David did when  
he and his companions were hungry and in need? In the  
25 days of Abiathar the high priest, he entered the house of  
God and ate the consecrated bread, which is lawful only  
for priests to eat. And he also gave some to his**



companions'. Then he said to them, 'The Sabbath was made for man not man for Sabbath.' So the son of man is Lord even on Sabbath."

5 Further, on in Chapter 3 of the same Gospel, the works of Jesus are reported as follows:-

10 "Another time he went into the Synagogue and a man with a shriveled hand was there. Some of them were looking for a reason to accuse Jesus, so they watched him closely to see if he would heal him on the Sabbath. Jesus said to the man with a shriveled hand, '*Stand up in front of every one.*' Then Jesus asked them '*which is lawful on the Sabbath, to do good or to do evil, to save life or to kill?*' But they remained silent."

15

Jesus ordered the man to stretch his hand and he was healed completely.

20 A similar account is given in Mathew 12:1-3. In that Gospel, it is reported that Jesus was asked whether it was lawful to heal on the Sabbath. He replied :-

"If any of you has a sheep and it falls in the pit on the Sabbath, will you not take hold of it and lift it out? How much more valuable is a man than a sheep! Therefore it is lawful to do good on the Sabbath. [Emphasis mine]

25

Attending a lecture or doing an examination involves listening, thinking reading and writing. Are members of the Seventh Day Adventist Church

prohibited from listening, thinking reading or writing on the Sabbath? If their objection for doing this on Sabbath is based on the fact that it will interfere with their Worship on Saturday, they should note that the doing of any other good on Sabbath, like the treatment of a sick person or rescuing a  
5 distressed person or animal as recommended by Jesus would equally interfere with Worship. In my humble opinion, this tends to show that for a good cause, a Christian is permitted to do some good work or to work out of necessity on Sabbath. Attending a lecture or sitting an exam once in a while on Sabbath could fall within the accepted exceptions to the Sabbath  
10 commandment.

Article 43 of the constitution directs everyone that:

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

While the petitioners are free to enjoy their rights and freedoms, they must respect the rights and freedoms of others who do not practice the same  
20 religion or those of the University. The regulations in issue are non-discriminatory. They equally apply to all the people at the University for seven days a week. The regulations are reasonable and necessary in order to run an institution as Makerere University. They do not, however, affect anyone who does not voluntarily choose to join the University. If I admit  
25 you to live in my house under specified conditions and you accept to do so, you will be held to be out of order if you subsequently attempt to replace the conditions with those that suite to your own peculiarities.

For these reasons, I would hold that Makerere University regulations do not in any way violate or contravene the petitioners constitutional rights of religion and education. I would answer the first issue in the negative.

5

### ISSUE NO.2

This is whether the respondent is entitled to claim a lawful derogation under article 43 of the Constitution of Uganda. I have held on Issue No.1 above that the respondent's regulations do not derogate on the rights and freedoms of the petitioners or anyone else. It follows therefore that the respondent does not need to claim the protection afforded by article 43 of the Constitution. I would answer Issue No.2 in the negative.

### ISSUE NO.3

What remedies are the petitioners entitled to, if any?

In my judgment, they are not entitled to any remedies.

20

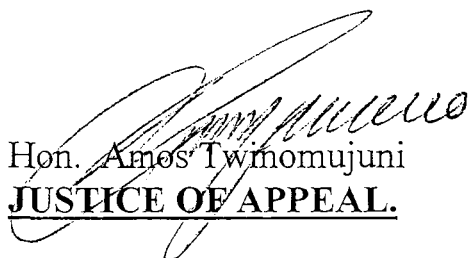
### CONCLUSION

25 I find no merits in this petition which I would dismiss accordingly.

However, since the petition raised a matter of public interest, I would order each party to bear its own costs.

Dated at Kampala this .....*24<sup>th</sup>*.....day of *September* 2003

5

  
Hon. Amos Twimujuni  
JUSTICE OF APPEAL.

10

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

CORAM: HON. DEPUTY CHIEF JUSTICE L.E.M. MUKASA-KIKONYOGO  
HON. LADY JUSTICE A.E. N. MPAGI-BAHIGEINE, J.A.  
HON. MR JUSTICE J.P. BERKO, J.A.  
HON. JUSTICE A. TWINOMUJUNI, JA.  
HON. LADY JUSTICE C.N.B. KITUMBA, JA.

10

CONSTITUTIONAL PETITION NO.01 OF 2003.

1. DIMANCHE SHARON
2. MOKEIRA GILPHINE
3. NANSEREKO LUKA ::::::::::::::::::::::::::::::: PETITIONERS

VERSUS

20 MAKERERE UNIVERSITY ::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT OF A.E.N. MPAGI-BAHIGEINE J.A.

This petition was filed by Dimanche Sharon, Mokeira Silphine and Nansereko Luka, hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners respectively, against Makerere University, hereinafter referred to as the respondent. It was filed under the **Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 Directions 1996** and **Article 137 of the 1995 Constitution.**

30

They seek a constitutional exemption from the application and implementation of the respondent's educational policy, in as far as it applies to them, on the ground that it infringes on their constitutionally guaranteed rights to freedom of religion and the right to education, under articles 20,29(1)(c), 30 and 37 of the 1995 Constitution.

The facts are that the petitioners are students at the respondent institution. They believe in and practice the **Seventh Day Adventist Christian Faith**, whose cardinal tenet is that believers cannot engage in any form of work on the Sabbath Day, which is a Saturday. For this reason, the petitioners find themselves unable to comply with the respondent's policy, which makes it mandatory for students including the petitioners to take the mandatory lectures and tests including examinations on Saturdays. The Sabbath begins on Friday at sundown and ends at sundown on Saturday. They therefore seek from this court a constitutional exemption from the application of the policy. The respondent is empowered to make educational policies and regulations under the **University and Other Tertiary Institutions Act No.7 of 2001**. The petitioners, however, made it clear that they had no objection to the respondent's policy per se because it is valid and lawful. It is only its application to them from which they seek to be exempted by this court.

Their petition sets down the following grievances:

**"1. Your Petitioners are all adults of sound mind, and students at Makerere University. They are members of the Seventh Day Adventist Christian Church and practice their faith and religion in accordance with their beliefs and the doctrine and dictates of the Seventh Day Adventist Christian faith. They have an interest in and are affected and by the following matters being inconsistent with and in contravention of Constitution of the Republic of Uganda, where by your Petitioners are aggrieved.**

**(a) The Makerere University policies and regulations made under the authority of the University and Other**

Tertiary Institutions Act (Act 7 of 2001), which policies and regulations require students to attend classes, and take mandatory tests and examinations on any day of the week (including the Sabbath day in the case of your Petitioners who practice the Seventh Day Adventist Christian faith), irrespective of the students' religious affiliations is inconsistent with and in contravention of Articles: 20, 29(1) (c), 30 and 37 of the constitution of Uganda.

- (b) The time limit of 30 days within which a Petition can be presented to this Honourable Court for Interpretation of the Constitution under Article 137 of the Constitution, which is set out in Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996, is inconsistent with and in contravention of Article 137 of the Constitution of Uganda.
- (c) Makerere University scheduled the taking of mandatory examinations for the subject of "Introducing Law" (for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners) and "Legal Aspects of Planning" (For the 3<sup>rd</sup> Petitioner) on Saturday, the 25<sup>th</sup> of January 2003, which is the Sabbath Day for your Petitioners and on which day they cannot by reason of their faith and beliefs under the Seventh Day Adventist Christian Faith, take examinations. For the same reason, the 3<sup>rd</sup> Petitioner was forced to miss a scheduled examination

in the course of "Civil Procedure" in 2002 and therefore could not graduate, and was on this basis required to repeat the year. By reason of the foregoing, your petitioners have suffered tremendous hardship and injustice and are entitled to legal redress.

2. Your Petitioners state the following reasons in support of this Petition namely:

- 10
- (i) Makerere University is a Public Institution, and is obliged under Article 20 of the Constitution of Uganda to respect and uphold the inherent and fundamental rights and freedoms (which include the religious freedoms) of the Petitioners as established under the Constitution.
- (ii) The Makerere University Policy of scheduling mandatory classes, test and examinations on the Sabbath day infringes on the fundamental rights and freedoms of the Petitioners to practice their religion and manifest their Sabbath practice, and the participation in heir beliefs of the Seventh Day Adventist Christian Faith as guaranteed under Article 29(1)(c) of the Constitution.
- 20
- (iii) The effect of these policies of Makerere University of scheduling mandatory classes, test and examinations on the Sabbath day, imposes an unconstitutional burden on your Petitioners, by virtue of their faith



and undermine their constitutionally guaranteed right to Education under Article 30 of the Constitution.

- (iv) The University policy of scheduling classes, mandatory tests and examinations on the Sabbath day, imposes an unconstitutional burden and hardship on your Petitioners' constitutionally guaranteed right to practice, profess, maintain and promote your Petitioners' religion in community with others under Article 37 of the Constitution of Uganda.
- 10 (v) Rule 4(1) of the Fundamental and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996, in requiring that all Petitions must be brought within 30 days of the injury complained of in the Petition, imposes an unconstitutional limitation of the right to Petition this Honourable Court for interpretation of the Constitution and redress (where appropriate) as established under Article 137 of the Constitution.
- 20 (vi) The legal effect of Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, Directions 1996 is an indirect and unconstitutional amendment of Article 137 of the Constitution of Uganda to introduce a time limit within which a Petition can be presented to this Honourable Court.
- (vii) The inflexible conduct and attitude of Makerere University with regard to your Petitioners who

practice the Seventh Day Adventist Christian Faith, has occasioned severe hardship, loss and detriment to your Petitioners, for which harm they are entitled to declarations, legal redress and appropriate compensation in damages.”

The Petitioners sought the following declarations:

- 10 “1. The Makerere University policies and regulations of scheduling lectures, mandatory tests and examinations on Sabbath day, is inconsistent with and in contravention of Articles 20, 29 (1) (c), 30 and 37 of the Constitution in the case of your petitioners who practice the Seventh Day Adventist Christian Faith.
2. The time limitation of 30 days introduced under Rule 4 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Direction 1996 is in contravention of Article 137 of the Constitution.
- 20 3. The enforcement of the respondent’s rules and regulations violated the petitioners’ constitutionally guaranteed rights under 20, 29 (1) (c), 30 and 37 of the Constitution.”

They further prayed for general and exemplary damages for the infringement of their constitutional rights and costs of the petition.

The petition was supported by affidavits deposed to by the three petitioners and others.

The respondent, in its answer, denied all the allegations, contending that the alleged breaches of the petitioners’ freedom of worship did not give rise to a

constitutional issue for interpretation by this Court. The respondent is a secular institution established by an Act of Parliament with the purpose of availing higher and quality education to a wider section of the public. The petitioners were forewarned of the respondent's policy before joining the institution.

The answer was supported by the affidavits of Ms Jayne Frances Nabawanuka, the Assistant Secretary (Legal) of the respondent. On one of these affidavit was attached a copy of the policy, Annexure "A" availed to  
10 the students before joining the respondent institution.

An additional affidavit in support of the answer was deponed to by Professor P.J.A Ssebuwufu, the Vice Chancellor of the respondent. This is quite detailed and outlines the purpose of the policy and the steps taken to accommodate the petitioners in its implementation. It highlights the achievements thereunder.

The petitioners were represented by Mr Kakembo – Katende assisted by Mr Frederick Sentomero and Mr David Sempala. Mr John Kanyemibwa  
20 assisted by Mr James Wamala appeared for the respondent.

The Attorney General was not represented though duly served.

Three issues were framed for determination by this Court, namely:

- "1. Whether the respondent's regulations are inconsistent with and in contravention of Articles 20, 29 (1) (c), 37 and 30 of the Constitution of Uganda in the case of your Petitioners?"**

2. Whether the respondent is entitled to claim a lawful derogation under article 43 of the Constitution of Uganda.
3. Whether Rule 4 (1) of the Fundamental Freedoms (Enforcement Procedure) Rules 1992, Directions 1996 are inconsistent with Article 137 of the Constitution of the Republic of Uganda?
4. What remedies are the Petitioners entitled to, if any?

The third issue was subsequently abandoned.

10 Submissions by Mr Kakembo-Katende

The respondent is a public University established by an Act of Parliament, No.7 of 2001. Under this Act, the respondent makes regulations governing academic work. A copy of this regulation is marked "MUI" and attached to the petition. A similar copy marked "A" is attached to the affidavit of Ms Jayne Nabawanuka, dated 3.3.2003, deponed to in answer to the petition. It is this regulation, setting out the respondent's policy, which is before this Court for interpretation. Under this policy students including the petitioners, are sometimes required to undertake mandatory academic work on the Sabbath Day contrary to their deeply held religious beliefs. Where the  
20 petitioners have been forced to skip such work because of their religious beliefs, it has been to the detriment of their academic progress which has resulted in discontinuation of their respective courses or repetition of courses. The petitioners claim that the implementation of this policy imposes an unconstitutional burden on them to choose between freedom of religion or their constitutional right to education. Extensive dialogue between the petitioners and the respondent seeking lawful exemption from

such policy and accommodation have come to naught – See annexures “A”, “B” and “C”, “F” and “G” to the petition.

The Seventh Day Church in Uganda has also unsuccessfully tried to intervene for and on behalf of the petitioners. The petitioners claim that the regulations and policy are inconsistent with and contravene articles 20, 29(1)(c) and 37 and article 30 of the Constitution regarding their fundamental rights to religious freedom and education. They, however, appreciate the object of the policy which is lawful and valid. It intends to give wider access to education to more people. They are also aware that not everybody’s wishes can be accommodated, nonetheless, they contend that the **effect** of the implementation of this policy violates their said fundamental rights. They, therefore, seek a constitutional exemption from its application to them. They are entitled to believe in the dictates of their faith without any fear or hindrance or reprisal. They should be allowed to practise their religious beliefs without worrying about any adverse repercussions. The effect of the application of the policy is to impede observance of their religious freedoms. This goes against their conscience, yet failure to comply with the policy would mean foregoing their full benefit of the quality education offered at the respondent institution which would infringe their fundamental right to education guaranteed under article 30. Even though the Seventh Day Adventist believers are a tiny minority of about 150 students out of 30,000 students, they are entitled to claim a lawful constitutional exemption from the implementation and effect of the policy.

**The Queen V Big M. Drug Mart Ltd (Others intervening) (1986) LRC 332.** The respondent cannot and is not entitled to claim a lawful derogation

from the petitioners' fundamental rights under article 43, on the ground that they are a minority.

**Submissions in reply by Mr James Wamala –**

The court should not only look at the effect of the policy but should also consider its object. The object or purpose of the policy is to ensure all Ugandans have education – (See the Preamble to Act No.7 of 2001) and to widen accessibility and high quality standard of education to as many students as possible. The policy is thus intended to accommodate the secular nature of the University in view of its diverse background and religions. It has both positive and negative effects. Both should be looked at together. See The Queen vs Big M. Drug Mart LTD (supra).

Positive effects:

- (a) More students have been admitted under the policy.
- (b) The quality of education has improved tremendously.
- (c) The fees charged have substantially and comparatively been reduced after the implementation of policy.
- (d) Revenues have increased, thus enabling the respondent to recruit and engage more skilled lectures and professors.

Negative Effects:

- (a) The policy affects all students of diverse religions cross-board. Moslems work on Friday, Roman Catholics, Moonies and Bahais et al have to work on their holy days. These other religions have not complained. The test is whether the policy substantially burdens religious freedoms. The evidence

adduced by the petitioners shows that their complaint is restricted to the policy of examinations. They have no complaints regarding tests or attending lectures on Saturdays. The policy is restricted to examinations and does not constitute a substantial burden. Examinations are not held on all the Saturdays. They are held only for 3 hours a day on particular Saturdays. There are exceptions to strict observance of the Sabbath.

10 The 1995 Constitution deliberately does not provided for supremacy of God. The number of the Seventh Day Adventist community is about 150 out of 30,000 students. This number should not be allowed to prejudice others. The limitation to their religious freedoms is justified on account of public interest. The Constitution should be looked at as a whole and where there are seemingly conflicting provisions as in this case, the right to education should prevail. The right to belong to a faith is not absolute and should be limited.

### Evaluation of Evidence

20 The guidelines for Constitutional interpretation relevant to this petition are that all the provisions of the Constitution concerning an issue are to be considered together, each one supporting the other so as to give effect to the purpose of the Constitution – see South Dokota vs North Carolina, 192 US 268 (1940) L Ed. 448.

Constitutional provisions are to be accorded a generous and purposive construction especially the part protecting the fundamental human rights and

freedoms. The interpretation should not be legalistic so that fundamental human rights are accorded maximum protection.

Derogations from fundamental and human rights are, however, to be given a narrow and strict construction - Attorney General vs Momoddu Jobe (1984) AC 689.

The standard of proof to be applied is the civil standard on a balance of probabilities. R v Oakes (1987) LRC (Const) 477 at 496 – 497.

- 10 It is incumbent upon the petitioners to show that they are entitled to the remedies they seek on the ground that their fundamental and human rights, have been infringed by the respondent's policy. However, the respondent must show justification for a lawful derogation from such fundamental rights. This must be within the ambit of article 43 (2) – R v Oakes (Supra). Both the purpose and effect of the policy impugned must be examined to determine its validity or invalidity. Purpose and effect are indivisible to the animation of the regulation or law – See The Queen vs Big M Mart (Ltd) (1986) LRC 332 where the applicable test was laid down:

20 “Both purpose and effect are relevant in determining constitutionality: either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature 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's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effect have



often been looked to for guidance in assessing the legislation's object and thus its validity."

Turning to issue No.1 as to whether the respondent's regulations are inconsistent with and are in contravention of articles 20, 29(1)(c) 37, and 30 of the Constitution, these articles read:

**"20 (1) Fundamental rights and freedoms of the individual are inherent and not granted by the state.**

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

10

Article 29(1) Every person shall have the right to –

**"(a) .....**

**(b) .....**

**(c) Freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution."**

20

Article 37 **"Every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others."**

Article 30. **"All persons have a right to education."**

It is material to note that the respondent's policies and regulations are made under the **University and Other Tertiary Institutions Act No.7 of 2001**, with the purpose "to provide for the establishment of the **National Council for Higher education**, its function and administration and to streamline the establishment, administration and standards of **Universities and other institutions of Higher Education in Uganda** and to provide for other related matters."

10 The purpose and effect of the Act and regulations in as far as this petition is concerned are to be construed against the background of article 7 of the Constitution which proclaims:

**"7. Uganda shall not adopt a state religion."**

This article therefore frees Ugandans from official dogma and leaves them to worship anything or nothing within articles 20, 29(1)(c), and 37. These stipulate that religious freedom has to be practiced "in a manner consistent with this Constitution" and "in community, with others." It thus gives religious equality but not immunity from observance of the law. Religious freedom is, therefore, not an absolute fundamental human right.

20 Uganda therefore, being a secular state, means that the respondent acting under Act No.7 of 2001 and the regulations thereunder is not circumscribed by the variety of religious beliefs, obtaining in the institution as deponed by the Vice Chancellor in his affidavit dated 7<sup>th</sup> May 2003.

The following salient paragraphs of this affidavit suffice to indicate the steps taken by the respondent in its implementation of the policy:

“4. The practice of scheduling lectures tests and or examination on any day of the week from 7.00 a.m. to 10.00 p.m. was adopted as University policy in 1997 bearing in mind the secular nature of the University and in an attempt to make University education accessible to a larger students’ population within the University’s limited physical infrastructure in accordance with Government Policy.”

10 7. The University has made alternative to such as of its students who many not be able to attend lectures and or examinations on a given day or time of the week in the following ways:

(a) Students are offered an opportunity, at the time of admission, to change course and or subjects in light of the provided timetables. The new students (freshers) are granted an option, where possible, to offer courses with the most convenient timetables.

20 (b) Students who may be unable to sit an examination held on weekends or at any time of the week in a particular semester are allowed to apply to their respective deans/directors to retake the course and or examination when it is next offered.

(c) Students who are unable to attend lectures and or tutorials held on a particular day or time of the week are not restrained from attending the same lectures/tutorials with students of different

programmes held on another day or at another time during the same semester.

10 9. The University cannot offer special examinations to those students who are unable to attend examinations on particular days due to religious considerations or for any other reason because such practice would create a variance in academic standards and further lead to an increase in the cost of education. The University may not be able to organize examinations within the available period and the policy of special examinations would lead to difficulties in synchronising examinations results.

20 10. Furthermore, the University is not in a position to implement the Makerere Seventh Day Adventists Students Association's recommendation to confine Seventh Day Adventist Students in a particular place for a specified period of time on Saturdays on which examination are held and to offer the said examinations to such students after their Sabbath as such act may be construed as sectarian, tortuous impractical, highhanded and unconstitutional. The University would also be compelled to offer the same treatment to various religious groups e.g. Muslims, Catholics, Anglicans, Bahais, Hindus etc. all whose members attend the University."

It is clear from the above that the respondent made efforts to accommodate the petitioners as much as possible. I consider that to demand more would mean that the constitutional guarantee would not be a protection of the fundamental rights and freedoms of worship and education of the petitioners but a denial of the exercise of the authority of the respondent, to freely exercise its rightful mandate under the Constitution and the Act.

The petitioners have a corresponding burden to obey the law and conform to policies that are in the public interest under articles 29(1)(c), 37 and 43(2).

10

In Hamilton V Regents, 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343, the court unanimously held that one attending a state-maintained University could not refuse attendance on courses that offended his/her religious scruples. Attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. It was observed that the need for high education and the duty of the state to provide it as part of the public educational system, were part of the democratic faith of the country. The decision was not overruled. I adopt it.

20

Furthermore, the petitioners in this case, were warned of the respondent's policy before joining the Institution – See Annexure “A” to the affidavit of Ms Jane Nabawanuka, the Assistant Secretary (Legal) Makerere University, deponed in support of the answer to the petition. It is titled “**Makerere University Academic Registrar’s Department Freshers Joining Instructions 1999/2000 Academic Year.**”

At the bottom of page 11 of these instruction is a note in bold letter reading”

**“Students are informed that University Programmes may run seven days a week. Since the University has students and members of staff from various religious backgrounds the University may not need the interests of a particular group, particularly in the crucial areas of attendance of lectures and/or examinations. You are therefore urged to respond to the academic work in the faculty even if it takes place on the respective days of worship.”**

10

At the bottom of these instructions at page 16 is a reminder that:

**“This and other information is contained in the University Prospectus. Each student is strongly advised to buy oneself a copy.”**

This was ample warning.

It, however, emerged through counsel’s submissions, that University education tended to be synonymous with Makerere University, which should not be the case.

20

The right to secure such education in institutions not maintained by the state is unquestioned. These are abundant including some, which specifically cater for particular religious faiths. The only problem with the respondent is that, historically, it has been the ‘Ivory Tower’ for decades. Things have, however, changed. It is education that should be sought after and not the name of the University, if the petitioners find themselves unable to sacrifice a little at the respondent institution.

In my view, the respondent has tried as much as possible to accommodate and minimise the infringement on the petitioner's rights. No constitutional exemption can be allowed.

I would, in conclusion, hold that the respondent's policy is not in any way inconsistent with articles 20, 29(1) (c) and 37 and 30 of the Constitution. No constitutional exemption can be allowed. Issue No. 1 would be in the negative.

10

Concerning issue No.2 as to whether the respondent is entitled to claim a lawful derogation under article 43 of the Constitution of Uganda, this article stipulates the general limitation on the fundamental human and other rights enshrined in Chapter 4 of the Constitution, thus:

**“43. (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.**

**(2) Public interest under this article shall not permit –**

20

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.”

30

Having found no inconsistency between the respondent's policy and the impugned articles, the respondent does not have to seek to be covered under a lawful derogation under article 43 above.

Issue No.2 would also be in the negative.

Issue No.3 was abandoned.

Issue No.4 concerns the remedies the petitioners would be entitled to in view of what I have stated above, they are entitled to none.

In the result I would dismiss the petition and order each party to meet its own costs.

Dated at Kampala this 24<sup>th</sup> day of September 2003.

  
A.E.N. MPAGI-BAHIGEINE  
JUSTICE OF APPEAL



THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ.  
HON. JUSTICE A.E.N. MPAGI BAHIGEINE, JA.  
HON. JUSTICE J.P. BERKO, JA.  
HON. JUSTICE A. TWINOMUJUNI, JA.  
HON. JUSTICE C.N.B. KITUMBA, JA.

10

CONSTITUTIONAL CAUSE NO. 01 OF 2003.

1. DIMANCHE SHARON]
2. MOREIKA GILPHINE]
3. NANSEREKO LUCK ].....PETITIONERS

V E R S U S

THE MAKERERE UNIVERSITY.....RESPONDENT

20

JUDGMENT OF JUSTICE J.P. BERKO, JA.

I have had the benefit of reading, in draft, the judgments prepared by the other learned Justices. I agreed with their conclusions that there is no merit in this petition.

30

In my view, to accede to the prayers of the petitioners and make the declarations they are seeking would place an intolerable burden on the University in perpetuity and make the smooth administration of the institution difficult. There is no way the University would know the number of interest groups that would make similar demands for special treatment in the future.

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I would also dismiss the petition. I agree with the orders as to costs proposed.

Dated at Kampala this 24<sup>th</sup> day of September 2003.

~~J.P. Berko~~  
Justice of Appeal.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CORAM: HON. LADY JUSTICE L.E.M. MUKASA-KIKONYOGO,DCJ  
HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, JA  
HON. MR. JUSTICE J.P. BERKO, JA  
HON. MR. JUSTICE A. TWINOMUJUNI, JA  
HON. LADY JUSTICE C.N.B. KITUMBA, JA

10

CONSTITUTIONAL PETITION NO. 1 OF 2003

1. DIMANCHE SHARON ]  
2. MOKEIRA GILPHINE ].....PETITIONERS  
3. NANSEREKO LUCK ]

VERSUS

MAKERERE UNIVERSITY].....RESPONDENT

20

JUDGMENT OF C.N.B. KITUMBA, JA

This petition was filed in this court under **Article 137 of the 1995 Constitution and The Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992 Directions 1996, Legal Notice No 4 of 1996.**

It was filed jointly by three petitioners namely: Dimanche Sharon, Moreika Gilphine and Nansereko Luck (hereinafter to be referred to as the first, second and third petitioners respectively) against Makerere University, which shall hereinafter be referred to as the respondent.

30

The petitioners sought the following declarations:-

- "1. The Makerere University policies and regulations of scheduling lectures, mandatory tests and examinations on the Sabbath day, is inconsistent with and in contravention of Articles 20, 29(1) (c), 30 and 37 of the Constitution in the

case of the Petitioners who practice the Seventh Day Adventist Christian faith.

2. The time limitation of 30 days introduced under Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996 is in contravention of Article 137 of the Constitution.
3. Makerere University violated the petitioners' constitutionally guaranteed rights under Articles 20, 29(1) (c), 30 and 37 of the Constitution."

They prayed this court to grant an order of redress by awarding them general and exemplary damages for the infringement of their constitutional rights. They also prayed for the award of costs of the petition.

The background to the petition is as follows:

The three petitioners are students at the Respondent University. They believe and practice the Seventh Day Adventist Faith. A cardinal tenet of their faith is that the believers do not engage in any form of work on the Sabbath day, which starts from sunset on Friday and ends sundown on Saturday of every week. God commands them to rest on that day. If the believers do any work on that day it is disobedience to God and he condemns them to hell.

The respondent is governed by the **Universities and Other Tertiary Institutions Act (Act No. 7/2001)** hereinafter to be referred to as the Act. According to the respondent's policy, mandatory lectures, tests and examinations are conducted during all the seven days of the week. There are regulations made under the authority of the Act to that effect. The petitioners were informed of the said policy before joining the Respondent University. On the strength of those regulations the respondent conducts lectures, tests and examinations on Saturday which is a Sabbath Day for the petitioners and other students of the same faith. The petitioners regard the attendance of lectures and doing tests and exams on Saturdays as work. When

lectures are held on Saturday the respondents miss attending but catch up by copying notes from students of other faiths. However, the tests and examinations are mandatory and if a student misses them he/she is obliged to retake them. When a student has missed too many tests or exams she or he may be discontinued from the Respondent University or may be compelled to repeat a year.

The petition is as follows:

10 1. **Your Petitioners are all adults of sound mind, and students at Makerere University. They are members of the Seventh Day Adventist Christian Church and practice their faith and religion in accordance with their beliefs and the doctrine and dictates of the Seventh Day Adventist Christian faith. They have an interest in and are affected and by the following matters being inconsistent with and in contravention of the Constitution of the Republic of Uganda, whereby your Petitioners are aggrieved.**

20 (a) **The Makerere University policies and regulations made under the authority of the University and Other Tertiary Institutions Act (Act 7 of 2001), which policies and regulations require students to attend classes, and take mandatory tests and examinations on any day of the week (including the Sabbath Day in case of your petitioners who practice the Seventh Day Adventist Christian faith), irrespective of the students' religious affiliations is inconsistent with and in contravention of Articles: 20, 29(1) (c), 30 and 37 of the Constitution of Uganda.**

30 (b) **The time limit of 30 days within which a Petition can be presented to this Honourable Court for Interpretation of the Constitution under Article 137 of the Constitution, which is set out in Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996 is inconsistent with and in contravention of Article 137 of the Constitution of Uganda.**

40 (c) **Makerere University scheduled the taking of mandatory examinations for the subject "Introducing Law" (for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners) and "Legal Aspects of Planning" (for the 3<sup>rd</sup> Petitioner) on Saturday, the 25<sup>th</sup> of January 2003, which is the Sabbath Day for your Petitioners and on which day they cannot by reason of their faith and beliefs under**

the Seventh Day Adventist Christian faith, take examinations. For the same reason, the 3<sup>rd</sup> Petitioner was forced to miss a scheduled examination in the course of "Civil Procedure" in 2002 and therefore could not graduate, and was on this basis required to repeat the year. By reason of the foregoing, your Petitioners have suffered tremendous hardship and injustice and are entitled to legal redress.

10

2. Your Petitioners state the following reasons in support of this Petition namely:

(i) Makerere University is a Public Institution, and is obliged under Article 20 of the Constitution of Uganda to respect and uphold the inherent and fundamental rights and freedoms (which include the religious freedoms) of the Petitioners as established under the Constitution.

20

(ii) The Makerere University Policy of scheduling mandatory classes, tests and examinations on the Sabbath day infringes on the fundamental rights and freedoms of the Petitioners to practice their religion and manifest their Sabbath practice, and the participation in their beliefs of the Seventh Day Adventist Christian faith as guaranteed under Article 29(1) (c) of the Constitution.

30

(iii) The effect of these policies of Makerere University of scheduling mandatory classes, tests and examinations on the Sabbath Day, imposes an unconstitutional burden on your Petitioners, by virtue of their faith and undermines their constitutionally guaranteed right to Education under Article 30 of the Constitution.

40

(iv) The University policy of scheduling classes, mandatory tests and examinations on the Sabbath day, imposes an unconstitutional burden and hardship on your Petitioners' constitutionally guaranteed right to practice, profess, maintain and promote your Petitioners' religion in community with others under Article 37 of the Constitution of Uganda.

(v) Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992, Directions 1996, in requiring that all Petitions must be brought within 30 days of the injury complained of in the

Petition, imposes an unconstitutional limitation on the right to Petition this Honourable Court for interpretation of the Constitution and redress (where appropriate) as established under Article 137 of the Constitution.

10 (vi) The legal effect of Rule 4(1) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules 1992, Directions 1996 is an indirect and unconstitutional amendment of Article 137 of the Constitution of Uganda to introduce a time limit within which a Petition can be presented to this Honourable Court.

20 (vii) The inflexible conduct and attitude of Makerere University with regard to your Petitioners who practice the Seventh Day Adventist Christian faith, has occasioned severe hardship, loss and detriment to your Petitioners, for which harm they are entitled to declarations, legal redress and appropriate compensation in damages.

When the petition came up for hearing counsel for both parties agreed to abandon declaration No. 2 of the declarations that were being sought. This was in view of this court's ruling in **James Rwanyarare and 9 others Vs Attorney General Constitutional, Miscellaneous Application No. 3 of 2002**. Paragraphs V and VI of the petition, which concerned the same matter, were also abandoned.

30 The petition is supported by the affidavits of the three petitioners. In their affidavits each of the petitioners avers how she missed exams set on Sabbath Day. In each instance, the University authorities were approached and the petitioners explained that they could not sit exams on a Saturday but they were told earlier either to sit the exams or observe their Sabbath and re-sit the exam at a later date. No alternative arrangements could be made for them. The first petitioner had missed a number of exams and had to do the Law Degree in five years instead of four. She missed going to the Law Development Centre and she could not be employed. The second petitioner avers  
40 that repeating a year would mean extra costs to her widowed mother

who has other siblings to support. The third petitioner states that she has to pay extra fees and that retaking exams was a great inconvenience to her as she had to attend lectures. Sometimes the timetable would clash and she would have to choose to attend some lectures and leave out others. The 3<sup>rd</sup> Petitioner is an executive member of Makerere University Seventh Day Students Association and is aware that the association has tried to negotiate with the Respondent University but the latter has been adamant to accommodate the students in any way.

10

The petition is also supported by the affidavits of Deborah Nassanga, Esther Irankunda and Fred Lulinaki, the chairperson of the Makerere University Seventh Day Association. He avers that he had been actively involved in dialogue with the administration of the Respondent University in an effort to change its policy on setting exams on the Sabbath Day. No success had been achieved. Pastor Dr. John B. Kakembo, the executive secretary to the Seventh Day Adventist Church in Uganda, swore an affidavit in support of the petition. In his affidavit Dr. Kakembo reiterates the unaccommodating attitude of the administration of the Respondent University. He explains the religious belief of the Seventh Day Adventist about the Sabbath Day.

20

In answer to the petition the respondent admits that the Petitioners are its students and requires them to attend classes lectures, tests and examinations on any day of the week. The respondent denies that the requirement is inconsistent with articles 20, 29(1) (c) 30 and 37 of the Constitution.

30

The respondent denies that the scheduling of classes tests and examinations on Saturdays infringes on the fundamental rights of the petitioners and imposes an unconstitutional burden on them.



The respondent states that it is a secular institution. The petitioners were admitted subject to the instruction that the programme may run seven days a week. The University has students and staff of various religious backgrounds, it can not meet the interests of a particular group particularly in the areas of attendance of lectures and examinations.

10 The respondent denies that there is any injustice or hardship caused to the petitioners and that the petitioners are not therefore entitled to any redress sought.

The answer to the Petition is supported by the affidavit of Jayne Frances Nabawanuka Assistant Secretary (legal) of the Respondent. There are additional affidavits in support of the answer to the petition deponed by Professor John Ssebuwufu, the Vice Chancellor and Denis Fred Okema , a student at the Respondent University.

The following issues were framed and agreed upon for determination by this court:

- 20 **"(1) Whether the Respondent's regulations are inconsistent with and in contravention of Articles 20,29(1) (c), 37 and 30 of the Constitution of Uganda in the case of your Petitioners?**
- (2) Whether the Respondent is entitled to claim a lawful derogation under Article 43 of the Constitution of Uganda?**
- (3) Whether Rule 4(1) of the Fundamental Freedoms (Enforcement Procedure) Rules 1992, 1996 are inconsistent with Art. 137 of the Constitution of the Republic of Uganda?**
- 30 **(4) What remedies are the Petitioners entitled to, if any?"**

Mr. Kakembo Katende, Mr. Fredrick Sentomero and Mr. James Sempala appeared for the Petitioners. Mr. Denis Wamala and Mr. John Kanyemibwa represented the respondent.

On issue No. 1, Mr. Kakembo Katende contended that the respondent's policy of conducting lectures, tests and exams on

Saturday, which is the Sabbath Day puts the petitioners in a dilemma. They have to choose between advancing their education at the cost of abandoning their deeply held convictions. On the other hand, uphold their religious convictions and prejudice their education and possibly their future. He submitted that this imposes a big unconstitutional burden on them to choose between their freedom of religion and their freedom of education. Counsel referred to the affidavit evidence of Fred Lulinaki and Pastor John B. Kakembo which show that extensive dialogue had taken place between the two parties with a view to accommodating the petitioners with regard to their Sabbath worship. The respondent had refused to make any concession on the grounds that it is a secular institution and can not, therefore, make special arrangements for different religious groups. This in counsel's view is not tenable because the respondent is a public institution.

Mr. Kakembo Katende submitted that in order to determine the constitutionality of these regulations one has to look at their purpose or effect. For that submission, counsel relied on **Zachary Olum Vs Attorney General Constitutional Petition No. 6 of 1999 (unreported)** and **Salvatori Abuki Vs Attorney General Constitutional Appeal No. 2 of 1997 (unreported)**.

Counsel agreed with the evidence contained in paragraphs 3 and 4 of Prof. John Ssebuwufu's affidavit dated 7-5-2003 in which he states that the policy was to bring access of university education to many people. Because of that the programme drawn up covered every day of the week. He submitted that the petitioners do not suggest that the policy was made to undermine their right to religion. He contended, however, that the effect of implementing the regulations infringes on their rights.

On that basis the petitioners are claiming a constitutional exemption from the application of the policy of scheduling mandatory activities on a Sabbath Day. He submitted that when the effect infringes on the petitioners' rights he can use it to challenge the law. In support of this submission, counsel relied on **Big M Drug Mart Ltd. 1986 LR C 332**. Counsel further contended that justice requires that provisions touching human rights should be interpreted liberally and broadly in favour of those for whom the right has been established. It is the court's duty to do so.

10

Learned counsel contended that the respondent's policy, which requires the petitioners to participate in mandatory activities, is contrary to articles 29(1) (c) and 37 of the constitution. According to counsel, article 37 is supplementary to the right guaranteed under article 29(1) (c). Article 37 gives the petitioners the right to belong to enjoy, practice, profess, maintain and promote their creed or religion in community with others. In counsel's view the essence of freedom of religion is the right to entertain such beliefs and the right to declare such beliefs openly without fear of reprisals. He submitted that the respondent's policy has the effect of forcing the petitioners to go against their conscience and it violates their freedom of religious thought and practice.

20

Counsel implored this court to follow **Sherbert V Verner No 374 U.S 398 USSC (Vol. 83 AP.1790) 1963**. In this case the petitioner succeeded in having the state law which denied her unemployment benefits declared unconstitutional. She was a Seventh Day Adventist and could not work on Saturday i.e Sabbath Day.

30

Counsel submitted that the court does not have to go into the attractiveness or otherwise of one's beliefs. The court has to consider the sincerity of one's beliefs. For that submission he relied on **Re Chikweche [1995] 2 LRC 93**.

Regarding article 20 he submitted that fundamental human rights and freedoms are inherent and are not granted by the state. According to article 20(2) the rights are to be respected by the state and all others. The respondent is bound by the above provision.

10 Counsel contended that the respondent's answer to the petition that it is a secular institution is not tenable. It is inconsistent with article 30 of the constitution, which provides for the petitioners' right to education. Section 28 of the Act provides that admission to public university is open to all qualified citizens of Uganda without discrimination. The right to education at the Respondent University does not mean just the right to admission. It also means the right to enjoy favourable conditions in which one can accomplish one's educational aspirations.

20 In reply, Mr. Denis Wamala, learned counsel for the respondent, agreed with the petitioners counsel's submission on the legal standard of constitutional interpretation as laid down in **Zachary Olum (supra)** that the purpose and effect has to be considered by the court. He, however, disagreed with counsel's submission that in the instant petition only the effect of the regulations should be looked at and its purpose should be ignored. Counsel distinguished **The Queen Vs Big Drug Mart (supra)** that in that case the purpose and effect was looked at. He further submitted that during constitutional interpretation all the provisions of the Constitution must be considered together, and the Constitution must be looked at as a whole.

30 He argued that articles 20, 29(1) (c) and 30 must be considered together and that in interpreting the Constitution the court has to take into account the **National Objectives and Directive Principles of State Policy**. Counsel argued that according to principle XIV (b) the state has a duty to ensure that all Ugandans enjoy rights and

opportunities and access to education. Principle XVIII (ii) provides that the state is obliged to take appropriate measures to avail every citizen equal opportunity to attain the highest standard of education possible. According to article 30 of the Constitution, all persons have a right to education. Section 3 of the Act provides that its object is to widen the accessibility of high quality standard institutions to students wishing to pursue higher education course.

10 According paragraph 4 of the affidavit of Prof. Ssebuwufu the Vice Chancellor, dated 7/5/2003, the policy was adopted taking into account the secular nature of the respondent and to make university education accessible. The students are not barred from attending lectures, which they miss. The exams are spread in two parts and they normally last three hours. The Respondent University issues draft timetables and the petitioners are required to raise objections before the final timetable is drawn.

20 Mr. Wamala criticised counsel for the petitioners for highlighting the negative effects of the policy and ignoring the positive ones. However, in counsel's view, both the negative and positive effects have to be looked at before determining whether the policy is in contravention of the Constitution. He submitted that in order to determine whether the effect negatively impacts on the provision of the Constitution so as to render it unconstitutional a substantial burden principle must be applied. In support of this submission he relied on the South African case **Christian Education S.A V The Minister of Education of the Government of RSA (1999) (9) BCL 951 SE.**

30 Counsel contended that whereas the petitioners complain in paragraph 1(a), 2(2) and (4) of the petition about all academic activities on the Sabbath Day and pray that they be declared unconstitutional, their evidence concerns only exams.

Mr. Wamala argued further that the doctrine relied upon by the petitioners is not absolute that there are exemptions. God requires people to do good on Sabbath. Using four Sabbaths in an academic year does not constitute a substantial burden.

Counsel argued that the rights specified in article 29(1) (c) and 37 are not absolute. They are subject to limitation in a manner consistent with the Constitution. Under article 30 all persons have a right to education and it is not only the petitioners. Article 20(1) (2) should  
10 be read in the same manner. He submitted that the respondent had upheld the right to education of many people in view of article 30.

I will now deal with the issues and consider them in the order they are set. However, before doing so I must state that the petitioners have the burden to establish a prima facie case that their constitutional rights are infringed by the respondent's policy. If they succeed, then the burden shifts on to the respondent to prove that its policy of scheduling mandatory lectures, tests and examinations on the Sabbath Day is not inconsistent with the Constitution in as far as  
20 their freedom to belong to and to practice their religious faith is concerned. I have also to address my mind to the principles of constitutional interpretation. Counsel for both parties have correctly stated that the law in constitutional interpretation is that the court has to look at the purpose and the effect of the policy complained of.

As stated in the **Queen Big M. Drug (supra)**

**"Both purpose and effect are relevant in determining constitutionally; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation."**

30

This means that if the purpose of the Respondent University regulations or the effect of implementing the regulations violates articles of the Constitution, then such regulations should be declared unconstitutional. Counsel's submission is also correct that, it is the

duty of this court to construct broadly and liberally fundamental human rights provisions in favour of the people for whom the rights have been provided for by the constitution. In addition to that, the provisions of the constitution have to be read together. As stated by Manyindo DCJ, as he then was, at p.17 of his judgment in **Major General David Tinyefuza V Attorney General Constitutional Petition No. 1 of 1996** (unreported).

10 **"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."**

I now consider the issues raised for determination in this petition. The first issue is whether the respondent's regulations are inconsistent with and in contravention of articles 20, 29(1) (3) 37 and 30 of the Constitution as far as the petitioners are concerned. It is necessary to reproduce the articles in issue, which provide as follows:

20 **"20. (1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.**

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

30 **29 (1) Every person shall have a right to-**  
**(c) Freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;"**

**30 All persons have a right to education.**

40 **37 Every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution language, tradition, creed or religion in community with others."**

As stated earlier, the Constitution must be interpreted as one integrated whole. Reference must, therefore, be made to the relevant provisions of the **National Objectives and Directive Principles of State Policy** when interpreting the articles of the Constitution, which the petitioners contend, have been infringed.

In this petition principles XIV (b) and XVIII (ii) are relevant and read as follows:

10     **"XIV     The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that-**  
    **(a).....**

**(b) All Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food, security and pension and retirement benefits.**

**and**

20     **XVIII(ii). The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible."**

When all are considered together, I find that the following two issues emerge. Firstly, it is not only the petitioners who have a right to education or to religion. Secondly, the freedom to practice one's religion provided by article 29(1) (c) *must be in a manner consistent with the Constitution*.

30     It should also be noted that there is no state religion in Uganda Article 7 of the Constitution reads:

**"Uganda shall not adopt a state religion"**

I agree with the statement in **Re Chikweche (supra)** that in a case of this nature the court should not concern itself with the validity or attractiveness of the petitioner's beliefs, but only with the sincerity of the believer. I am satisfied that the petitioners are sincere in their beliefs and I will not indulge into the discussion of the petitioners'



faith which has been ably explained in the affidavits of Dr. Kakembo and the annextures attached thereto.

However, according to the evidence adduced the respondent is a secular institution, which provides university education to students of different religious beliefs. The lecturers, too, belong to different religions. The petitioners were clearly informed before joining the Respondent University that the programme would run seven days of the week.

10

This is clearly put in the **Freshers Joining Instructions 1999/2000 Academic year** which is Annexure 'A' to the affidavit of Jayne Frances Nabawanuka which was sworn in support of the answer to the petition. It is stated thus:

"N.B. The last two weeks of a semester are for conducting University Examinations.

20

**Students are informed that University Programmes may run seven days a week since the University has students and members of staff from various religious backgrounds the University may not meet the interests of a particular group, particularly in the crucial areas of attendance of lectures and/or examinations. You are therefore urged to respond to the academic work in the Faculty even if it takes place on the respective days of worship."**

30

In my view, the petitioners joined the Respondent University well knowing what was expected of them. I cannot appreciate Mr. Kakembo Katende's argument that they are being coerced to choose between their faith and their education.

I take note of paragraph 5 of Ms Esther Irankunda's affidavit deponed to on 22/5/2003 in which she avers that during the time she was at the Respondent University, tutorials were held on Sunday but people of other Christian faiths did not complain. The same students used to go to the library, shop and wash clothes

whereas the Seventh Day Adventist students could not do the same. In my view, the fact that people of other Christian faiths did not complain with regard to tutorials does not mean that the respondent's policy did not affect them. They were indeed affected but had to make the required sacrifice as they chose to pursue their education at the Respondent University.

I would like to note that the Respondent University is not the only University in the country. The petitioners freely chose to go to  
10 Makerere University and have, therefore, to abide by the conditions. The right to education provided for by article 30 of the Constitution does not in any way mean the right to attend the Respondent University at the students' own terms.

Regarding article 20 of the Constitution, the case for the petitioners is that the respondent is a public institution, which derives its powers to make its regulations under sections 38, 40, 41 and 78 of the Act. Its regulations contravene article 20 of the Constitution. I disagree. The objects of the Act are set out in Section 3 as follows:

20 " 3 The objects of this Act are to establish and develop a system governing institutions of higher education in order to equate qualifications of the same or similar courses offered by different institutions of higher education while at the same time respecting the autonomy and academic freedom of the Institutions and to widen the accessibility of high quality standard institutions to students wishing to pursue higher education courses"(emphasis mine)

In my view, the evidence adduced especially in the affidavit of  
30 Professor John Ssebuwufu shows that the respondent policy is in strict compliance with the Constitution. In his affidavit of 7<sup>th</sup> May 2003 he avers, *inter alia*, that the practice of scheduling lectures, tests and examinations on any day of the week from 7.00 am to 10.pm has yielded the following advantages:

- (a) university education has been made accessible to a large number of students including evening students,

- (b) there has been an increase of the intake of privately sponsored students,
- (c) the variety of courses offered has increased,
- (d) the University has generated more revenue and
- (e) the cost of University education for students has become cheaper.

The same witness also depones that if the policy is scrapped, there would be negative effects. Some of those effects are that the cost of university education would go up, duration of courses would be prolonged, the respondent would not be able to get some highly qualified lecturers and some students who qualify for university education, would not be admitted because of the limited physical facilities. All these negative effects, in my view, would prejudice the enjoyment of the right to education of others.

He, further, avers that the students are offered the opportunity on admission to change courses or subjects in the light of provided timetable. The students who are unable to take the exams on weekends in any particular semester are allowed to apply to their respective deans and retake the exam or course when the same is next offered. The students who cannot attend lectures or tutorials on weekends are free to attend the same with students on a different programme held on another day or another time during the semester.

I find that the petitioners' are asking the respondent to practice discrimination on the basis of religious beliefs, which is contrary to Article 21(2) of the Constitution. It should be appreciated that the petitioners' rights are not absolute. Article 43 (1) of the Constitution clearly provides:

**"43 (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the**

fundamental or other human rights and freedoms of others or the public interest.

The petitioners have failed to establish a prima facie case that the respondent's policy is inconsistent with articles 20, 29(1) (c) and 30 and 37 of the Constitution.

I would therefore answer the first issue in the negative.

10 I now turn to issue No. 2 whether the respondent is entitled to claim a lawful derogation under article 43 of the Constitution. From what I have discussed on the first issue the respondent's policy is not inconsistent with any article of the Constitution. The question of lawful derogation does not, therefore, arise. I would answer this issue in the negative.

I make no finding on issue No. 3, which, was abandoned at the beginning of the trial.

20 Issue 4 concerns what remedies the petitioners are entitled to, if any. Obviously the petitioners are not entitled to any remedies. I would answer this issue in the negative.

Regarding costs, the petitioners are students. From their affidavit evidence they are of humble means. As they brought this petition to this court for determination of what they genuinely believed to be their rights, I would order that each party bears its own costs.

The petition lacks merit. I would, therefore, dismiss it.

30

Dated at Kampala this 24<sup>th</sup> day of September 2003.

  
C.N.B. KITUMBA,  
JUSTICE OF APPEAL