

The appellant, Simon Kyamanywa; and another person were tried and convicted by the High Court on the first count of an indictment of two counts of robbery contrary to sections 272 and 273(2) of the Penal Code. The particulars of the count on which they were convicted were that the appellant, Simon Kyamanywa, and his co-accused, Sunday Joseph, on or about the 26th day of May, 1994, at Kijujubwa Village, in Masindi District, robbed September Mathias of one NIA Radio Cassette, model CRC 3 OOT KY II and one torch and at or immediately before or immediately after the said robbery, threatened to use a deadly weapon to wit a gun on the said September Mathias. The appellant and his co-accused were sentenced to death. The co-accused separately appealed to the Court of Appeal which substituted a conviction for simple robbery for the one of capital robbery. The appellant's appeal to the Court of Appeal against his conviction also succeeded. His conviction for robbery, contrary to sections 272 and 273(2) of the Penal Code was quashed and the sentence of death set aside. The Court of Appeal substituted a conviction of robbery contrary to Sections 272 and 273(1)(b) for the one of robbery for which he had been convicted by the High Court. The Court of Appeal

JUDGMENT OF THE COURT:

{Appeal form the decision of the Court of Appeal in Kampala [Kato - JA, Engwa - JA and Twinomujuni - JA] dated 16th March 1999, in Court of Appeal Criminal Appeal No. 5 of 1998}

UGANDA:
RESPONDENT

AND

KYAMANYWA SIMON:
APPELLANT

BETWEEN

CRIMINAL APPEAL NO. 16 OF 1999

(CORAM: ODER - JSC, TSEKOKO - JSC, KAROKORA - JSC, KANYEIHAMBA - JSC, MUKASA-KIKONYOGO - JSC)

AT MENGO

IN THE SUPREME COURT OF UGANDA

THE REPUBLIC OF UGANDA

3.4.200

Section 6(3) of the Judicature Statute 1996, provides:-

In essence the objection is that the appeal is incompetent because the appellant has no right of appeal to this Court on the ground set out in his Memorandum of appeal. The appeal is not properly before this Court.

When the appeal was called for hearing, Mr. Charles Ogwal Olwa, Principal State Attorney, appearing for the State respondent, took a preliminary objection to the appeal, and prayed that the appeal should be struck out. Mr. Joseph Zagyenda appearing for the appellant opposed the objection. The learned Counsel then made their arguments on the objection. We postponed our ruling on the same and asked both the parties to proceed with their respective submissions on the merit of the appeal. We indicated that we would give our ruling on the objection in our judgment. We now proceed to do so.

(b) *Sentence be set aside.*

(a) *The appeal be allowed.*

"1) *The decision of the Court of Appeal that the appellant be sentenced to receive 6 strokes of the cane is in conflict with the provisions of the 1995 Constitution and is therefore, illegal. It is proposed to ask Court for an order that*

follows:-

The appellant has now appealed to this Court against the sentence of six strokes of the cane. The only one ground of appeal is set out in the Memorandum of Appeal as

was withdrawn with the leave of this Court. The Court of Appeal also ordered that he should undergo Police supervision for three years after serving the term of imprisonment. The co-accused, Sunday Joseph, made a separate appeal to this Court. (Criminal Appeal No. 5 of 1998). On 8-9-99, that appeal sentenced the appellant to a term of imprisonment of six years and six strokes of the cane.

Section 274A of Penal Code by virtue of which the Court of Appeal sentenced the appellant to six strokes of the cane does not specify or fix the number of strokes of the cane to which a person must be sentenced on conviction under sections 273 and 274. It does not say, for instance, that "..... any person who is sentenced to a term of imprisonment under the provisions of section 273 or section 274 of this Code, shall, in addition thereto, be sentenced to X strokes of the cane of corporal punishment." The words underlined are our addition for purposes of explaining the point. If the section provided for the number of strokes of the cane which a Court must impose, then the

"108(1) Only one sentence of corporal punishment shall be imposed at one time. Such corporal punishment shall be inflicted with a rod or cane to be approved by the Minister. The sentence shall specify the number of strokes which shall not exceed twenty four."

Corporal punishment is not defined by the Penal Code Act. *The Shorter Oxford Dictionary 1973 Vol I* defines it as: "Punishment inflicted on the body, Now confined to flogging." *The Concise Oxford Dictionary* defines it as: "Punishment inflicted on the body especially by beating." The provisions of section 108(1) of the Trial on Indictment Decree appears to be consistent with this definition. The section indicates what weapon or instrument should be used in inflicting corporal punishment and how it should be meted out. It states:

"Without prejudice to anything contained in any written law, any person who is sentenced to a term of imprisonment under the provisions of section 273 or section 274 of this Code, shall, in addition thereto, be sentenced to corporal punishment."

In the instant case, the appellant is appealing against a sentence of corporal punishment imposed on him by the Court of Appeal. Sentence of corporal punishment is provided for by section 274 A of the Penal Code which states:

"In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order on a matter of law not including the severity of sentence."

For the respondent, Mr. Charles Ogwal Olwa, Principal State Attorney, opposed the appeal. He submitted in his reply that because the Constitutional Court has not yet declared corporal punishment unconstitutional, corporal punishment is legal under section 274A of the Penal Code Act. Only the Constitutional Court under article 137(3)

In his submission on the merit of the appeal, Mr. Joseph Zagyenda, the appellant's learned Counsel, contended that the punishment of six strokes of the cane imposed on the appellant, is in conflict with article 24 of the Constitution. Caning is a form of torture, cruel, inhuman and degrading punishment. We should therefore, declare it to be unconstitutional, and set a side the appellant's sentence to corporal punishment of six strokes of the cane.

For the above reasons, we see no merit in the respondent's preliminary objection to this appeal. It is therefore, overruled.

The appeal is competent for another reason. The appellant is not appealing against severity of sentence. He is appealing against the legality (or constitutionality) of the sentence. He contends that the sentence of corporal punishment to which he was sentenced by the Court of Appeal is illegal because it is in conflict with article 24 of the Constitution. It is contended that the punishment is a form of torture, is cruel, inhuman and degrading. This is a matter of law not including severity of sentence. It is a condition required by section 6(3) of the Judicature Statute for a person to appeal to the Supreme Court against sentence.

As it is, the number of strokes of the cane applicable is left to the discretion of the trial Court. Section 108(1) of the Trial on Indictment Decree sets out the maximum within which that discretion may be exercised. The limit is 24 strokes. In the circumstances, the sentence of corporal punishment by strokes of the cane to which the Appellant was sentenced by the Court of Appeal is one which is not fixed by law for purposes of section 6(3) of the Judicature Statute. For that reason, this appeal is competent.

This means that it is the Constitutional Court which has the original jurisdiction on matters of interpretation of the Constitution. It also has the original jurisdiction in cases where a person seeks a declaration that an Act of Parliament is inconsistent with a provision of the constitution. This is provided for in article 137(3), which states:-

"137 (1). Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court".

The jurisdiction for interpretation of the Constitution in the first instance is the preserve of the Constitutional Court under Article 137(1) of the Constitution which says

This appeal requires us to decide whether, and declare that, corporal punishment is inconsistent with article 24 of the Constitution. The constitutionality of corporal punishment is therefore being challenged by the appellant. We have to decide whether corporal punishment is constitutional or not. In order to make that decision, it is necessary, in our view, to construe the meaning of that article in relation to Section 274A of the Code Act. In our view that clearly involves interpretation of the Constitution.

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

Article 24 of the Constitution which the appellant contends the corporal punishment is in conflict with provides:

of the Constitution can declare corporal punishment unconstitutional. Secondly, corporal punishment created by section 274A of the Penal Code Act, is legal because it was saved by article 273 of the Constitution when the Constitution came into force in 1995, the Penal Code Act having been in existence before. He prayed for dismissal of the appeal.

As the appellate court in constitutional matters this court cannot entertain and determine this appeal as a court with original jurisdiction or a court of first instance. The issues raised by this appeal is being raised for the first time in this court. It has not come to this Court on appeal. The appellant has not been aggrieved by a decision of the Constitutional Court on the question raised by his appeal, which is a condition precedent before this court can entertain and determine the question.

"(3) Any party aggrieved by a decision of the Court of Appeal sitting as a constitutional court is entitled to appeal to the Supreme Court on questions of Law."

First in constitutional matters this court is an appellate court. Article 132(3) provides:-

This court cannot determine at this stage the issues raised in the appeal for the following reasons.

In so far as this appeal seeks for an interpretation of the constitution and for a declaration under article 137(3)(a) of the constitution that corporal punishment is unconstitutional, it follows that it is the Constitutional Court which has the original jurisdiction on these matters as the court of first instance to consider and determine the issues raised by this appeal.

In the instant case the appellant is, in essence, seeking for a declaration that the corporal punishment to which he has been sentenced is inconsistent with or contravenes the provisions of article 24 of the Constitution. The sentence of corporal punishment is provided for by an Act of Parliament. If corporal punishment were to be declared to be inconsistent with the provisions of article 24 of the Constitution the result would be that to that extent Section 274A of the Penal Code would be inconsistent with these provisions of Article 24.

is inconsistent with or in contravention of a provision of this Constitution may petition the Constitutional court for a declaration to that effect, and for redress where appropriate.

**"(3) A person who alleges that:-
(a) An Act of Parliament,
(b)**

Under clause 5(a), the court concerned has discretion to refer a question arising before it if it is of the opinion that the question involves a substantial question of law. The provisions of this clause notwithstanding another question now arises whether this court should exercise its discretion under clause 5(a) of article 137 of the Constitution in the instant case in view of its position and jurisdiction in the hierarchy of courts in the judicial system as established by the 1995 Constitution? Clause 5(a), appears to empower any court before which a question as to the interpretation of the

In the instant case, none of the parties to the appeal has requested the court for a reference to the Constitutional Court of the question of interpretation of the Constitution which has arisen. Accordingly, clause (5)(b) of article 137, is inapplicable to this case. The court, therefore, is not obliged to comply with clause 5(b).

(b) Shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this article."

(a) May, if it is of the opinion that the question involves a substantial question of law; and

"5. Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a Field Court Martial, the Court

clause says:

In view of what we have said above in this judgment, a question as to the interpretation of the Constitution has arisen in the proceedings of hearing this appeal in this court. The provisions of clause (5) of article 137 of the Constitution are, therefore, relevant. The appeal.

Secondly, it is the Constitutional Court as the court of first instance on the issue, and not this court, which should first deal with the matter, because it may be necessary to adduce evidence before the Constitutional Court to prove that corporal punishment is a form of torture, cruel, inhuman and degrading treatment or punishment. On the basis of such evidence (if any) and submissions by counsel, the Constitutional Court would then make the necessary decision and declaration on the issue raised in this

"(6) Where any question is referred to the Constitutional Court under clause (5) of this article the Constitutional Court shall give its decision on the question and the Court in which the question arises shall dispose of the case in accordance with that decision."

Clause (6) of article 137 of the Constitution provides:

with clause 5(a) of article 137 of the Constitution. For these reasons, we think that this Court should make such a reference in accordance with clause 5(a) of article 137 of the Constitution. Many courts below will be affected by such a decision. It is therefore, important that issues raised in this appeal should be properly and fully canvassed in the Constitutional Court which should make entail corporal punishment. It is therefore, important that issues raised in this appeal is bound to have consequences in respect of other offences for which convictions proper course to take. Moreover it has to be appreciated that the issue raised in this the other hand as discretion must be exercised judiciously our view is that it is the substantial question of law involving interpretation of the Constitution has arisen. On the Constitutional Court. It would be an arbitrary decision to do so, given the fact that a reason for this Court to negatively exercise its discretion by not referring the question to conflict with or contravenes provisions of the Constitution. There appears to be no good Code. That is to say it should answer the question whether corporal punishment is in Constitutional Court to decide on the question in relation to section 274 A of the Penal in this appeal involves a substantial question of law. It is therefore, necessary for the We also think that the question of interpretation of the Constitution which has arisen under discussion has arisen and this court before which the question has arisen.

Constitution arises in any proceedings before it to refer the question to the Constitutional Court at its own discretion. Only the Field Court Martial, is excepted. This court is not excepted. If it was the intention of the makers of the Constitution to do so, they would have no doubt done so as they did the Field Court Martial. In the circumstances our view is that the expression **"any proceedings in a court of law other than a Field Court Martial"** is wide enough to include the proceedings in this appeal in which the question under discussion has arisen and this court before which the question has arisen.

The Reference of the Hon. Justices of the Supreme Court, Oder, Tsekooko, Karokora, Kanyeihamba and Mukasa-Kikonoyo, JJ. SC, of the Supreme Court sitting at Kampala in Supreme Court Criminal Appeal No. 16 of 1999.

**REFERENCE TO THE CONSTITUTIONAL COURT:
IN THE CONSTITUTIONAL COURT OF UGANDA.
THE INTERPRETATION OF THE CONSTITUTION (PROCEDURE) RULES.**

FORM:

In the circumstances, and in accordance with the provisions, of clause 5(a) of article 137 of the Constitution and the Schedule to the Interpretation of the Constitution (Procedure) Rules, 1992 (Modification) Directions 1996 (Legal Notice No. 3 of 1996), the following question is hereby referred to the Constitutional Court.

by the appellate Constitutional Court in another case in the future.

then such a decision would stand as the law until it is over-turned or upheld on appeal, the decision of the Constitutional Court on the question referred to it is not appealed, as the appellate Constitutional Court consisting of all the members of the Court. In case matter for speculation), then such an appeal would come to this Court in its jurisdiction Constitutional Court on the question is appealed (which at this stage can only be a mandatory language of clause (6) of article 137. In case the decision of the Constitutional Court on the question. To us, that appears to be the effect of the It would have to dispose of the appeal in accordance with the decision of the Appellate Court, but as the Court from the proceedings before which the question arose. to it, this Court would dispose of the appeal before it, not as the Constitutional Similarly after the Constitutional Court has given its decision on the question referred

constitutionally it is, under Article 131(2) of the Constitution.

jurisdiction as the appellate Constitutional Court consisting of all its members, which under clause (5) of article 137 of the Constitution. It would not be doing so in its this judgement it would do so like any other Court other than a Field Court Martial in proceedings before which the question has arisen. As we have already said before in If this Court referred the question to the Constitutional Court it would do so as the court

JUSTICE OF THE SUPREME COURT

L. E. MUKASA-KIKONYOGO

Tempe

(write a dissenting opinion or reference)

JUSTICE OF THE SUPREME COURT

G. W. KANYEHAMBA

JUSTICE OF THE SUPREME COURT

A. N. KAROKORA

[Signature]

JUSTICE OF THE SUPREME COURT

J. W. N. TSEKOOKO

[Signature]

JUSTICE OF THE SUPREME COURT

A. H. O. ODER

[Signature]

Dated at Mengo this:..... day of:..... 2000. *7th April*

3. The Supreme Court desires the Constitutional Court to determine the question or issues in order to dispose of the above appeal.

Is the sentence of six strokes of the cane inconsistent with or does it contravene the provisions of article 24 of the Constitution?"

"On 16th March 1999, the Court of Appeal of Uganda at Kampala (Kato, Engwan and Twinomujuni JJA) in the Court of Appeal Criminal Appeal No. 52/98, Simon Kyamanywa vs Uganda, convicted the appellant of robbery contrary to sections 272 and 273(1)(b) of the Penal Code Act and sentenced him to imprisonment for six years and to six strokes of the cane. It was also ordered that the appellant should undergo Police supervision for three years. The sentence of six strokes of the cane was imposed under section 274A of the Penal Code Act.

2. The question or issues are:
1. The Supreme Court being of the opinion that a substantial question of law as to the interpretation of the Constitution has arisen in the above proceedings.