THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[CORAM: KATUREEBE, CJ; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; TIBATEMWA-EKIRIKUBINZA; & MUGAMBA, JJ.S.C.; TUMWESIGYE; AG.JSC]

CONSTITUTIONAL APPEAL NO 02 OF 2018

BETWEEN

1. MALE H. MABIRIZI K. KIWANUKA

2. (i) KARUHANGA KAFUREEKA GERALD
(ii) ODUR JONATHAN
(iii) MUNYAGWA S. MUBARAK
(iv) SSEWANYANA ALLAN
(v) SSEMUJJU IBRAHIM
(vi) WINFRED KIIZA

3. UGANDA LAW SOCIETY

:: APPELLANTS

AND

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

[Appeal from the Judgment of Justices of the Constitutional Court (Owiny-Dollo, DCJ, Kasule; Kakuru; Musoke & Cheborion JJ.CC) dated 26th July 2018 in Consolidated Constitutional Petitions No. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018]

JUDGMENT OF TUMWESIGYE, Ag. JSC

Introduction

The appellants filed 3 separate appeals against part of the majority decision of the Constitutional Court in consolidated Constitutional

Petitions Nos. 49 of 2017, 03 of 2018, 05 of 2018, 10 of 2018 and 13 of 2018. The appellants were dissatisfied with the part of the majority Judgment of the Constitutional Court upholding Sections 1, 3, 4, and 7 of the Constitution (Amendment) (No. 01) Act, 2018. (hereinafter referred to as "the Amendment Act") The main complaint in their respective petitions was that the process of enacting the Amendment Act as well as the provisions of the Act itself were unconstitutional since they violated various provisions of the Constitution providing for: (i) the procedure of amending the Constitution; and (ii) development of democracy in Uganda.

Background:

On 27/09/2017, Hon. Raphael Magyezi, Member of Parliament of Uganda representing Igara West Constituency tabled before Parliament a motion seeking leave to introduce a Private Member's Bill entitled '*The Constitution (Amendment) Bill, 2017*' .

The main purpose of the Bill (there were other minor purposes) was to amend Article 102(b) of the Constitution which provided that a person to be qualified for election as President shall not be less than thirty-five years and not more than seventy-five years of age. It also sought to amend Article 183(2)(b) which provided for the same age qualification as that of the President. The Amendment Bill sought to remove the above age limits altogether.

Before Hon. Magyezi's motion was introduced to Parliament there was commotion in the House resulting in the suspension of 25 members of the opposition by the Speaker, who ordered the suspended members to vacate the House. When they refused to

get out the Speaker ordered the Sergeant-at-Arms to use force to eject them. She suspended the sitting and left the Chamber.

The eviction of members from the House was not done by the Sergeant – at- Arms and his officers alone. They were joined by men from Uganda People's Defence Forces. The ejection was effected violently and some members were injured. Members who were ejected were bundled and thrown onto security vehicles and detained.

When the House resumed Hon. Magyezi's motion was debated and passed on 28th September, 2017. A certificate of Financial implications was issued in respect of Hon. Magyezi's Bill by the Minister of Finance.

After the Bill received its first reading, the Speaker sent it to the Committee of Legal and Parliamentary Affairs for consideration. The Speaker emphasized the need for Members to consult the people on the provisions of the Bill. Parliament facilitated all members of Parliament with money to go and consult the people.

On 18/12/2017 the Bill was given a second reading. The Speaker invited the Chairperson of the Legal and Parliamentary Affairs Committee to present the Committee's Report.

In the course of presentation of the Committee Report by the Chairperson, some Members of Parliament kept interrupting the presentation with points of procedure ranging from the authenticity of the Committee Report to whether the Report had been tabled before Parliament. The Speaker addressed these

issues and directed the Committee Chairperson to continue with his presentation.

After the presentation of the Committee Report was completed, the Hon Deputy Attorney General moved a motion to suspend Rule 201(2) of the Rules of Procedure so that debate on the Report could commence. A question was subsequently put to the House regarding the Attorney General's motion. The question was agreed to and debate on the Report commenced.

On 20/12/2019, voting on the second reading was done. The Speaker after tallying the results announced that 97 members had voted against the motion and 317 for the motion. She therefore held that the motion for the second reading had been carried.

The Bill then proceeded to the Committee of the Whole House where each clause of the Bill was debated. During the Committee Stage, new clauses to the Bill were introduced. These related to: (i) extension of the term of the 10th Parliament by two years; (ii) extension of the term of the current Local Government by two years; and (iii) re-introduction of Presidential term limits.

On the same day (20/12/2017) a motion for the third reading of the Bill was tabled by Hon Raphael Magyezi. The question was put and agreed to by the House. Voting on the third reading then commenced. Voting was by roll call.

Having tallied the results, the Speaker announced the results as follows: (i) Abstentions were 2; (ii) 63 were against; and (iii) 315 were in favor of the Bill. In light of these results, the Speaker

declared to the House that the Bill had been passed as more than two – thirds of all the members had supported it.

Subsequently the Bill as passed by Parliament was sent to the President accompanied by the Speaker's Certificate for Presidential assent. The Bill received Presidential assent on 27/12/2017 and became part of the laws of Uganda as Constitution (Amendment) (No. 01) Act, 2018.

Believing that both the process of enacting the Amendment Act and its contents contravened various provisions of the Constitution, the appellants lodged petitions in the Constitutional Court. These were Constitutional Petitions Nos. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018. The appellants' main contention in these petitions was that because the process of passing the Amendment Bill and enacting the Amendment Act and the provisions therein were unconstitutional, the Amendment Act should be nullified in its entirety.

At conferencing 14 issues were agreed for determination by the Constitutional Court.

Having considered these issues, the majority Justices of the Constitutional Court (4 to 1) found that whereas some of the provisions of the Amendment Act were unconstitutional, other provisions were compliant with the Constitution. Therefore, applying the principle of severance, the majority of the members of the Constitutional Court struck out those provisions of the Amendment Act that were inconsistent with the Constitution and

retained those provisions they found to be consistent with it. On that basis the court declined to grant the main relief sought by the appellants to nullify the whole Amendment Act.

Dissatisfied with the holding of the majority Justices of the Constitutional Court, the appellants filed separate Appeals to this Court. The appellants' combined Memoranda of Appeal contained a total of 112 grounds.

At the pre-hearing conference the parties with the guidance of the Court agreed to consolidate their appeals. From the 112 grounds of appeal, 8 issues were framed for this Court to determine. These were:

1. ***Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.***

2. ***Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?***

3. ***Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it***

inconsistent with the 1995 Constitution of the Republic of Uganda?

4. ***Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?***

5. ***Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?***

6. ***Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?***

7a. ***Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.***

7b. If so, what is the effect of the decision of the Court?

8. What remedies are available to the parties?

Representation

The appellant, Mr. Male H. Mabirizi, in Constitutional Appeal No. 02 of 2018 represented himself. Mr. Elias Lukwago of M/S Lukwago & Co. Advocates together with Mr. Ladislaus Rwakafuzi of M/S Rwakafuzi & Co. Advocates appeared on behalf of the

appellants in Constitutional Appeal No. 03 of 2018. Mr. Wandera Ogalo represented the appellant in Constitutional Appeal No. 04 of 2018. The Attorney General who was the respondent represented himself and appeared together with the Deputy Attorney General, the Solicitor General and several other senior legal officers from the Attorney General's Chambers.

All parties filed written submissions and were allowed to give oral highlights of their cases during the hearing of the consolidated appeals.

Preliminary objections raised by the Attorney General.

The Attorney General raised two preliminary objections in regard to Constitutional Appeal No. 2 of 2018, Male Mabirizi vs. Attorney General.

He contended that the grounds of appeal contained in Mr. Mabirizi's memorandum of appeal offended rule 82 of the Judicature (Supreme Court) Rules Directions S.I No. 13-11 for being speculative, argumentative, and narrative. He argued that the grounds of appeal also fell short of stating in precise terms the manner in which the Constitutional Court decision was wrong.

He prayed this court to strike out the appeal for noncompliance as it was an abuse of court process.

In response, Mr. Mabirizi argued that the respondent was barred by rule 98(b) to raise such an objection without the leave of court.

Rule 82 states as follows;

Contents of memorandum of appeal.

(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and nature of the order which it is proposed to ask the court to make.

I agree with the learned Attorney General that the grounds of appeal filed by Mr. Mabirizi were argumentative, narrative and not concise. I will pick two examples from Mr. Mabirizi's grounds of appeal to demonstrate this point.

Ground 23:

"The majority justices of the Constitutional Court erred in law when they upheld part of the Act in total defiance of the binding Supreme Court decision (s) that a law is null and void upon a finding that the procedure of enacting and assenting to it was incurably defective and flouted."

Ground 24:

"The majority justices of the Constitutional Court erred in law when they upheld part of the Act in total departure from Constitutional Court decisions to the effect that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it."

It is clear from the foregoing grounds of appeal that the grounds lack precision and are argumentative. They state the alleged error of the Constitutional Court and go further to explain how the Constitutional Court made the error. The grounds also make arguments by putting the views of the appellant in the grounds of appeal.

According to rule 82 of this Court's rules, all the appellant is required to do is to state in the ground of appeal the error that the court allegedly made and leave it to the Supreme Court to decide whether it was an error or not.

I find that the Attorney General's Preliminary Objection is well founded. Therefore this court should have struck out Mr. Mabirizi's appeal on this ground. However, this is a very important constitutional matter that touches on the governance of this country. It would not be appropriate to strike out the appeal on a Preliminary Objection.

This court has invoked its inherent powers under rule 2(2) of the Rules of this court to overrule such Preliminary Objections using the same reason in the cases of **Attorney General vs. Major General David Tinyefuza** SCCA No. 1 of 1997, **John Ken Lukyamuzi vs. Attorney General & Anor** SCCA No. 2 of 2007.

I would, therefore, allow Mr. Mabirizi's appeal to proceed inspite of his breach of rule 82(1) of the rules of this court.

The Attorney General's 2nd Preliminary Objection was that the appellant filed his petition before the Constitutional Amendment Bill had been signed by the President to become an Act of

Parliament. He submitted that Article 137 (3) (a) of the Constitution provides that a person can only challenge an Act of Parliament and not a mere proposal in the form of a bill. He therefore argued that both the petition and the appeal were incompetent.

In response, Mr. Mabirizi contended that this preliminary point is unfounded in law, belated and offended rule 98(a) of the Judicature (Supreme Court Rules) Directions.

He argued that Article 137((3(b)) gives a petitioner right to seek redress where any act or omission by any person or authority becomes inconsistent with the Constitution and that his cause of action arose on the day he was prevented from entering Parliament.

The appellant further argued that the Attorney General was raising matters that were not pleaded and considered by the lower court and therefore, he should not have raised them on appeal in this court. He relied on the case of **Bitamisi vs. Rwabuganda** SCCA No. 16 of 2014 to support his argument.

I agree with the appellant's argument that the Attorney General should have brought this Preliminary Objection in the Constitutional Court and not in this court. In the case of **Bitamisi vs. Rwabuganda** (**supra**) the appellant raised new matters regarding 3rd party interests in the suit land that were not part of her pleadings in the lower courts on appeal. This court held that it could not consider new matters that were not part of the parties' pleadings on appeal.

I would therefore, overrule the Attorney General's 2nd Preliminary Objection and allow the appellant to proceed with his appeal.

Determination of the issues

I will now proceed to determine the issues raised in this appeal. I will consider issue 1 first, followed by issue 5. Thereafter I will consider issues 2, 3, 4, 6, 7 and 8 in that order.

Issue 1

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

Mr. Elias Lukwago, learned counsel for the appellants adopted his submissions in the Constitutional Court and the submissions of the appellants filed in this court. In his highlights during the hearing he further elucidated what the basic structure doctrine was, how applicable it was in Uganda setting, and how the learned majority Justices of the Constitutional Court had misapplied it and thus reached a wrong conclusion that amending Article 102(b) of the Constitution did not affect the basic structure of the Constitution of Uganda.

Counsel set out a brief background of the basic structure doctrine and relied on several authorities from different jurisdictions which included **Kesavananda Bharati v. State of Kerala**, AIR 1973, SC, **Minerva Mills v. Union of India**, AIR 1980 SC 1789, **Anwar Hossain Chowdhury v. Bangladesh**, 1041 DLR 1989 App Div 169, **Executive Council of Western Cape Legislature v. The President of the Republic of South Africa & Others** (CCT27/95

[1995] ZACC 8; and **Njoya vs. Attorney General and others** (2004) AHRLR 157.

The Attorney General in his reply submitted that the learned Justices of the Constitutional Court identified provisions of the Constitution which they considered to be fundamental features of the Constitution and which, therefore, formed the basic structure of the Constitution, and further, that the framers of the Constitution entrenched those provisions by safeguarding them from irresponsible amendment. Such safeguards include the requirements of at least two thirds majority of Parliament and holding a referendum.

According to the Attorney General Parliament was within its powers to enact sections 3 and 7 of the Amendment Act.

Understanding The Basic Structure Doctrine

According to Aqa Kazza in his essay "**The Doctrine of 'Basic structure' of the Indian Constitution: A critique**" the Indian Supreme Court which coined the doctrine was inspired by the writings of a German professor, Prof. Conrad Dietrich, in his lecture on **'Implied Limitation of the Amending Power**' in 1965 where he stated:

> "**Any amending body organized within the statutory scheme, howsoever verbally unlimited its power cannot by its very structure change the fundamental pillars supporting its constitutional authority."**

In the **Kesavananda** case (supra) the Indian Supreme Court while acknowledging the power of Parliament to amend the Constitution under Article 368 of the Indian Constitution held, by majority of 7 to 6, that this power could not be exercised to abrogate or take away the fundamental freedoms guaranteed under the Constitution. The court held that Parliament could not amend the Constitution to alter its basic structure. Sikri, CJ, held:

> **The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided the result the basic foundation and structure of the Constitution remains the same...**
>
> **It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents...**

The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-constitutional revolution. Therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility.

However, if the meaning I have suggested is accepted a social and economic revolution can gradually take place while preserving the freedom and dignity of every citizen. For the aforesaid reasons, I am driven to the conclusion that the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles.

The question of application of the basic structure doctrine again arose before the Indian Supreme Court in the case of **Minerva** (supra) where the validity of the amendments to the Constitution giving unlimited power to Parliament to amend the Constitution and prohibiting judicial review of Constitutional amendments was challenged. The court held that judicial review was part of the basic structure of the Constitution and struck down clause (4) of Article 368 that had been included as an amendment to the Constitution.

Bhagwati, J, held thus:

> **Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.**

In the case of **Anwar Hossain Chowdry** (supra) the Parliament of Bangladesh through its 8th constitutional amendment amended its Constitution by incorporating a provision therein for six permanent Benches of High Court in six of its districts. It was also provided in that amendment that the President could by notice fix the territorial jurisdiction of these permanent Benches. The petitioner challenged the constitutionality of the amendment in the Supreme Court arguing that the framers of the Constitution never

intended to provide for permanent decentralization of the High Court in the Constitution of Bangladesh. The court by majority found that such permanent Benches of the High Court with mutually exclusive jurisdictions was entirely outside the contemplation of the Constitution. Their finding was based on the fact that the High Court as originally set up in the Constitution had judicial power over the entire Republic and so formed a basic structure of the Constitution. In the court's view the basic structural pillar had been destroyed and the judicial power of the Republic vested in the High Court had been taken away. Hence the amendment of Article 100 was ultra vires as it had destroyed the essential limb of the judiciary by setting up rival courts to the High court in the name of Permanent Benches.

B. H. Chowdhury, J, one of the members of the coram, expounding on the basic structure doctrine held:

> **Call it by any name-'basic feature' or whatever but that is the fabric of the constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against Article 7 because the amending power is but a power given by the Constitution to Parliament; it is a higher power than any other given by the Constitution to parliament but nevertheless it is a power within and not outside the Constitution.**

The application of this doctrine has also been recognized on the African continent. In the South African case of **Executive Council**

of Western Cape Legislature (supra) the court struck down a section in a statute directing the reform of local government, which empowered the President to amend sections of the Act by proclamation. A majority of the court held that the constitutional framework of separation of powers meant that Parliament could not delegate primary legislative power to the executive, such as the power to amend or repeal Acts of Parliament.

Sachs, J observed as follows:

> **There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.**

In Kenya, the Court of Appeal in the case of **Njoya vs. Attorney General and Others** (supra) held:

Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing constitution and the alteration of the Constitution does not involve the substitution thereof of a new one or the destruction of the identity or the existence of the Constitution.

The doctrine of basic structure has not yet gained universal acceptance. For example, in the Tanzanian case of **Attorney General vs. Rev. Christopher Mtikila**, Civil appeal No. 45 of 2009, the Court of Appeal (the final court of appeal in Tanzania) reversed the decision of the High Court which had applied the doctrine to strike down a constitutional amendment that barred independent candidates from standing in elections for political office. The Court of Appeal held:

Let us now examine our Constitution of 1977. We have already seen that Art 98(1) provides for the alteration of any provision of the Constitution, that is, there is no article which cannot be amended. In short there are no basic structures. What are provided for are safeguards. Under Art 98(1)(a) constitutional amendments require two-thirds vote of all Members of Parliament while Art. 98(1)(b) goes further that:

A Bill for an Act to alter any provisions of the Constitution or any provisions of any law relating to any of the matters specified in List Two of the Second Schedule to this Constitution shall be passed only if it is supported by the votes of not less than two-thirds of all

Members of Parliament from Mainland Tanzania and not less than two-thirds of all Members of Parliament from Tanzania Zanzibar.

List Two of the Second Schedule of the Constitution enumerates eight matters, to wit: (i) The existence of the United Republic; (ii) The existence of the Office of the President of the United Republic; (iii) The Authority of the Government of the United Republic; (iv) The existence of the Parliament of the United Republic; (v) The Authority of the Government of Zanzibar; (vi) The High Court of Zanzibar; (vii) The list of Union Matters; (viii) The number of Members of Parliament from Zanzibar.

These eight matters could have been basic structures in the sense that Parliament cannot amend them. However, they are amendable once the procedure for amendment is followed. So, there is nothing like basic structures in our Constitution.

It is our considered opinion that the basic structures doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case only persuasive, when considering our Constitution.

In **Teo Soh Lung v. Minister for Home Affairs [1989] 1 S.L.R. (R) 461**, H.C. the High Court of Singapore rejected the application of the basic structure doctrine holding that the doctrine which limits Parliament's power to amend the Constitution, did not apply

in Singapore as this would amount to usurpation of Parliament's legislative function contrary to Article 58 of the Constitution.

Chua, J, reasoned that a constitutional amendment, being part of the Constitution itself, can never be invalid if the procedure for its amendment is complied with. He further observed that if the framers of the Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. Furthermore, that if the courts were allowed to impose limitations on the legislative power to amend, they would be usurping Parliament's legislative function, contrary to Article 58.

Whether the Doctrine of Basic Structure applies to Uganda

It is of significance to note that the jurisdictions which have applied this doctrine have not laid down what provisions of the Constitution should constitute its basic structure or what criteria the Courts should apply in determining provisions of the Constitution that should constitute its basic structure. All that the authorities tend to show are hypothetical examples to justify the applicability of the basic structure doctrine.

It is also important to note that the individual Courts themselves did not agree on the applicability of this doctrine. In the **Kesavananda** case, which seems to have originated this doctrine, the Court decided the case by majority of 7 to 6. Even the Bangladesh case of **Anwar Hossain** (supra) the Court was divided.

I should further observe that the circumstances in which Courts have applied this doctrine do not exist in Uganda. For example in **Kesavananda**, the issue at hand was the policy of the Government in power at the time to develop a welfare state in India. To this extent, the Indian Parliament had, among other things, passed

constitutional amendments: (i) aimed at redistributing the land from the barons to the peasants and (ii) ousted the power of the Courts to review the adequacy of the compensation given to the barons. In Uganda the law does not allow the ousting of courts from reviewing constitutional amendments.

Another example is in the South African case of **Executive Council of Western Cape Legislature (supra).** In this case, the Constitutional Court of South Africa applied the basic structure doctrine to strike down a section in a statute directing the reform of local government, which empowered the President to amend sections of the Act by proclamation. A majority of the court held that the constitutional framework of separation of powers meant that Parliament could not delegate primary legislative power to the executive, such as the power to amend or repeal Acts of Parliament. Again, this is not the case under our Constitution. We do not have any provision under our Constitution or any law for that matter which empowers the President to carry out legislative duties.

Constitutions differ, both in terms of content and the circumstances that led to their emergence. Thus the factors that might have led to the creation of the Indian Constitution or the inclusion of the provisions it contains therein are clearly different from the factors that led to the enactment of the Uganda Constitution.

The political instability that Uganda went through over several years led to the Preamble that begins our Constitution. The framers of the Constitution specifically embedded the values contained in the Preamble and the National Objectives and Directive Principles of State Policy within the Constitution.

The Constitution therefore builds strict safeguards and procedures which must be followed in amending the Constitution. For example Article 260 of the Constitution spells out provisions which Parliament, supported by two-thirds majority of all members, can amend subject to a Referendum being held to support them. Article 261 spells out provisions which Parliament, supported by two-thirds majority of all members, can amend subject to ratification by two-thirds of all members of the district council in each of at least two-thirds of all the districts of Uganda.

Lastly, Article 262 provides for those provisions which Parliament can amend, but can only do so by a majority of two-thirds of all Members of Parliament.

Furthermore, Article 255 gives citizens the right to demand the holding of a referendum on any issue. This Article provides as follows:

(1) Parliament shall by law make provision for the right of citizens to demand the holding by the Electoral Commission of a referendum, whether national or in any particular part of Uganda, on any issue.

(2) Parliament shall also make laws to provide for the holding of a referendum by the Electoral Commission upon a reference by the Government of any contentious matter to a referendum.

(3) Where a referendum is held under this article, the result of the referendum shall be binding on all organs and agencies of the state and on all persons and organizations in Uganda.

(4) A referendum to which clause (3) applies, shall not affect

(a) the fundamental and other human rights and freedoms guaranteed under Chapter Four of this Constitution; and

(b) the power of the Courts to question the validity of the referendum.

Accordingly, if the citizens of Uganda feel that a matter should be decided through a referendum they will demand the holding of the referendum. Therefore in my view, the necessity of applying the doctrine in Uganda does not arise.

On the face of it, it may appear that there are provisions which are fundamental but not contained in either Article 260 or 261 and therefore Parliament, with two-thirds of its members in support can amend them without taking into account peoples' wishes on the matter. However, it is important to note that these important provisions are connected to other provisions of the Constitution either directly or by infection. For example in **Paul K. Ssemogerere v. Attorney General, Constitutional Appeal No. 01 of 2002**, Parliament had made amendments to Articles 88, 89, 90 and added Article 257A to the Constitution. This Court found that these amendments had an adverse effect on other fundamental provisions of the Constitution like Articles 2(1) 28, 41(1), 44(c), 128 (2) & (3) and 137 (3) of the Constitution. The Court observed that in enacting the impugned constitution amendment Act, Parliament had by infection amended these Articles. Kanyeihamba, JSC who wrote the lead judgment of the Court observed as follows:

> ***On the other hand, Section 5, in so far as it prescribes new clauses (2) and (3) of Article 97 which are intended to restrict a citizen's unhampered "access to information in the possession of the state or any other organ or agency of the State" when the Constitution of Uganda in Article 41 guarantees and entrenches that right, is not only in conflict with that same article but constitutes a blatant attempt to clothe Parliament with supremacy***

which in Uganda lies in the majesty and sanctity of the Constitution.

...

Consequently, in my opinion, in so far as section 5 of Act 13 of 2000 purports to restrict that access unconstitutionally, it conflicts with the Constitution and therefore, is null and void.

...

Under Article 28(1), a person is entitled to the right of a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Consequently, by subjecting that right to the exigencies of Parliament and the whimsical discretion of its personnel, Section 5 attempts to amend Article 28(1) by implication and Article 44(c) by infection. Article 128 prescribes and guarantees the independence of the Judiciary. In my view, the provisions of Act 13 of 2000, while not affecting that independence, whittle away the importance of Article 28(3). Clause 3 of Article 28 enjoins all organs and agencies of the State which include Parliament, Members of Parliament, the Speaker and the Clerk of Parliament to accord to the Courts such assistance as may be required to ensure the effectiveness of the Courts. By giving Parliament, the Speaker and the Clerk of Parliament the sole discretion as to who and what may assist the Court and when, the function of the Courts to administer justice fairly, speedily and impartially would be so severely restricted

by the provisions of Act 13 of 2000 as to be rendered illusory. Similarly, in so far as Section 5 of Act 13 of 2000 restricts the right of Members of Parliament and the use of Hansard and other Parliamentary records to assist petitioners, the Constitutional Court and other courts to proceed effectively, the provisions of Article 137(3) and those others guaranteeing the administration of justice would be amended by infection.

Pursuant to this finding, the Court struck down the Constitution (Amendment) Act 13 of 2000. The court did not use the doctrine of basic structure to do so.

Furthermore, I note that the principle of separation of powers is such an important principle that it should not be allowed to be undermined by one arm of the Government applying doctrines which are ill defined to interfere with the legislative function of Parliament.

I find the words of Prof. Conrad Dietrich apposite on this. In one of his essays carrying the title "**Basic Structure of the Constitution and Constitutional Principles**", he observes as follows:

Finally, a note of caution might not be out of place. The jurisprudence of principles has its own distinct dangers arising out of the flexibility and lack of precision of principles as well as their closeness to rhetorical flourish. This might invite a loosening of judicial discipline in interpreting the explicit provisions of the Constitution. ... Tightening of judicial scrutiny would be

necessary in order to diminish the dangers of opportunistic use of such principles as mere political catchwords.

I would therefore agree with majority Justices of the Constitutional Court and the Attorney General that all the basic structure provisions are embedded in the Constitution and the procedures for amending them are provided for in the Constitution and therefore the doctrine of basic structure does not apply to the Constitution.

Whether Article 102(b) and 183(2) are part of the basic structure of the Constitution.

The second question is whether Articles 102(b) and 183(2)(b) on age limit for the President and district Chairperson form part of the basic structure of the Constitution. Mr. Elias Lukwago contended that the learned Justices of the Constitutional Court erred when they misapplied the basic structure doctrine and found that the qualifications of the President and district Chairperson did not form part of the basic structure of the Constitution.

Counsel submitted that the learned Justices restricted the application of the basic structure doctrine when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of Parliament and not to the age limit under Article 102(b) and 183(2)(b) of the Constitution.

Counsel relied on the dissenting judgment of Kasule, JCC, in **Saleh Kamba and Others vs. Attorney General and Others**, Const. Petition No. 16 of 2013 for the proposition that in interpreting the Constitution, court ought to take into account the

history of the country and that the history of Uganda is clearly captured in the preamble of the Constitution and National Objectives and Direct Principles of State Policy which should have been relied upon to find that the age limit constituted part of the basic structure of the Constitution.

Counsel Lukwago referred court to the case of **President Alvaro Uribe** of Colombia who, he stated, spearheaded a constitutional amendment with the purpose of making him eligible to run for president for a third time contrary to the two terms permitted by the Constitution. The amendment was struck down as it was considered by court to be a violation of the basic structure of the Constitution.

Mr. Mabirizi also contended that the Amendment Act was no different from the **Alvaro Uribe** case as it was purposely enacted to enable the President, who by the next election would be aged above 75 years and therefore not be eligible, to contest.

Counsel further argued that age limit as envisaged in Article 102(b) was among the provisions designed to guarantee orderly succession to power and so its removal destroyed one of the basic features of the Constitution. Further, that it was the intention of the framers of the Constitution not to entrust the top most office of our country in the hands of a very young person aged below 35 years of age or a senile person aged above 75 years.

Learned Attorney General supported the decision of the Constitutional Court and argued that sections 3 and 7 of the Amendment Act did not amend Article 1 of the Constitution by infection. The Attorney General contended that contrary to the

appellants' argument the amendment did not in any way take away the people's right to choose who leads them.

The Attorney General further argued that the amendment of Article 102(b) is in line with orderly succession of Government with every President strictly observing his or her own term. He cited various articles of the Constitution to support his argument that point to orderly succession and peaceful transfer of power such as Articles 1(1) and (4), 17(1), 59, 103(1), 105(1) and 107.

The Attorney General also argued that the amendment to Articles 102(b) and 183(2)(b) will enable citizens who were denied opportunity to aspire for those offices to do so.

Consideration of the Issue

There is no doubt that the Office of the President is the supreme Office in the land. The President is the leader of the People of Uganda who are the sovereign. Article 1 of our Constitution is very clear on the issue of sovereignty of the people of Uganda. Sub article 4 of this Article is more emphatic when it comes to who shall govern the people of Uganda. The sub article makes it categorical that the people of Uganda shall **'express their will and consent on who shall govern them...through regular; free and fair elections.**' Thus the power of the people to elect their leaders is very fundamental to our Constitution.

Having stated so, the Constitution is also quite clear on how the President of the Republic is elected. It is by universal adult suffrage through a secret ballot. Thus the people have a final say on who shall govern them. It therefore follows that removal of the

qualification as to age on who can stand for President does not in any way take away the power of the people to ultimately decide which person should hold the Office of the President of the Republic. Regardless of the age of the person standing for election, the people will always have the ultimate say on who shall govern them. This power of the people to choose who governs them, a matter that is so fundamental to our Constitution, was not taken away by amending the clause on age limit.

Further, a review of the Odoki Constitutional Commission Report that led to the enactment of the 1995 Uganda Constitution shows that the issue of imposing a maximum age on who can stand for President was never taken to be essential by the people. I agree with the view of Kasule, JCC, where he stated in his judgment relating to the petition that -

> **I also note that there is nothing in the Constitutional Commission Report proposing that the age limits of the President or other local government leaders should be entrenched provisions of the Constitution. The Report only proposed minimum age limit of 40 years for one standing for the office of President and never put a maximum age limit of the President, reasoning that:**
>
> > **"Since we have proposed the minimum age, we are of the view that there is no need to fix the maximum age; the electorate will decide on the appropriate candidate.**

Nowhere did the people during consultation by the Odoki Constitutional Commission express the view that a person aged 75 years or above would be unable to govern because of advanced age. There are examples all over the world which show that persons

aged above 75 years are heads of government and their countries are not suffering on account of it. On the other hand Uganda's political instability and turmoil happened when those who were in charge of government were very much below 75 years of age.

The appellants argued that the learned Justices of the Constitutional Court overlooked the significance and importance of the preamble in deciding that the amendments as to qualification did not affect the basic structure of the 1995 Constitution.

A review of the Judgments of the learned Justices of the Constitutional Court shows that they were well aware that the preamble of our Constitution was also a factor to consider in deciding whether the basic structure of the Constitution had been eroded. For example Musoke, JCC, observed as follows:

> **"In the process, Courts have suggested various guidelines which can be relied on to determine whether an amendment touches the basic structure of a particular Constitution and is, therefore, void. Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. Importantly, in answering this important question, <u>Courts will consider factors such as the Preamble to the Constitution</u>, National Objectives and Directive Principles of State Policy (in countries which have them in their constitutions, such as Uganda), the Bill of rights, the history of the Constitution that led to the given provision, and the likely consequences of the amendment."**

Similarly, Cheborion, JCC observed as follows:

> **In light of the above provision and the Directive Principles of State Policy, can Parliament effect a Constitutional amendment seeking, for instance, to do away with certain rights by scrapping this provision? I will not speculate but clearly, faithful interpretation of our Constitution given its historical background as earlier detailed and <u>in light of its preamble favour the position that the basic structure doctrine, to a restricted extent, be upheld as applicable in our legal system to govern amendments to the Constitution.</u> We must also take into account our shared values as a country which are alluded to in the Directive Principles of State Policy.**

Thus contrary to the contention of the appellants the learned Justices of the Constitutional Court did not overlook the Preamble or the Directive Principles of State Policy in interpreting the Amendment Act vis-à-vis the provisions of the Constitution.

It is therefore my view that the removal of these two clauses that is removing the age limit of who can be elected President Uganda and District Chairman did not violate the basic structure of the Constitution and further did not amend by infection Article 1 of the Constitution.

<u>Issue 5</u>

I will now proceed to consider issue 5 since, in my view, it is closely related to issue 1 above. Issue 5 was framed as follows:

> ***"Whether the learned majority Justices of the Constitutional Court misdirected themselves when they***

held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?"

The appellants' arguments on this issue are premised on their contention that the amendments as to age of the President and district Chairperson were unconstitutional because: (i) Parliament usurped the power of the people in passing the amendments and thus interfered with the basic structure of the Constitution; (ii) the amendments granted indefinite eligibility for the sitting President to offer himself for re-election in the subsequent election cycles; (iii) there was noncompliance with Article 263(1) of the Constitution since the amendments by infection amended Articles 1, 8A and 21 of the Constitution; and (iv) the amendments effecting the removal of age limits amounted to constitutional replacement.

In my resolution of issue 1, I comprehensively dealt with the issue of the amendments with regard to the qualifications of a person who can run for President or District Chairperson in relations to the basic structure doctrine. It was my view that the amendments did not: (i) alter the basic structure of the Constitution; and (ii) did not take away the power of the people guaranteed under Article 1 since the people remained the ultimate deciders of who would govern them. They retained the mandate to vote for the person they wanted to be President or District Chairperson. It is noteworthy that Article 102(b) was one of those Articles that Parliament had power to amend without necessarily referring the matter to the people by way of a Referendum. The above notwithstanding, as I have highlighted in issue 2, the people were

consulted by members of Parliament on the proposed amendments.

Furthermore, if the people felt that this matter is so fundamental to the governance of this country that it should not be left to Parliament alone to decide it, they have the right, under Article 255 to demand the holding of a referendum to decide it.

Regarding the appellants' argument that the amendments were unconstitutional because they gave the sitting President an opportunity to offer himself for re-election in the subsequent election cycles and that this would have far reaching implication in the political trajectory of Uganda, under Article 1 of the Constitution, the people of Uganda remain the ultimate deciders on who shall be their President. Indeed I pointed out in my consideration of issue 1 that Article 103(1) of the Constitution is clear on how the President of the Republic is elected. It is by universal adult suffrage through a secret ballot. This right to vote in elections (in this case for the person to hold the Office of President) is reserved for the people of Uganda. Thus it is not a guarantee that when the present office holder presents himself to run for President, he will automatically get elected. The people will exercise their right to choose who will be their President.

On the appellants' contention that Article 263(1) of the Constitution was not complied with since Articles 1, 8A and 21 of the Constitution were amended by infection, I have already found that the amendments did not in any way amend by infection the provisions of Article 1 since the people of Uganda remain the ultimate deciders on who shall be their President. With regard to Articles 8A and 20, it is also my view that the amendments with regard to age did not amend these two articles by infection. Besides, these two articles are not among those listed under Articles 260 and 261 that require a separation of 14 days between

the 2nd and 3rd reading of the bill amending these provisions as required under Article 263(1). The appellants' arguments with respect to the amendments vis-à-vis the provisions of article 263(1) are therefore untenable.

Lastly, I will now turn to the appellants' argument that the amendments effecting the removal of age limits amounted to constitutional replacement.

The doctrine of constitutional replacement was pioneered and developed by the Colombia Constitutional Court. In his Article entitled **'Unconstitutional Constitutional Amendments in the Case study of Columbia: An analysis of the justification and meaning of the constitutional replacement doctrine'**, Associate Professor Carlos Bernal observes that:

> ***The Constitutional Court first referred to the constitutional replacement doctrine in its judgment C-551/2003. Along with the statement of the doctrine, the Court offered a justification for it and outlined some ideas concerning the kind of judicial review required by this doctrine. The Court ruled that the power to amend the constitution comprises the power to introduce changes to any article of the constitutional text. Nonetheless, these changes can neither imply a derogation of the constitution nor its replacement by a different one. The Court justified this assertion mainly on the basis of the distinction between original and derivative constituent powers. The point of departure of this distinction is the concept of constituent, or constitution-making, power.*** [Emphasis mine].

It appears from the above excerpt that the doctrine of constitutional replacement is almost on all fours with the basic structure doctrine that was considered in issue 1.

I also note that according to the Article the Colombia Constitutional Court developed, the doctrine of constitutional replacement *'**aims to justify the power of the Court to review the content of Constitutional Amendments despite the fact that the Constitution only grants the power to review constitutional amendments exclusively on procedural grounds**.'* Thus the Colombia Constitutional Court developed the constitutional replacement doctrine in order to circumvent this constraint.

However, this is not the position in Uganda. Under Article 137(3) of our Constitution an Act to amend the Constitution can be reviewed on other grounds than procedural grounds. For example, the Constitutional Court can review and indeed declare such a Constitution Amendment Act null and void if its contents are inconsistent with the provisions of the Constitution even if the procedure as outlined in the Constitution has been duly complied with.

The essential elements of the constitution under review concern the qualifications of a person to be elected President of the Republic of Uganda or District Chairperson.

It is evident that the Amendment Act neither abolished the Office of the President nor did away with the qualifications on who could be elected the President of Uganda. All that the amendments did was to effect some qualification changes on eligibility for the office

of the President of Uganda or District Chairperson. In my view the amendments could be said to amount to constitutional replacement if they abolished the Office of the President altogether or completely. In my view qualifications of the President do not go to the foundation of the Constitution.

In conclusion on issue 5, it is my finding that the learned Justices of the Constitutional Court did not err when they held that the amendments to Articles 102(b) and 183 (2) (b) effected by sections 3 and 7 of the Amendment Act did not contravene the Constitution.

Issue 2

"Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?."

The appellants under this issue argue that there were procedural irregularities committed by Parliament in the course of passing the Amendment Act. They assert that these procedural irregularities contravened both the Constitution and the Rules of Procedure of Parliament. They therefore contend that the learned majority Justices of the Constitutional Court erred in holding that Parliament properly followed the provisions of the Constitution and its Rules of Procedure in the course of passing and enacting the Amendment Act.

I will consider each alleged procedural violation alone in the course of resolving this issue.

i. Consideration of the Bill against the provisions of Article 93 of the Constitution.

Appellants' Submissions

Counsel for the appellants relied on the provisions of Article 93 (a) (ii) and submitted that Parliament was prohibited from proceeding with a bill or motion, including an amendment Bill, unless introduced on behalf of the Government, that had the effect of imposing a charge on the consolidated fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction. Counsel further argued that this prohibition equally applied to an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in Article 93(a).

Counsel submitted that whereas the Constitutional Court made a finding that the Amendment Act violated the provisions of Article 93 of the constitution, it declined to nullify the entire Act on ground that non-compliance only affected Sections 2, 6, 8 and 10 of the Amendment Act since they were introduced by way of amendments that imposed a charge on the consolidated fund.

Counsel argued that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution prohibited Parliament in absolute terms from proceeding on a private member's bill or a motion including amendments thereto which had the effect of creating a charge on the consolidated fund. In counsel's view, Parliament flagrantly violated Article 93 of the

Constitution when it proceeded to consider and enact into law the Amendment Bill with its amendments which had the effect of imposing a charge on the consolidated fund as found by the Constitutional Court. Counsel contended that it was therefore erroneous for the Constitutional Court to apply the doctrine of severance into a Bill which was considered and passed as an integral legislation in the same process.

It was also counsel's contention that under Article 128(5) of the Constitution administrative expenses of the Judiciary including all salaries and allowances are charged on the consolidated fund. He argued that the Amendment Act added an extra 15 days within which the Supreme Court could decide an election Petition. In counsel's view this translated into more allowances and thus a charge on the consolidated fund.

Counsel argued further that the Certificate of Financial Implications in respect of the Bill stated that the planned expenditure would be accommodated within the medium term expenditure framework for ministries departments and agencies concerned. In counsel's view, by so stating, the minister appeared to concede that the Bill would have some sort of expenditure, especially when one notes that the Minister thereafter then states that there are no additional financial obligations beyond what is provided in the medium term.

With regard to the 29,000,000/= facilitation given to each Member of Parliament, counsel argued that the learned Justices of the Constitutional Court erred in holding that this facilitation did not make the enactment of the Amendment Act inconsistent with

Article 93. Relying on the affidavits of Hon. Winnie Kiiza, Hon. Ssemujju Ibrahim Nganda, Hon. Jonathan Odur and Hon. Gerald Karuhanga, counsel submitted that a charge was made on the consolidated fund by paying Members of Parliament including ex officio members to carry out consultations with the public regarding the Bill.

It was also argued that Article 156 of the Constitution required Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill *"which shall be introduced into Parliament to provide for issue from the Consolidated Fund of the sums necessary to meet that expenditure ...."* Furthermore that Article 154 of the Constitution also provided that no monies would be withdrawn from the Consolidated Fund except….where the issue of those monies has been authorized by an Appropriation Act."

According to counsel, the Appropriation Act was in this respect a conduit from the Consolidated Fund. Counsel submitted that it was erroneous for the Constitutional Court to hold that the 29 million shillings did not come from the Consolidated Fund but the account of Parliament. He argued that the decision to pay that money was a result of the motions for the 1st and 2nd second reading of the Bill. Those motions therefore had the effect of unconstitutionally removing 29 million shillings from the Consolidated Fund.

In counsel's view, to hold otherwise would mean that expenditure on the Magyezi bill was provided for in the 2016/17 Budget since it was introduced in September 2017. Further that it would mean

that at the time of preparing budget estimates in 2016 Parliament was aware of this bill and made provision for it. Counsel submitted that this did not seem logical. The logical conclusion, according to counsel, was that the Ministry of Finance provided the money. He added that, if it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act, which the Attorney General failed to do.

Counsel invited this Court to make a finding that this ex gratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

Respondent's Submissions

The Attorney General begun by pointing out that Article 93 of the Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill, except when introduced on behalf of Government that had financial implications as provided therein.

The Attorney General further pointed out that the above notwithstanding, Article 94 of the Constitution guaranteed the right of a Member of Parliament to move a private member's bill. Relying on the decision of this Court in **P.K. Ssemwogerere & Anor Vs Attorney General, Constitutional Appeal No. 1 of 2002**, the Attorney General submitted that the above two provisions of the Constitution had to be construed harmoniously with each sustaining the other and not destroying the other.

The Attorney General submitted that pursuant to Article 94 of the Constitution, Parliament made Rules of procedure governing the way it conducted business. Referring this Court to Rule 117 of the

Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial Implications. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implications and did not contravene Article 93 of the Constitution.

The Attorney General further contended that Rule 117 of the Rules of Procedure of Parliament was in *pari materia* with Section 76 of the Public Finance Management Act of 2015.

Having laid out the legal provisions above, the Attorney General submitted that the evidence on record [at page 601 Para 8 Vol 1] shows that on 27th September 2017, Hon. Raphael Magyezi, a Member of Parliament representing Igara County West constituency, tabled in Parliament a motion for leave to introduce a private Members' Bill entitled: The Constitution (Amendment) (No. 2) Bill of 2017.

The Attorney General further submitted that Hon. Magyezi's evidence [at page 613 para 26 Vol 1 of the record] shows that on 3rd October 2017, he moved the House so that the bill could be read first time and the same was seconded and laid on the table of Parliament, accompanied by a Certificate of Financial Implications as required under section 76 of the Public Finance Management Act, 2015 and the Rules of Procedure of Parliament.

The Attorney General was emphatic that Parliament only proceeded with the bill presented by Hon. Raphael Magyezi after the Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that

this position was confirmed by the Constitutional Court. The Attorney General referred this Court to the Judgments of some Justices of the Constitutional Court as Justice Kasule, Justice Cheborion, Justice Kakuru and Justice Musoke which shows that Hon. Magyezi's bill complied with Article 93.

The Attorney General further submitted that the Justices of the Constitutional Court were right to strike out the provisions of the Amendment Act that did not comply with Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of severance.

The Attorney General further argued that the sections 1, 3, 4 and 7 of the Amendment Act did not contravene Articles 66(3), 106(3) and 128(5) since they did not affect any expenses, payments and emoluments in the institutions they referred to.

On the issue of the Certificate showing some form of expenditure, the Attorney General submitted that the role of the Certificate of Financial Implications was to appraise the Speaker and/or Parliament whether the Bill had financial implications or not. He referred to Page 43 vol 3 of the Record of Appeal where the Secretary to the Treasury stated that the rationale of the Certificate issued was to show that the Bill had no financial implications. The Attorney General further submitted that the Certificate issued showed that the Bill was budget neutral. Referring to the testimony of the Secretary to the Treasury at page 43, the Attorney General argued that this phrase meant that as far as the budget was concerned, there were no extra resources or a charge and that is what the Ministry was confirming.

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination [at pages 309 Vol. 3 of the Record], the Clerk to Parliament ably

pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that the said facilitation to Members of Parliament did not make the enactment of the Amendment Act inconsistent with Article 93 of the Constitution.

In conclusion on this point, the Attorney General submitted that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government, that had financial implications. In his view, the Article did not concern itself with the money used in processing the bill, allowances/facilitations that was paid out to the Members of Parliament to process the Bills.

Consideration of the issue

The appellants contend that Article 93 prohibits Parliament from proceeding with a Bill or motion including an amendment Bill or motion brought by a private member that has the effect of imposing a charge on the consolidated fund or any public fund of Uganda. According to the appellants, the Bill from which the Amendment Act emerged had the effect of imposing a charge on the consolidated fund because: (i) it contained provisions therein that would require a charge on the consolidated fund in order for them to be validly enacted; (ii) the facilitation of UGX 29,000,000/= given to each Member to consult on the Bill was drawn from the consolidated fund; (iii) the additional 15 days given to the Supreme Court to hear and determine a Presidential Election Petition could require additional funds drawn from the consolidated fund; and (iv) the Certificate issued by the minister of finance in respect of the Bill showed that there would be some form of expenditure.

The appellants contend that the above four instances clearly show that the Bill contravened Article 93. They therefore argue that the learned Justices of the Constitutional Court erred in holding that the Bill did not contravene the Constitution. The Attorney General on the other hand supports the Constitutional Court's finding on this issue.

Section 76 of the Public Finance Management Act, 2015 provides the relevant parts as follows:

> *(1)* ***Every Bill introduced in Parliament shall be accompanied by a certificate of financial implications issued by the Minister.***
>
> ***(2) The certificate of financial implications issued under subsection (1) shall indicate the estimates of revenue and expenditure over the period of not less than two years after the coming into effect of the Bill when passed.***
>
> ***(3) In addition to the requirements under subsection (2) the certificate of financial implications shall indicate the impact of the Bill on the economy.***

The requirement for a certificate of financial implications is re-emphasized by the Rules of Procedure of the Parliament of Uganda. Rule 107 of the 2012 Rules [then applicable when the Bill was introduced before Parliament] provided for the same as follows:

> *(1)* ***All bills shall be accompanied by a certificate of financial implications setting out—***
>
> ***(a) the specific outputs and outcomes of the Bill;***
>
> ***(b) how those outputs and outcomes fit within the overall policies and programmes of government;***
>
> ***(c) the costs involved and their impact on the budget;***
>
> ***(d) the proposed or existing method of financing the costs related to the Bill and its feasibility.***

(2) The certificate of financial implications shall be signed by the Minister responsible for finance.

On 03/10/2017, Hon. Raphael Magyezi laid on the table of Parliament, the Constitution (Amendment) (No.2) Bill of 2017. This Bill was accompanied by a Certificate of Financial Implications as required by the above provisions. This Certificate was issued on 28/09/2017. The appellants do not contend that the Bill was not accompanied by a Certificate of Financial Implications or that the Certificate issued was defective.

It is not in dispute that in the course of debating the Bill introduced by Hon. Magyezi, other provisions were introduced, which in my view, had the effect of creating a charge on the consolidated fund and thus were contrary to Article 93 of the Constitution. In determining whether the Bill introduced by Hon. Magyezi was inconsistent with Article 93 of the Constitution, recourse should be had on reviewing the provisions contained therein at the time Hon. Magyezi tabled it before Parliament and when Parliament first proceeded with it.

The Constitution (Amendment) (No.2) Bill of 2017 as originally laid before Parliament by Hon. Magyezi on 03/10/2017 provided in the relevant parts as follows:

1. ***The object of the bill is to amend the Constitution of the Republic of Uganda with articles 259 and 262 of the Constitution-***

(a) to provide for the time within which to hold Presidential, Parliamentary and local Government Council elections under article 61;

(b) to provide for eligibility requirements for a person to be elected as President or District Chairperson under article 102(b) and 183(2)(b);

(c) to increase the number of days within which to file and determine a presidential election petition under article 104(2) & (3);

(d) to increase the number of days within which the Electoral Commission is required to hold a fresh election where a Presidential Election is annulled under Article 104(6); and

(e) for related matters

In my view, the above provisions did not have the effect of imposing any additional charge on the consolidated fund as envisaged under Article 93 of the Constitution. I fail to see how providing time within which to hold Presidential, Parliamentary and local Government Council elections, or providing eligibility requirements for a person to be elected President, or increasing the number of days within which to file and determine a presidential, or increasing the number of days within which the Electoral Commission is required to hold a fresh election in case the presidential election is annulled would impose a charge on the consolidated fund. Therefore, in my view, Hon. Magyezi's bill as originally tabled did not have the effect of imposing a charge on the consolidated fund. It therefore follows that at the time of proceeding with the Bill as tabled by Hon. Magyezi, no provisions existed that had the effect of imposing a charge on the consolidated fund. The provisions that had this effect were brought in much later, at the Committee stage.

It is not in contention that the provisions which had the effect of imposing a charge on the consolidated fund were those which were added to the bill at Committee Stage. Those provisions were rightly struck down by the Constitutional Court for contravening the provisions of Article 93 of the Constitution.

The appellants also contended that each Member of Parliament was given UGX 29,000,000/= to go and consult on the Bill. The

appellants contend that this money was got from the consolidated fund and therefore constituted an additional charge prohibited under Article 93 of the Constitution.

The Secretary to the Treasury, in paragraph 9 of his affidavit in reply to the Petitions, deponed that this facilitation was already existing in the budget of the Parliamentary Commission. His assertion was also supported by the Clerk to Parliament who testified that the money given to members for facilitation had already been appropriated for use for Parliamentary activities by the Parliamentary Commission in the financial year 2017-2018. The appellants' argument concerning money provided to members of Parliament to consult on Hon. Magyezi's bill would lead to a conclusion that if public funds are spent on consultation of a private member's bill by members of Parliament including committees of Parliament, that money spent would be a charge on the consolidated fund and render the bill unconstitutional. This argument cannot be accepted. I respectfully do not accept the view that money spent by Parliament in taking any bill through all its stages constitutes a charge on the consolidated fund envisaged under Article 93 of the Constitution. If it were so, no private member's bill would ever be passed. In my view, what Article 93 requires is for the Minister to indicate, among other things the likely expenditure the bill is likely to cause on the national budget through once the provisions contained in the bill are brought into force as Act of Parliament.

Concerning allowances likely to be spent as a result of the 15 extra days given to the Supreme Court to determine a presidential election petition, my view is that this is a matter that is purely speculative and trivial which should not have been raised by the appellants.

The third ground in support of the contention that the Bill contravened Article 93 of the Constitution was grounded on the fact that the Certificate of financial Implications issued shows there was going to be some sort of expenditure, which was inconsistent with Article 93.

Having found that the provisions in Hon. Magyezi's bill did not in any way have the effect of imposing a charge on the consolidated fund, and having also found that the shs. 29,000,000/= given to each Member of Parliament to carry out consultation on the bill did not impose a charge on the consolidated fund, I find it superfluous and therefore unnecessary to consider the issue of the Minister's certificate allegedly showing that there was going to be some sort of expenditure.

I therefore find that the learned Justices of the Constitutional Court did not err by holding that the Constitution (Amendment) (No.02) Bill as originally introduced by Hon. Magyezi was not inconsistent with Article 93 of the Constitution of Uganda.

No one disputes the fact that the amendments which were introduced at Committee stage were unconstitutional. These amendments included the reintroduction of the president's term limits and entrenching of the same, and extending the term of Parliament and local councils, and other consequential amendments.

All these amendments were fundamental to the Constitution yet the people were not consulted on them; some of the amendments had financial implications since they required a referendum, yet they were not accompanied by the Minister of Finance's certificate of financial implications; the votes relating to those amendments required a separation of 14 days between the second and third readings in accordance with Article 263(1) since they fell under

Article 260 either by infection or directly yet this was not done, and after their passing by Parliament they were excluded by the Speaker from her certificate of compliance under Article 263(2)(a). these are all constitutional irregularities and therefore the Speaker should not have allowed them to be introduced in the bill at Committee Stage.

The appellants' argument, however, is that these late amendments were an integral part of the bill that was passed by Parliament and assented to by the President and so the Constitutional Court erred when it applied the doctrine of severance to strike out of the Amendment Act only those sections of the Act that related to the amendments that were introduced at the Committee Stage instead of declaring the whole Amendment Act as unconstitutional.

The Attorney General, on the other hand, argued that the learned Justices of the Constitutional Court were right to apply the doctrine of severance to nullify those provisions of the Amendment Act that did not comply with the provisions of the Constitution and the Rules of Procedure and to uphold the provisions of the Amendment Act that did.

Consideration of the doctrine of Severance

A review of the majority judgments of the Constitutional Court shows that the doctrine of severance was applied by the court in three instances: (1) in respect of violation of Article 93 vis-à-vis the Amendment Act, (2) in respect of violation of Article 263(1) relating to the 14 days rule that are required to separate the second reading from the third reading and (3) in respect of the Speaker's certificate of compliance.

The doctrine of severance has been addressed by written law as well as case law. Article 2 of the Constitution itself provides for severance. It states:

> **(1) This Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**
>
> **(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of inconsistency, be void.** [my emphasis]

The above constitutional provision is what the Constitutional Court relied on to sever the Amendments by striking down those provisions that were unconstitutional and preserving those that were Constitutional.

Review of case law from different jurisdictions and scholarly writings shows that courts prefer this approach as opposed to nullifying the law in its entirety. In determining when or not to apply the doctrine of severance Courts are guided by various factors. However, the major consideration is the desire to ensure that the intention of the legislature in enacting a Statute is not defeated.

In **Prabagaran a/l Srivijayan v. Public Prosecutor, [2017] SGCA 67**, the Singaporean Court of Appeal approached the issue of severance as follows:

> ***"In the exercise of severance, legislative intent is paramount. The reason for this is clear: to allow the courts to do so in a manner that is contrary to the intent underlying the passage of the provision in question***

would effectively confer upon the judiciary legislative powers and violate the principle of separation of powers. […] it must be shown to be Parliament's intention behind the enactment of an Act that is found to be partially in breach of the Constitution that it should nevertheless continue to be given effect even after the severance and invalidity of some portions."

In reaching this conclusion the Singaporean Court of Appeal first identified the test of severability. It called in aid the US Supreme Court decision in **Alaska Airlines Inc v. Brok**, **480 U.S. 678, 684** and held that a legislative provision is:

a. Severable if 'the truncated statute, with the unconstitutional portion excised, will operate in the manner that the legislature intended'

b. Severable if the legislature 'would have enacted the truncated statute with only the remaining provisions.'

c. But, conversely, not severable if the truncated statute "cannot function without [the unconstitutional part], at least in a manner that Parliament could not have contemplated

In the South African case of **Johannesburg City Council v Chesterfield House (Pty) Ltd, 1952 (3) SA 809 (A) 822** it was held as follows:

[W]here it is possible to separate the good from the bad in a statute and the good is not dependent upon the bad, then that part of the statute which is good must be given

effect to, provided that what remains carries out the main object of the statute . . . however, where the task of separation is so complicated as to be impracticable, the whole statute must be declared ultra vires.

In **Farieda Coetzee v. Government of the Republic of South Africa and Matiso & Ors v. the Commanding Officer, Port Elizabeth Prison, & Ors, 1995 (4) SA 631 (CC)**, a two-stage on determining whether to apply the doctrine was advanced. Kriegler, J observed as follows:

Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?

It has also been argued that for the doctrine to apply, the parts of the statute where it is to be applied should clearly stand out. Thus, in **Premier Limpopo Province v. Speaker of the Limpopo Provincial Legislature & Ors (CCT 94/10) [2012] ZACC 3**, it was observed as follows:

It cannot be over-emphasized that severance should be reserved for cases where it is clear from the outset

exactly which parts of the statute need to be excised to cure the constitutional deficiency.

In **Halsbury's Laws of England (VOLUME 1(1) (2001 REISSUE) UPDATE 25** at **page 131**, the following passage appears:

25. <u>Severance of partly invalid instruments or actions</u>. An order or other instrument or an action may be partly valid and partly invalid. Unless the invalid part is inextricably interconnected with the valid, such that to sever it would be to alter the substance of the valid part, a court is entitled to set aside or disregard the invalid part, leaving the rest intact. The courts' approach to severance is that it is generally appropriate to sever what is invalid if what remains after severance is essentially unchanged in purpose, operation and effect: this is the test of substantial severability. Severance need not be limited to cases in which it can be accomplished by judicial surgery or textual emendation by excision...

Prof. Kevin C. Walsh in his article **'Partial Unconstitutionality'** observes as follows:

"Current law and scholarship answer that severability doctrine is the exclusive way to deal with partial unconstitutionality. Severability doctrine governs whether a Court may first separate out or 'sever' the unconstitutional provisions or applications of a law, and then subtract or 'excise' them, so the constitutional

remainder can be enforced going forward. Thus conceived, this judicial operation creates a new law that consists of the old law 'minus' its unconstitutional provisions or applications."

The learned author further proceeds to analyze when to apply the severance test. He relies on two US authorities [**Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 330 (2006)** and **Alaska Airlines, Inc. v. Brock** (supra)] and opines as follows:

"The lodestar for this severability determination is legislative intent. Because a court must not 'use its remedial powers to circumvent the intent of the legislature', the Court must ask before severing: 'would the legislature have preferred what is left of its statute to no statute at all?' If the answer is 'no', then the Court should declare the Statute entirely invalid and enjoin its enforcement in all applications."

In the **Alaska Airlines, Inc.** case, the Court held that '***Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.'***

Lastly, it has also been argued that the doctrine of severance should be invoked where third parties interests have been created as a result of a legislation. In his essay entitled **'Two Tests of Severance: Procedural and Substantive Constitutional**

Violations and the Legislative Process in Missouri[1]' Johnathon Whitefield observes that severance is justified:

> ***When innocent third parties rely on the passage and implementation of a law in good faith, and invalidation of the law would have collateral effects that outweigh the need to ensure consistent legislative practice.***

Later in his article, he also opines as follows:

> ***'For procedural constitutional violations, "the entire bill is unconstitutional unless [the court] is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not."*** *To determine whether or not the provisions that are part of the added subject pass this test, the court considers "whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill." [*Emphasis mine].

In support of his opinion, the writer relied on the decision of the Missouri Supreme Court of **Hammerschmidt v. Boone Cnty., 877 S.W. 2D 98, 103**. In regard to this decision, the learned author opined thus:

> ***Historically, the Supreme Court of Missouri has applied severance as a remedy in several cases involving the single-subject rule, starting with Hammerschmidt. In that case, severance was discussed as a potential***

remedy for the constitutional infirmities of House Bills 551 and 552. Specifically, the court indicated that severance is a "more difficult issue" when procedural mandates of the constitution are violated. Despite the stated difficulty of such an analysis, the court in Hammerschmidt had "no difficulty in divining the primary subject" of the bills in question and found that the "title indicates the bill relates to elections." The court stated that a comparison of the "bill's passage through the House prior to the addition of amendments [with the] contents as finally passed and presented to the governor shows that the bill is about election procedures."

Application of the doctrine of severance in Uganda

I shall proceed to highlight briefly where this doctrine has been applied by this Court. I however note from the onset that in some instances, this Court has pointed out that its application of the doctrine was to ensure that the legitimate objective of Parliament in enacting the Act was realized. For example in **Attorney General v. Salvatori Abuki,** Constitutional Appeal No. 01 of 1998, this Court set aside the order of the Constitutional Court nullifying the whole of section 7 of the Witch Craft Act. The Constitutional Court had found the section inconsistent with Article 24 of the Constitution, a finding that this Court agreed with. However, this Court pointed out that there were legitimate grounds why the legislature enacted it. Wambuzi, CJ (as he was then) while applying the principle of severance observed as follows:

"I may add here that Article 2 of the Constitution that the Constitution is the supreme law of Uganda and under clause (2) of the article,

> ***"If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void"***
>
> ***It was open to the Constitutional Court to find that section 7 of the Witchcraft Act is void to the extent that it authorizes the making of an exclusion order excluding a person from his or her home which would be a violation of a fundamental right of the petitioner.***
>
> ***...***
>
> ***However, in Uganda I would think that whatever the language is "reading down" or "constitutional exemption" the impugned law is not to be declared void merely because one aspect of its application offends a provision of the Constitution. Otherwise the words 'shall be void to the extent of the inconsistency' are meaningless.***

Again this Court in **Paul K. Ssemogerere & 2 Ors v. Attorney General,** Constitutional Appeal No. 01 of 2002, appears to have impliedly recognized the severance doctrine provided under Article 2(2) of the Constitution. Kanyeihamba, JSC (as he was then) opined as follows:

> ***Consequently, in my opinion, insofar as section 5 of Act 13/2000 purports to restrict that access [of information] unconstitutionally, it conflicts with the Constitution and therefore is null and void.*** [Emphasis mine.]

It would follow from the interpretation of this holding that if there was a restriction that was constitutional, for example on grounds of national security, then such amendment could not be declared null and void. Thus the bad would be thrown out and the good retained without necessarily striking out the impugned provision or Act.

Lastly in **Col. (Rtd) Dr. Besigye Kiiza v. Museveni Yoweri Kaguta & anor, Election Petition No. 01 of 2001** and **Rtd. Col. Dr. Kiiza Besigye v. Electoral Commission & Anor, Election Petition No. 01 of 2006**, this Court invoked the severance doctrine to truncate affidavits so that only those parts of the affidavit that were compliant with the law could be retained while the offending parts could be excluded. Karokora, JSC observed that:

> ***it seems to me that the proper practice should be that whenever it is possible, court which is faced with an affidavit which contains some inadmissible matter which can be severed and discarded without rendering the remaining part of the affidavit meaningless, the court should severe the offending part and use the rest of the affidavit.***

The present case

Having examined this doctrine, I will now proceed to determine whether it is applicable to the Amendment Act.

The major contention of the appellants is that the procedural irregularities manifest in the passing of the Amendment Act cannot let it stand. There are two kinds of procedural irregularities involved in this case. The first one which is major in my view involves the failure by Parliament to comply with procedural

requirements provided in the Constitution. The second one relates to Parliament's failure to comply with its own Rules of Procedure.

I am aware that in **Paul K. Ssemogerere case** (supra) this Court emphasized the need for compliance with the provisions of chapter 18 when it comes to amending the Constitution. Kanyeihamba, JSC who wrote the lead judgment of the Court held as follows:

> ***"In my opinion, the requirements of chapter 18 are mandatory and cannot be waived, not even by Parliament. Consequently, and with the greatest respect, the majority of the learned Justices of the Constitutional Court erred in law in holding that those provisions could be waived and that in any event, they were not essential to validating any constitutional amendment."***

In light of this holding, the court proceeded to strike out the impugned Amendment Act on grounds that: (i) the Bill was not accompanied by a certification of the Speaker (ii) voting by use of shouts "ayes" and "nays" could not help in determining whether the two-thirds majority had been attained; and (iii) there was no compliance with the 14 days rule between the 2nd and 3rd reading of the Bill since it had by infection amended provisions of the Constitution that required compliance with a 14 days rule.

The case of **Paul K. Ssemwogerere** (supra) must be distinguished from the instant case. In **Ssemwogerere's** case the bill was not accompanied by the Speaker's certificate of compliance. In the instant case the bill, was accompanied by the Speaker's certificate of compliance though defective. In **Ssemwogerere's** case Parliament had no quorum and furthermore members who were

present and voted to pass the bill voted by voice so the will of Parliament was unascertainable. In the instant case Parliament had quorum and members voted by roll call.

In deciding the petition leading to this appeal, by a unanimous decision, the Constitutional Court, rightly in my view, struck down sections 2, 5, 6, 8, 9 and 10 of the Amendment Act which provided for the extensions of the tenure of Parliament and Local Government Councils by two years, and for the reinstatement of the Presidential term limits, provisions that had been unconstitutionally introduced to the bill at Committee Stage.

By majority the Court applied the severance doctrine and retained sections 1, 3, 4, and 7, of the Constitution as being compliant with the Constitution.

Courts' duty among other things, is to be faithful to the Constitution. Courts must not only guard against infringement of the Constitution but must also uphold provisions of legislation that are compliant with it. To strike out constitutionally complaint provisions of legislation in Parliament starting the process of enacting the same provisions all over again would, in my view, be unnecessary especially knowing that the bill was passed by Parliament with over whelming support at 2nd and 3rd reading of the bill. In my view, it would be a waste of national resources for Parliament to have to repeat the process all over again.

Accordingly, the Constitutional Court did not err in applying the doctrine of severance to the Amendment Act to strike out the offending provisions and retain the ones that were passed in accordance with the Constitution.

i. Alleged Smuggling of the Motion to introduce Constitutional (Amendment) (No. 2) Bill onto the Order Paper.

Appellants' Submissions

Counsel submitted that the Bill leading to the enactment of the Amendment Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure of Parliament by virtue of the fact that the same was smuggled onto the Order Paper.

Counsel found fault with the finding of the Constitutional Court that the Speaker enjoyed wide, and almost unfettered, discretionary powers to determine the Order of Business in the House and as such that no wrong was committed by the Speaker in amending the Order Paper to include the motion seeking leave to introduce a private member's Bill.

Counsel submitted that the above finding was at variance with the express Rules of Procedure of Parliament. He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. Counsel argued that in the proviso to the said rule, the Speaker was only given a prerogative to determine the order of business in Parliament. He contended that the evidence on record specifically under paragraphs 12, 13, 14, 15 and 16 of Hon. Semujju Nganda's Affidavit in support of the Petition demonstrates that on 19th September 2017, the Deputy Speaker assured the House that: (i) there was not going to be any ambush to Members of Parliament

as far as handling the Amendment Bill was concerned; and (ii) the Order Paper would reflect the day's business.

Counsel contended that on 20th September 2017 the Deputy Speaker repeated the same thing and assured Members that nothing would be done in secrecy since all business had to go through the Business Committee under Rule 174.

Counsel argued that the bill was never presented in the Business Committee for appropriate action and consideration. In his view, Members of Parliament were taken by surprise on the 26th day of September 2017 when the Speaker amended the order paper on the floor of the House to include a motion by Hon. Magyezi that sought leave to introduce a private member's Bill to amend the constitution.

Counsel further pointed out that efforts made by the shadow Minister of Justice and Constitutional Affairs, Hon. Medard Sseggona and other MPs to raise procedural matters specifically that there were other motions which had preceded Hon. Magyezi's motion were futile.

Counsel argued that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the Order Paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. Further, that under Rule 29 there must be a Weekly Order Paper including relevant documents that must be distributed to all Members through their pigeon holes and where possible, electronically. Counsel argued that all these Rules were flagrantly violated.

Respondent's Submissions

The Attorney General refuted the appellants' contention that the Bill from which the Amendment Act emerged was smuggled into the House. He submitted that in the exercise of its legislative powers set out in Art. 91, Parliament has power to make law. Further, that under Article 94(1), it had powers to make rules to regulate its own procedure, including the procedure of its committees.

The Attorney General further pointed out that under Article 94(4) the Speaker had powers to determine the order of business in Parliament; and that a Member of Parliament had a right to move a private members Bill.

The Attorney General contended further that on 27th September 2017, in exercising his powers under Article 94(4)(b), Hon. Raphael Magyezi tabled in Parliament a motion for leave to introduce a private Members Bill entitled, The Constitution (Amendment)(No. 2) Bill, 2017. The Attorney General submitted that the inception, notice of motion and tabling of the motion were undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill on the Order Paper as alleged by the appellant.

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25) wherein she had power to set the Order of Business and that under Rule 7 the Speaker presides at any sitting of the house and decides on questions of order and practice. Furthermore, that while doing this, the Speaker made a

ruling on the various motions before her including the motion by Hon Nsamba. In the Attorney General's view, the Speaker was aware of Rule 25(s) new and 24(q) old that provide for an Order of precedence which makes a Private Members Bills come before all others.

The Attorney General also asserted that the Magyezi Bill met the test mandated by Rule 121 and was lawful as Rule 120 (1) allows for every Member to move a Private Members Bill. He pointed out that the bill was introduced by way of a Motion to which was attached the Proposed Bill noting that the other two Bills, that is the Nsamba and Lyomoki Bills had no attachments and one was a mere Resolution.

The Attorney General further contended that the Speaker had [under Rule (47 old) 55 new] been given written Notice of this Motion three days before. In his view, the Speaker as the custodian of what gets onto the Order Paper under Rule 24(Old) Rules gave a go ahead to the Magyezi Bill.

In conclusion, the Attorney General submitted that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the Constitutional Court finding that the Bill followed the required procedure, up to its enactment.

Constitutional Court holding on the alleged Smuggling of the Notice to introduce the Bill on the Order Paper

A review of the Judgments of the Justices of the Constitutional Court shows that: (i) Two of the Justices (Owiny-Dollo, DCJ and

Kasule, JCC) were categorical that the Speaker enjoyed discretion under Rules 24(1) and 165(1) of the old Rules to determine the order of business; (ii) One member of the panel (Musoke, JCC) acknowledged that the Speaker failed to comply with the Rules regarding the addition of the Magyezi Bill on the order paper. She was however of the view that this procedural irregularity did not contravene any of the provisions of the Constitution since the members were able to proceed and debate on the issue; (iii) One Member (Kakuru, JCC) found that the Speaker's actions contravened the Parliamentary Rules of Procedure with the result that the whole process of enactment was vitiated; (iv) One member (Cheborion, DCJ) did not make a finding on this issue.

Consideration of the Issue

The appellants' contention under this issue is that the motion to introduce the Constitution (Amendment) (No.02) Bill was smuggled on the order paper of Parliament of 27/09/2017 and that this was inconsistent with Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Parliament. The Attorney General on the other hand contends that the motion to introduce the Bill was properly admitted and tabled on the floor of Parliament.

I note that the appellant has cited the provisions of the 2017 Rules. However, at the time of tabling the Bill on 27/09/2017, it is the 2012 Rules that were still in force. I will therefore refer to the 2012 Rules in my resolution of this issue.

Counsel for the appellants contend that Rule 174 vests power to arrange the business of Parliament and the order of the same in

the Business Committee. Further, that in the proviso to the said rule, the Speaker is only given a prerogative to determine the order of business in Parliament. By this, counsel seems to argue that it is only when the Business Committee has sat and approved the business of the House that the Speaker can then exercise his or her power to determine the order of business as approved by the Business Committee of the House.

This interpretation by the appellants is, in my view, erroneous. Rule 165 (1) of the 2012 Rules provided for the powers of the Committee as follows:

> ***It shall be the function of the Business Committee subject to rule 24, to arrange the business of each meeting and the order in which it shall be taken; except that the powers of the Committee shall be without prejudice to the powers of the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business as required by clause (4)(a)of article 94 of the Constitution.***

A review of this Rule shows inter alia that it is subject to Rule 24 of the 2012 which provides as follows:

> *(1)* ***The Speaker shall determine the order of business of the House and shall give priority to Government business.***
>
> ***(2) Subject to sub rule (1), the business for each sitting as arranged by the Business Committee in consultation***

with the Speaker shall be set out in the Order Paper for each sitting and shall whenever possible be in the following order..."

A clear reading of these two provisions, in my view, shows that the power of the Business Committee to arrange the business of each meeting and order in which it shall be taken is subject to the powers of the Speaker to determine the order of business in the House. My reasoning is further fortified by the provisions of Article 94(4) (a) of our Constitution which provides as follows:

The rules of procedure of Parliament shall include the following provisions- (a) <u>the Speaker shall determine the order of business in Parliament</u> and shall give priority to Government business.

It therefore follows that the powers of the Business Committee to generate business of the House is subject to the powers of the Speaker to determine the order of business of the House.

I also note that under Rule 47 of the old Rules, no motion can be moved unless the Member moving it has given written notice of the motion to the Speaker and the Clerk to Parliament of not less than three days previous to the sitting at which it is intended to move the motion. It is not clear from the record whether and when (if at all) Hon. Magyezi gave his written notice to the Speaker of his intention to move a motion to table a private member's bill. It would therefore ordinarily follow that if Hon. Magyezi did not give this Notice in accordance with the above Rule, then it would be a breach of the rules.

The appellants have also contended that under Rule 27 [Rule 26 of the 2012 Rules], the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. Further that there must be a weekly order paper including relevant documents that should be distributed to all Members through their pigeon holes and where possible, electronically. All this is in not dispute. However, this, in my view, does not take away the powers of the Speaker to determine the order of business of the House. This power, in my view, extends to amending the order paper to include matters that have not been previously included.

Before I take leave of this matter, I note that both the 2012 and 2017 Rules have provisions for urgent matters which may not necessarily follow the procedure as laid down in those Rules, but nevertheless can be brought before the House on short Notice. Thus, if we were to take the appellants' arguments that all Business to be discussed in the House must pass through the Business Committee or be brought to the attention of the Business Committee which must then circulate the order paper to all members, without which the business shall not be discussed, we would be misinterpreting the intention of Rule 26 [27 new]. The framers of this Rule clearly must been aware of it when they included in the same Rules provisions relating to urgent business that may require immediate attention of Parliament.

In conclusion on this point, it is my view that the Speaker did not breach Article 94 of the Constitution and the Rules of Procedure

when she allowed the Hon. Magyezi to table his motion on the floor of Parliament.

ii. No requisite Consultation and/or Public Participation in the course of enacting the Bill.

Appellants' Submissions

Counsel for the appellants submitted that the learned majority Justices of the Constitutional Court erred in law and fact when they held that there was proper consultation of the people of Uganda on the Constitution (Amendment) Bill, 2017. He submitted that the requisite consultation and public participation of the people, which is mandatory, was not conducted. He argued that public participation is one of the basic structures of our Constitution and therefore this being a matter which touched the foundation of the Constitution specifically Articles 1, 2 and 8A, public participation was of paramount importance.

In support of his submissions above, counsel relied on two persuasive authorities from Kenya, that is **Law Society of Kenya v. Attorney General, Constitutional Petition No. 3 of 2016** and **Robert N. Gakuru & Others v. Governor Kiambu County & Others**. Petition No. 532 of 2013.

Counsel submitted that the significance of consultations, a fundamental value of our Constitution, was not appreciated by the majority Justices of the Constitutional Court. Counsel argued that they dismally failed in their duty of evaluating the evidence on record and as a consequence arrived at a wrong decision that the

people were consulted on the Constitution (Amendment) (No. 2) Bill, 2017 whereas not.

Counsel argued that there was overwhelming and cogent evidence on record indicating that;-

a. The process leading to the enactment of the Constitution (Amendment) Act was not preceded by a Consultative Constitutional review exercise as was the case with the promulgation of the 1995 Constitution and the 2005 amendments.

b. The Constitution (Amendment) Bill was presented in Parliament by a private member, Hon. Raphael Magyezi, and there was no evidence on record that he consulted the people of Uganda let alone his constituents in Igara West Constituency before tabling the same before Parliament.

c. Much as the Speaker directed that consultations should be conducted, Parliament as an institution never designed a structured framework or process for public participation or consultation which may have included Parliamentary *barazas*, public rallies, radio and Television broadcastings among others.

d. The Committee on Legal and Parliamentary affairs which was assigned the duty of processing the Bill did a very shoddy work in terms of consultation.

e. The opposition Members of Parliament were denied the opportunity and right to engage the people over the aforesaid bill. The public gatherings for opposition members of

Parliament which had been organized countrywide were blocked, ruthlessly and violently dispersed by the police and other security agencies and many Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment.

In breaking up the opposition Members of Parliament's rallies, Police relied on the directive issued by Asuman Mugyenyi, the Director of operations, Uganda Police Force, which directive was unanimously declared unlawful, arbitrary, and unconstitutional by the Constitutional Court. Ironically, the Constitutional Court held that there was no evidence to demonstrate that the aforesaid illegal directive was ever implemented and that it had adversely affected the entire consultation process. Counsel argued that this finding was untenable, both in law and fact, as there was overwhelming evidence on record to show that the said directive was enforced as illustrated. Counsel further argued that indeed during cross examination Asuman Mugyenyi admitted that his directive was enforced by all the police officers countrywide.

f. Despite the fact that Members of Parliament were given ex gratia facilitation of UgX29m (save for those who returned it) the purported consultation as argued by the Respondent was illusory and ineffectual.

Counsel invited Court to uphold the findings of the learned dissenting Justice of the Constitutional Court that Parliament

failed to encourage, empower and facilitate public participation of citizens in the process of enacting the Amendment Act.

Respondent's Submissions

The Attorney General submitted that the majority Learned Justices of the Constitutional Court made a proper finding that there was public participation and consultation in the process of conceptualization and enactment of the impugned Act.

The Attorney General also argued that unlike the Constitutions of South Africa and Kenya and the County Governments Act, 2012 of Kenya, the 1995 Constitution of the Republic of Uganda did not provide a standard measure or parameters for consultative constitutional review. Rather it recognizes various roles of people and bodies in the constitutional amendment process and in so doing, permits amendment of the Constitution in various ways as provided in Articles 259, 260, 261 and 262.

The Attorney General further submitted that other than what is contained in the 1995 Constitution and as rightly observed by the Constitutional Court, Parliament has never enacted a law to guide consultation or set parameters or standard measures against which effective consultation or public participation can be measured, be it at pre-legislative stage, legislative stage, and post legislative stage. The Attorney General observed that the only exception was in Article 90(3)(a) which gives the committees of Parliament the power to call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence.

The Attorney General submitted that in light of this there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the Constitution. He argued further that it was dependent on Parliament to determine how best to achieve the participation objective.

The Attorney General also distinguished two cases on public consultation relied upon by the appellants. He argued that the **Doctors For Life** Case which provided for what to look at while gauging whether a Parliament has met the consultation or public participation requirement, was decided basing on the South Africa Constitution which had mandatory provisions [under section 72] that required public participation in the law making process which is not the case in Uganda.

In relation to the case of **Robert Gakuru and others v. Governor Kiambu County** (supra), the Attorney General submitted that while it was elaborate on public participation and consultation it was limited in its application to the Ugandan setting because unlike the provisions in the Constitution of Uganda, public participation is elaborately and illustratively provided for in the Constitution of Kenya and in the County Governments Act, 2012 of Kenya. Further, that these requirements were clearly stipulated in a mandatory manner in articles 10, 94, 118, 174, 196 and 201 of the Constitution of Kenya. Furthermore, that the yardsticks to be used to measure compliance with the public participation and consultation requirements were also provided in section 87 of the County Governments Act, 2012 which is not the case for Uganda.

In the Attorney General's view, because of the different legal regimes in these countries, it would be erroneous for the cited cases and standards set therein to be similarly applicable to Uganda in the absence of a clear legal regime on public participation.

The above notwithstanding, the Attorney General submitted that at pages 620 – 640 Vol. 3 of the record, that he detailed what the Parliamentary Committee on Legal and Parliamentary Affairs did to comply with the requirement for public participation. The Attorney General further submitted that the law is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, he argued, the law does not require that the proposed legislation must be brought to each and every person wherever the person might be. In his view, what was required was that reasonable steps should be taken to facilitate the said participation. In other words, what was required was that a reasonable opportunity should be afforded to the public to meaningfully participate in the legislative process.

The Attorney General also argued that the appellants' attack on the Committee's nature of consultations in terms of quality and quantity was not factual. He argued that notices of invitation [as submitted at pages 620 – 640 Vol. 3 of the record] were published in the print media inviting all persons who wished to participate in the process to do so. He argued further that fifty four groups of persons, legal and natural, heeded the invitation, including the President of Uganda and registered political parties. The Attorney General also argued that Parliament could not deny them

audience. He however argued that Parliament could not force unwilling participants to come to the committee.

It was also the Attorney General's contention that the committee operated within its powers and conducted open hearings as a means of accomplishing its mandate in relation to legislation.

He further argued that there was no merit in the appellants' contention that because only seven out of 455 members adduced evidence of consultation the Act should be nullified for lack of public participation. The Attorney General submitted that an examination of the relevant Hansard clearly showed that the reports of Members of Parliament through their debating and voting was representative of the consultations carried out.

The Attorney General invited this Court to uphold the majority Judgment of the Constitutional Court that in the circumstances proper consultation was carried out.

Constitutional Court holding on the issue of Public Participation/Consultation regarding the Bill

A review of the Judgments of the Justices of the Constitutional Court shows that: (i) Majority Justices found that there was proper consultation carried out in light of the legal provisions prevailing; (ii) whereas there was some stifling of consultations by the Police, there was no sufficient evidence to prove that throughout the country, the police unduly restricted consultative Meetings.

Consideration of the Issue

The appellants' major contention under this issue is that there was no sufficient consultation of the public (if any) in the course of

gathering views regarding the proposed amendments in the Bill. The appellants further contend that the Police frustrated their consultation with unnecessary interruptions and that in some cases they did not consult their constituents at all.

There is no doubt that the authorities cited by the appellants properly illustrate the concept of public participation and the yardstick for determining whether public participation has been achieved in respect of a proposed enactment of Parliament. However, it is worthwhile noting that these authorities are from countries which have in their Constitutions and Statutes elaborate provisions guiding on public consultation. This is not the case with Uganda. Be that as it may, since the people of Uganda are the source of all power under our Constitution, it is very important that they should be consulted whenever there is a proposed amendment to the Constitution or any law proposed to be enacted by Parliament. Public participation is therefore of paramount importance in this respect.

In my view, it is a fundamental part of the legislative process reflective of good governance and has been recognized as such at various levels. For example, at the international level various international human rights instruments emphasize the importance of public participation in governance. For instance, under the **Universal Declaration of Human Rights of 1948**, Article 21 is to the effect that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Furthermore, in the **International Covenant on Civil and Political Rights (ICCPR)**, Article 25 thereof provides as follows:

> ***"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;***
>
> ***(a)To take part in the conduct of public affairs, directly or through freely chosen representatives;..."***

In **Kiambu County Government & 3 ors v. R. N. Gakuru & Ors,** (supra), the Kenyan Court of Appeal emphasized the need to involve the public in the legislative process. It emphasized this participation as follows:

> ***The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation***.

Lastly, in **Doctors for Life International v. the Speaker of the National Assembly and 11 ors, Case CCT 12 of 2005**, the South African Constitutional Court set down the following test with regard to public participation in the legislative process.

> ***To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional***

obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.

Would it be correct to argue that in regard to the Amendment Bill there was no public consultation or that it was inadequate?

Review of the Hansard shows: (i) that the Chairperson of the Legal and Parliamentary Affairs Committee while presenting his report before the House informed the House that they had made wide consultations. For emphasis, he attached a list of those the Committee had consulted along with their memorandum; (ii) the Committee made announcements in print and electronic media inviting people to give their views on the proposed amendments; (iii) Some of the stakeholders invited by the Committee entered appearance while others did not; (iv) Each Member of Parliament was given 29,000,000/= by the Parliamentary Commission to go to their Constituencies and consult their constituents on the Bill; (v) Almost all members of Parliament informed the House in the course of debating that they had consulted their people on the matter. Clearly, this, in my view, shows that there was consultation of the people by those whom they had elected to represent them.

No one can deny that the Police Director of Operations wrote a letter restricting consultation. The Constitutional Court rightly condemned this as a blatant violation of fundamental human rights and freedoms.

The appellants' major evidence on the issue of lack of consultation on the provisions of the Bill as a result of violence was contained in the affidavit evidence of 5 members of Parliament.

The first was **Hon. Winfred Kiiza**, Woman MP for Kasese District. She deponed in the relevant part as follows:

> *13 That I wish to state and contend that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were inconsistent with and in contravention of the Constitution as hereunder:-*
>
> *(v) That when the Constitutional (Amendment) Bill No. 02 of 2017 was introduced, the Clerk to Parliament dispatched me and other Members of Parliament to conduct nationwide consultations in our respective constituencies concerning the said impugned Constitution Amendment Bill.*
>
> *(w) That given my position as the leader of the Opposition in Parliament, I and other Members of Parliament leaning to the opposition met and agreed to conduct joint nationwide consultative meetings and rallies regarding the impugned Constitution (Amendment) Bill.*
>
> *(x) That based on the above decision, I joined the Hon. Ssewanyana Allan, Member of Parliament for Makindye West, Hon. Kasibante Moses, Member of Parliament for Rubaga North, Hon. Kato Lubwama, Member of Parliament for Rubaga South and Hon. Jack Wamai Wamanga, Member of Parliament for Mbale Municipality among others. That while in the process of consulting*

the people in the above mentioned constituencies on different occasions, the Police disrupted our consultation meetings by beating, torturing the people, using tear gas and firing live bullets in an attempt to disperse the people who had gathered to give us their views regarding the Constitution (Amendment) Bill.

(y) That I have been advised by my lawyers which advice I verily believe to be true that the arbitrary actions of the Uganda Police Force in beating, torturing and arresting Members of Parliament and their electorates during the consultation meetings on the Constitution (Amendment) Bill, 2017 were inconsistent with and in contravention of articles 1, 3, 8A, 24, 29, 44(c), 79, 2018(2), 209, 211(3), and 259 of the Constitution

The second direct evidence was in the Affidavit of **Hon. Ssewanyana Allan, Member of Parliament for Makindye West** who deponed in the relevant parts as follows:

16 That I wish to state and contend that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were inconsistent with and in contravention of the Constitution as hereunder:-

(l) That I am aware that the Committee on Legal and Parliamentary Affairs did not consult the people of Uganda for them to present their views on the impugned Constitution (Amendment) Act and as such, the national interest of the people was ignored.

(m) That I am advised by my lawyers that the failure to involve the people of Uganda in the process leading to the enactment of Constitution (Amendment) Bill No. 02 of 2017 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution and as such was inconsistent with and in contravention of Articles 1, 2, 8A, 79, and 91 of the Constitution.

The third deponent was **Hon. Odur Jonathan, MP Erute County South** who deponed as follows:

15 *That I wish to state and contend that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were inconsistent with and in contravention of the Constitution. The use of violent means at the time of the enactment of the impugned Act arose as hereunder:-*

(r)That on 24th October, 2017, I and Hon. Atim Joy Ongom (Woman MP Lira District), Hon. Abacacon Angiro Gutomoi Charles (MP Erute County North), Hon. Akello Sylvia (Woman MP Otuke District), Hon. Okot Felix Ogong (MP Dokolo South) and Hon. Atim Barbara Cecilia Ogwal (Woman MP Dokolo District also Commissioner of Parliament) on 24th October 2017 were violently and unlawfully stopped from consulting the people and that Police dispersed people who had gathered at Adyel Division in Lira District for the consultation on Constitution (Amendment) Bill No.2 of 2017 by firing live bullets and teargas inflicting severe fear in me…

(s) That the actions of the armed forces of Special Forces Command, the Uganda Police Force and other militia in beating, torturing arresting and subjecting me and other Members of Parliament while in our various constituencies to consult the people on the Constitution (Amendment) Bill, 2017 were inconsistent with and in contravention of articles 1, 3, 8A, 24, 29, 44(c), 79, 208(2), 209, 211(3) and 259 of the Constitution.

The fourth deponent was **Hon. Munyagwa S. Mubarak, MP Kawempe South Constituency** who deponed as follows:

16. *That I am reliably advised by my lawyers which advise I verily believe to be true that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were*

inconsistent with and in contravention of the Constitution as hereunder:-

(j) That I am aware that the Committee on Legal and Parliamentary Affairs did not consult the people of Uganda for them to present their views on the impugned Constitution (Amendment) Act and as such, the national interest of the people was ignored.

(k) That I have been advised by my lawyers which advise I verily believe to be true that the failure to involve the people of Uganda in the process leading to the enactment of Constitution (Amendment) Bill No. 02 of 2017 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National objectives and Directive Principles of state policy and other constitutional provisions and as such was inconsistent with and in contravention of Articles 1, 2, 8A, 79, 91, 259 and 260 of the Constitution.

Lastly, **Hon. Betty Nambooze Bakireke, MP Mukono Municipality** deponed as follows:

19. That I have been advised by the Petitioner's advocates, which advise I verily believe to be true that the purported decision of the Committee on Legal and Parliamentary Affairs to ignore the need for participation of the people of Uganda and present their views on the impugned Constitution (Amendment) Act was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National objectives and Directive Principles of state policy and other constitutional provisions and as such was inconsistent with and in contravention of Articles 1, 2, 8A, 79, 91, 259 and 260 of the Constitution.

The above-mentioned Members of Parliament deponed in their affidavits that there was no consultation or that there was interference with the process of consultation as I highlighted above.

Hon. Winfred Kiiza deponed her affidavit in her dual capacity as Woman MP for Kasese District and as Leader of the Opposition. In her affidavit she avers that she joined some Members of Parliament in their Constituencies in the course of the consultation. These members were the Hon. Allan Ssewanyana, MP Makindye West, Hon. Kasibante Moses, MP Rubaga North, Hon. Kato Lubwama. MP Rubaga South and Hon. Jack Wamai Wamanga, MP Mbale Municipality. She does not depone in her affidavit that in her own constituency, her consultations were interfered with.

A review of the Hansard shows that save for Hon. Kasibante Moses, MP Rubaga North, the rest of the mentioned members did not air out their views during the debate on the Committee's Report at the second reading. However, save for Hon. Allan Ssewanyana, MP Makindye West, the rest of the members voted at the second reading and third. With regard to Hon. Kasibante Moses, MP Rubaga North, his submissions on the floor of Parliament appear to contradict the statements deponed by Hon. Winfred Kiiza. In his submissions on the floor of Parliament during debate on the Committee's Report, he stated as follows:

> *…Madam Speaker, the Constituency I represent is a home to very senior officials of this Government, including the Vice President and this is what they have sent me to say…'*

He then proceeds to state what his constituents told him. This is captured at page 5222 of the Hansard. When this is compared to what the Hon. Winnie Kiiza stated in her affidavit, it is clear that contrary to what she alleged in her affidavit, there was consultation of the people in Rubaga North. It suffices to note that save for Hon. Ssewanyana Allan, the rest of the other Members of Parliament she mentioned in her Affidavit did not depone affidavits of their own.

Turning to the **affidavit of Odur Jonathan**, I note that he also mentions different MPs from Lango region whose consultations were interfered with by the Police and other security personnel. These were: (i) Hon. Atim Joy Ongom (Woman MP Lira District), (ii) Hon. Abacacon Angiro Gutomoi Charles (MP Erute County North), (iii) Hon. Akello Sylvia (Woman MP Otuke District), (iv) Hon. Okot Felix Ogong (MP Dokolo South) and (v) Hon. Atim Barbara Cecilia Ogwal (Woman MP Dokolo District also Commissioner of Parliament).

None of these MPs deponed their own affidavits. This notwithstanding, a review of the Hansard of Parliament of 20/12/2019, shows that by the time the Speaker closed the debate on the Committee's Report, two members (Hon. Atim Joy Ongom and Hon. Okot Felix Ogong) had made submissions on the Report. At page 5203 the Hon. Atim Joy Ongom submitted as follows:

> *Thank you so much, Madam Speaker, for giving me this opportunity. Thank you also for giving us the opportunity to go and consult with our constituencies.*
>
> *I consulted my people-Lira District has got three constituencies: Erute South, Erute North and Lira Municipality. In Lira Municipality alone, I had over 6,000 people in one gathering but it was unfortunate that we were dispersed with teargas and that was the circumstance where you heard that Hon. Cecilia Ogwal was beaten.*
>
> *The voters gave me their information and my people said, 'No' to the amendment of Article 102(b). They said I should not touch it…'*

Clearly, the above shows that the Hon. Atim Joy Ongom consulted contrary to what Hon. Odur Jonathan alleged.

With regard to the Hon. Okot Felix Ogong, pages 5171 and 5172 of the Hansard show that he aired his views in the course of the debate of the Committee's Report. Suffice to say, the record shows that at the time of being timed out, he had not mentioned anything about his consultations being frustrated. The other members mentioned in the affidavit of Odur Jonathan show that they participated in the voting process.

The record also shows that the Hon. Winfred Kiiza and Hon. Betty Nambooze had not contributed by the time the Speaker closed the debate on the Committee's Report. However the record shows that when voting on whether the Bill should go for the third reading, both of them participated. They also participated during voting on the 3rd reading.

Further review of the Hansard shows that majority of the members of opposition in Parliament debated the Committee's Report during the second reading. Indeed each member who rose to speak on the Report categorically stated that they had consulted their constituents and that the views they were presenting were those of their constituents. These members included inter alia Hon Kyagulanyi (Page 5161), Hon Lilly Adong (5162), Hon. Mafabi (5186), Hon. Odongo Otto (5225) and Gilbert Olanya (5220).

While taking note of the affidavit evidence that in a few parts of the country some consultation rallies were violently dispersed, which again was clearly unconstitutional as it was in violation of Article 23 of the Constitution, I do not accept the view that because of the unlawful incidents that happened in limited parts of the country (for that is what the evidence on record show) the court should

declare the whole process of enacting the Amendment Act unconstitutional on account thereof.

Accordingly, it is my view that the people of Uganda were consulted by their members of Parliament with regard to Hon. Magyezi's bill as tabled in Parliament. I, therefore, agree with the finding of the majority Justices of the Constitutional Court in this respect.

iii. Non Observance of Rule 201: Bill not tabled, Non observance of three days Rule and Motion to suspend Rule 201 not seconded.

Appellants' Submissions

Under this issue, counsel for the appellants submitted that: (a) hard copies of the Committee Report were not tabled as required under Rule 201(1); (b) there was nonobservance of Rule 201(2) which requires debate of a Committee Report to take place three days after it had been laid on the table; and (c) the motion to suspend Rule 201 was never seconded.

Counsel faulted the learned Justices of the Constitutional Court for holding that the motion to suspend Rule 201(2) was at the Committee stage of the whole House. He argued that the evidence on record shows that the motion was made during plenary. In his view, the failure to second the Deputy Attorney General's motion to suspend rule 201 was an illegality that rendered subsequent proceedings invalid.

Respondent's Submissions

The Attorney General refuted the Appellants' assertion that the suspension of Rule 201 (2) of the Rules of Procedure of Parliament and non secondment of the motion to waive Rule 201 adversely affected the whole process of enacting the impugned Act. He further disputed the appellants' assertions that the suspension of Rule 201(2) deprived Members sufficient time to debate the report of the Legal and Parliamentary Affairs Committee in that they were given only 3 minutes to debate and that hard copies were not duly tabled before the house as provided in Rule 201 (1).

The Attorney General submitted that the evidence [at page 719 of the record] shows that on 18th December, 2017 the Speaker informed the House that on the preceding Thursday, she had directed the Clerk to upload the committee's report on their ipads and that therefore the highlighted Rule did not apply. The Attorney General further submitted that at page 263 of the record, wherein the motion to suspend Rule 201 (2) was moved and debated, the said motion was supported by Hon Janepher Egunyu at Page 761 of the record and other members who rose up to debate and support the motion.

Relying on the decision of Alfonso Owiny-Dollo, DCJ [at page 176] and Cheborion, JCC [at Page 95], the Attorney General submitted that Members of Parliament had adequate notice as to the contents of the report (four days before debating the same) and therefore the purpose of Rule 201(2) was achieved

He prayed that since the Members of Parliament received the report of the Committee three days before the debate, this Court

should uphold the finding of the Constitutional Court that no prejudice was caused to the members.

Regarding the issue of secondment of the motion by the Deputy Attorney General, the Attorney General submitted that this issue was extensively interrogated by the learned Justices of the Constitutional Court before making their findings. He argued that all the Justices of the Constitutional Court found that since Parliament was proceeding as a Committee of the Whole House, the failure to second the motion of Hon Mwesigwa Rukutana offended no Rule at all.

The Attorney General asked this Court to find that the Constitutional Court came to the right decision as far as the secondment of the motion for suspension of Rule 201 was concerned. He invited this court to reject the assertion by the Appellants and uphold the findings of the majority Justices.

Without prejudice to his submissions above, the Attorney General submitted that Rule 59 of the Rules of Procedure of Parliament does not prescribe the manner of seconding a motion. Rather that it simply required a motion to be seconded. In the Attorney General's view, considering that the Rules are silent on the manner of secondment, the practice that has been adopted by the House is for Members who are seconding a motion to either rise up in support when a motion is proposed or if the motion is with notice, the designated Members stand up and speak to the motion in support.

Constitutional Court holding on Rule 201

A review of the Judgments of the Justices of the Constitutional Court shows that by majority [4 to 1], the learned Justices found that: (i) Parliament properly suspended Rule 201 (2) via a motion presented by the Deputy Attorney General; (ii) the requirement for secondment of the Deputy Attorney General's motion was not necessary since it was moved when Parliament was proceeding as a Committee of the whole House; (iii) the purpose of 'tabling' the Bill was achieved by uploading the Committee's Report on the Members' Ipads four days prior to the presentation of the Committee Report. The Justices observed that the purpose was to give the Members adequate notice of the contents of the Report, so that they could debate from an informed point of view.

Consideration of the Issue

The relevant provisions of the contentious Rule 201 for purposes of resolving this issue are as follows:

(1) ***A report of the Committee shall be ... laid on the Table...***

(2) Debate on a report of the Committee on a bill, shall take place at least three days after it has been laid on the table...

The appellants contend that there was a violation of this Rule because: (i) the Committee Report was never tabled on the floor of Parliament; (ii) the debate on the report commenced before three days passed; and (iii) the motion to suspend Rule 201 (2) was not seconded and thus the Rule was still applicable.

(i) <u>The Committee Report was never tabled on the floor of Parliament</u>

A review of the Hansard of Parliament of 18/12/2017 shows that the Chairperson of the Committee on Legal and Parliamentary Affairs, Hon. Jacob Oboth tabled on the floor of Parliament a copy of the Committee Report and copies of stakeholder submissions [See Page 718 Vol 1]. Further review of the Hansard shows that immediately after tabling the Report, the Hon. Gerald Karuhanga raised a procedural point regarding Rule 201(2). He submitted as follows:

> *"Madam Speaker, the procedural point I am raising is specifically from Rule 201(2). The Chairperson of the Committee laid the report a few minutes ago and the rule instructs that once the report of the Committee on a Bill is laid on the Table by the Chairperson…, the debate shall ensue three days later."*

Clearly, what can be discerned from the above is that the Committee Report was indeed tabled in the literal sense of the word as used in Rule 201.

However, failure to give members hard copies was not fatal. The record of the Hansard is clear that the members were given electronic copies of the same. At page 719 of the Record, the Speaker ruled as follows:

> ***Honourable members, ever since the ninth parliament, we agreed to use less paper and that is why we bought you ipads. Last week, on Thursday, I directed the clerk to***

upload all these reports on your ipads so this rule does not apply.

It is clear from the above excerpt that members had access to the Committee's Report. No member came up to state that he or she did not receive a copy of the Report. Failure to avail members of the report would have been fatal. In the circumstances, I find that the Committee's Report was duly tabled in accordance with Rule 201(1) of the Rules of Parliament.

(ii) **The debate on the report commencing without three days having passed and alleged failure to second the motion to suspend Rule 201 (2).**

It is not in contention that debate on the report commenced immediately after its tabling and presentation by the Chairperson of the Committee. In my view this was a breach of Rule 201(2). It is also not true that the motion to suspend the rule was moved at Committee stage. It was actually moved during the plenary. However, I do not agree that this was fatal to the bill. My view is premised on two factors.

The first factor is on the rationale of the three days Rule in Rule 201 (2). I agree with the learned Justices of the Constitutional Court that the rationale for the three days rule was to enable members internalize the Report and its contents so that they could debate it from an informed point of view. Indeed some of the members were alive to this reason as well. For example, Hon. Karuhanga, having raised on a point of procedure in regard to Rule 201(2) submitted as follows:

...Therefore, I would like to believe equally that this was intended to allow us, as members, to deal with all the issues and objections, to analyze, study, assess and consult because we represent the people of Uganda so that we come here, we speak for Ugandans and not ourselves.

At page 755 of the Record, the Deputy Attorney General submitted as follows:

> *The rule is intended, as I said, to ensure that members have at least three days to look at the Committee Report, scrutinize it and inform themselves on how they debate.*

Thus by members receiving electronic copies four days in advance and before the Committee Report was presented to them, diligent members who were desirous of perusing the Report had ample time within which to peruse the report so as to acquaint themselves with the contents. It would therefore follow that they could not talk of being ambushed.

The second factor relates to the fact that Rule 201(2) was suspended by the House. The Deputy Attorney General moved a motion that Rule 201(2) be suspended so that debate on the Bill can proceed immediately.

Rule 16 (1) provides for suspension of Rules as follows:

> ***Any Member may, with the consent of the Speaker, move that any rule be suspended in its application to a particular motion before the House and if the motion is carried, the rule in question shall be suspended.***

Subrule (2) of this rule however, provides an exception as follows:

> *This Rule shall not apply in respect to rule 5, 6, 11, 12, 13(1), 16 and 97*

Rule 201(2) is not among those Rules excluded under Rule 201(1). It therefore follows that Rule 201(2) can be suspended. The question that follows is whether the motion was properly passed. Rule 58 provides for **motions which may be moved without notice.** An example of such a motion is *'any motion for the suspension of any Rule of Procedure.'* [See Rule 58(d)] Ordinarily, motions require secondment. This is evident in Rule 59 (1) which provides as follows:

> ***In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.***

There is evidence on record that the Deputy Attorney General's motion to suspend Rule 201(2) was seconded. At page 761, the Hon. Janepher Egunyu is quoted by the Hansard submitting as follows:

> *'Thank you Madam Speaker, for giving me a chance to speak on this matter. I have stood to support the Attorney-General in suspension of this Rule…Before we waste a lot of time, I would like to support the Attorney General that we suspend the rules and the debate goes on."*

Whereas Rule 59 provides for seconding of motions, it does not define what amounts to seconding. Thus in the absence of clear parameters of what can amount to seconding a motion, it is my view that any form of support for a motion on the floor by any member, other than the mover of the motion, amounts to seconding.

In conclusion on this issue, it is my finding that the majority learned Justices of Appeal did not err when they held that rule 201 was not breached (3 Justices) or that non observance of rule was not fatal.

iv. Alleged Denying Members adequate time to consider and debate the Bill.

Appellants' Submissions

Counsel submitted that there was overwhelming evidence on record to show that Members of Parliament were not accorded sufficient time to debate the report of the Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great national importance.

Counsel for the Appellants further contended that the actions of the Speaker to close the debate on the Amendment Bill before each and every MP could debate and present their views on the bill was in violation of Rule 133 (3) of the Rules of Procedure of Parliament.

Respondent's Submissions

The Attorney General submitted that Rule 80 (2) of the Rules of Procedure of Parliament provides that if the question of closure is agreed to by a majority, the motion which was being discussed

when the closure motion was moved shall be put forthwith without further discussion. He argued that the requirement is that the majority have to agree to the closure and that this was done. The Attorney General further argued that there was no requirement that each and every Member of Parliament must debate before closure.

He called on this Court to find that the Constitutional Court rightly arrived at the decision they made and prayed that this Court upholds the same.

Constitutional Court holding on the issue of denial of time to Members of Parliament in the course of debate

A review of the Judgments of the Constitutional Court shows that the Justices of the Constitutional Court who considered this issue found that: (i) it was not a mandatory requirement that for any constitutional amendment bill to be enacted into law, deliberations must be received from each and every Member or majority of Members; (ii) Some Members of Parliament interupted the debate by unnecessary disruptions all aimed at frustrating the proceedings; (iii) there is no evidence on record that any Member of Parliament was prevented from further contributing on the debate at the third reading of the bill.

Consideration of the Issue

The appellants' contention that members were denied time to consider and debate the Bill is premised on: (i) Commencement of debate on the Bill immediately after it had been tabled; (ii) the Speaker allocating only three minutes to each member proposing

to debate; and (iii) the Speaker closing the debate on the Bill before each member had debated.

(i) **Commencement of debate on the Bill immediately after it had been tabled**

Most of the appellants' contentions were premised on the contravention of Rule 201. As I have shown in the preceding issue, Rule 201(2) was properly suspended. Furthermore, each member had access to the Committee Report four days prior to the debate since the same had been uploaded on their ipads. In my view, this constituted sufficient time for vigilant members to read and internalize the contents of the Committee's report. It would therefore follow that there was no ambush on them with regard to the issue of preparing for debating.

(ii) **The Speaker allocating only three minutes to each member proposing to debate**;

Considering that it was a full house, giving each member three minutes to express their views on a report they had received in advance was fair in the circumstances. Further review of the record shows that indeed when some of the members stood up to debate, they exceeded the 3 minutes allocated to each member, since the Speaker could in some cases grant an extension of time.

(iii) **The Speaker closing the debate on the Bill before each member had debated.**

Review of the Record [vol 1 Page 855] shows that before the Speaker put the question to close the debate, she pointed out that

124 members had contributed. She immediately put the question to close the debate and it was agreed to.

Rule 80 provides for a motion for closure of debate as follows:

(1) After a question has been proposed in the House…and debated, a member may move 'That the question be now put', and unless it appears to the Speaker that the motion is an abuse of the rules of the House or an infringement of the rights of any Member, the question "That the question be now put' shall be put forthwith and decided without amendment or debate.

(2) If the question of closure is agreed to by a majority, the motion which was being discussed when the closure motion was moved shall be put forthwith without further discussion.

This rule in my view was followed to the letter by the Speaker.

v. <u>Alleged Illegal Suspension of some Members of Parliament.</u>

Appellants' Submissions

Counsel submitted that on the 18th December 2017 when parliament convened to consider the report of the legal and parliamentary affairs committee, three Honorable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling and instead arbitrarily suspended some Members of Parliament from parliament in contravention of Articles 1, 28(1), 42, 44 (c) and 94 of the Constitution.

He argued that the Hansard showed that Hon Theodore Sekikuubo brought to the attention of the Speaker the fact that the report of the Committee on Legal and Parliamentary affairs was fatally defective since non Members had signed it. Further that Hon. Ssentamu Robert and Hon. Betty Amongi raised another point of procedure that the matter concerning the Amendment Bill was before the East African Court of Justice and that proceeding with the same would amount to breach of the sub judice rule. Counsel contended that rather than pronouncing herself on these issues raised, the Speaker instead adjourned the proceedings. Furthermore, that before Members could leave the chambers, the Speaker made an arbitrary order suspending some Members of Parliament without assigning any reason whatsoever as required under the Rules nor did she state the offences committed.

Counsel took issue with the finding of the Constitutional Court that the decision of the Speaker to suspend certain Members of the House from participating in the proceedings in the House was due to the fact that the suspended members had defied the Speaker and disrupted the proceedings in the House; thus provoking the wrath of the Speaker.

Counsel submitted that the learned Justices of the Constitutional Court misdirected themselves on matters of law and fact. He argued that the Speaker grossly violated the Rules of Procedure of Parliament and she did not accord the said MPs a fair hearing before suspending them; she did not assign any reason for their said suspension; and she acted ultra vires since she was functus officio at the time she pronounced her arbitrary decision

suspending the said MPs. Counsel submitted further that by virtue of the illegal suspension of the MPs, the Speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

Respondent's Submissions

The Attorney General contended that Rule 7 of the Rules of Procedure of Parliament provided for the general power of the Speaker. He argued that under Rule 7(2), the Speaker had an obligation to preserve order and decorum of the House. Further that Rules 77 and 79(2) give the Speaker powers to order any members whose conduct is grossly disorderly to withdraw from the house. Furthermore that under Rule 80, the Speaker is permitted to name the member who is misbehaving and that under Rule 82 the Speaker has power to suspend the member from the service of the House.

The Attorney General pointed out that the matter of suspension of the Members of Parliament was ably canvassed in the Affidavit of the Clerk to Parliament [at Paragraphs 17- 23, page 612-613 record].

Relying on the Judgments of Musoke, JCC [at page 737]; Owiny Dollo, DCJ [at Page 171-172]; Cheborion, JCC [at page 632] and Kasule, JCC [at pages 263-264], the Attorney General submitted that the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and

disruptive to withdraw from Parliament and the Speaker properly did so.

The Attorney General further pointed out that once a Member who conducted himself/herself in a disorderly manner was suspended, Rule 89 required that such a member had to immediately withdraw from the precincts of the House until the end of the suspension period. The Attorney General also argued that Rule 88 (4) gives guidance on the period of suspension of a member and that it requires that a Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. The Attorney General placing reliance on Rule 88(4) argued that the 3 sittings for which the member was suspended started running from the next sitting of Parliament.

The Attorney General submitted that the Appellant misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances of this case. He argued that going by the Appellant's arguments, it would be absurd that a Member who was found by the Speaker to have conducted himself/herself in a disorderly manner in the House and is therefore suspended from the services of the House, is then allowed to remain in the House for the day's sitting.

As far as the right to fair hearing was concerned, the Attorney General submitted that Rule 86(2) of the Rules of Procedure of parliament provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice which in the instant case was not made by the suspended Members.

Regarding the contention that the Speaker while suspending the Members was out of her chair, the Attorney General submitted that this was not true. In support of his contention, he referred to the Hansard of 18th December 2017 [at page 726 of the record] of appeal where the Speaker said

> *"... I suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended..."*

The Attorney General further submitted that the reason for suspension was at page 731 of the record of appeal.

The Attorney General submitted that under Article 257 (a) of the Constitution as well as under Rule 2(1) of the Rules of procedure of Parliament define, 'sitting' is defined to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee. Furthermore, that Rule 20 of the rules of Procedure of Parliament provide that the Speaker may at any time suspend a sitting or adjourn the house.

In light of this, the Attorney General contended that the Speaker only suspended the sitting to 2.00 o'clock and did not adjourn the House, hence there was a continuous sitting and therefore she was not functus officio.

In conclusion on this point, the Attorney General submitted that the Speaker properly acted within her mandate to suspend Members of Parliament for their unparliamentarily conduct. Further that there is no evidence to show that the suspended Members of Parliament moved a substantive motion challenging

their suspension. He prayed that the findings of the Justices of the Constitutional Court be confirmed.

Constitutional Court holding on the suspension of some Members of Parliament

A review of the Judgments of the learned Justices shows that: (i) there was unrebutted evidence that the suspended Members had defied the Speaker and disrupted the proceedings in the House thus provoking the Speaker to suspend them; (ii) In the exercise of her discretion to suspend the Members, the Speaker did not act ultra vires the Rules permitting her to take disciplinary action to maintain the honour of the House; and (iii) whereas each member has a right to participate in the proceedings of Parliament, this participation is premised on good behavior in the House. A member can be suspended by the Speaker for purposes of preserving order and decorum in the House if the member engages in misconduct that disrupts proceedings.

Consideration of the Issue

The appellants contend that the suspension of some members of Parliament was illegal because: (i) it was arbitrarily done since they were never accorded a hearing before the suspension; (ii) the Speaker did not disclose the offence committed by the suspended members and/or reason as required by the rules; (iii) the Speaker acted ultra vires since she was functus officio; (iv) in suspending them, the Speaker denied them an opportunity to represent their constituents.

The Attorney General contends that whatever action the Speaker took was within her powers as provided for in the Rules.

Rule 7 provides for the general powers of the Speaker. Sub-rule 2 mandates the Speaker to *'preserve order and decorum in the House.'* The duty to ensure order in the house is emphasized by Rule 86(2) of the Rules of Parliament.

Rule 82 provides guidelines on how a member of parliament is expected to conduct himself or herself and what he or she is not supposed to do in the course of a sitting. For emphasis, members are also expected to abide by the Code of Conduct prescribed in appendix F of the Rules. Rule 87 provides for order in the House. Sub-rule 2 provides in the relevant terms as follows:

> ***The Speaker...shall order any member whose conduct is grossly disorderly to withdraw immediately from the House...for the remainder of that day's sitting...***

Rule 88 provides for naming and suspending of members as follows:

> *(1)* ***If the Speaker...considers that the conduct of a member cannot be adequately dealt with under sub rule (2) of rule 87, he or she may name the member.***
>
> ***(2) Where a member has been named, then-***
>
> ***(a) In the case of the House, the Speaker shall suspend the member named from the service of the House;***

Lastly, under Rule 89, a member who has been suspended from the service of the House by virtue of sub rule (2) or (3) of rule 88 is required to immediately withdrawal from the precincts of the House until the end of the suspension.

A review of the Record [at Vol 1page 726] shows that on 18 December 2017, at around 11 o'clock, the Speaker suspended 6 members. These members were: (i) Hon. Ibrahim Ssemujju; (ii) Hon Allan Ssewanyana; (iii) Hon. Gerald Karuhanga; (iv) Hon. Hon. Jonathan Odur; (v) Hon. Mubarak Munyagwa; and (vi) Hon. Anthony Akol.

It suffices to note that immediately when the Speaker commenced the proceedings of the day, she observed as follows:

> ***"...I would like to appeal to the honourable members to exercise tolerance and a spirit of accommodation...I also would like to remind the members who were suspended last time that if they do misconduct themselves again, they will be suspended again, this time for seven sittings...therefore do not endanger your right to speak and vote. I am just asking you honourable members, that we tolerate and listen to one another..."***

Some of the members did not take heed to the Speaker's advice. Indeed a review of the Hansard from the moment the Speaker said the above words to the suspension of the members shows that: (i) Many times the Speaker pleaded with members to be orderly and to take their seats. In one instance she shouted *'Order!'* followed by *'Honourable Members, I would like to remind you about rule 88 of the Rules of Procedure of Parliament: your conduct in the House'*; and (ii) the Speaker called on the leader of opposition to manage her side. Indeed in one instance the Speaker asked, *'Are you members assaulting the leader of opposition. Give her space.'* Clearly, what can be inferred from all this is that there were

members who in the eyes of the Speaker were behaving contrary to the Rules which required them to behave with decorum and curtsy. It is therefore not surprising that the Speaker, in order to bring order in the House, suspended some of those members.

Members of Parliament are expected to behave in a way that brings honor to the House. See **Severino Twinobusingye vs AG, Constitutional Petition No. 47 of 2011.**

I would therefore find no fault with the decision of the Speaker to suspend members who conducted themselves in a disorderly way. She acted within her powers as provided for in the Rules highlighted above. If any of the suspended members felt that they were unjustly treated by the Speaker, nothing prevented them from moving a substantive motion in Parliament to challenge her action.

On the issue of fair hearing, I find the appellants' assertion that the Speaker should have given members who were suspended a hearing before suspending them untenable. The members misbehaved before the Speaker who called them to order many times. They were aware of their conduct as well. I concur with the analogy of contempt of Court made by Kasule, JCC, in his Judgment that:

> ***It is asserted by the petitioners that the Speaker ought to have afforded a hearing and also have provided reasons for suspending the six Honourable Members of Parliament under Articles 28(1) and 44(c). It is however unexplained by the petitioners what fair hearing the***

Speaker should have given to the suspended members. Like in contempt of Court proceedings the members affected misconducted themselves in the very eyes and hearing of the Speaker, including disobeying her very orders to them to be orderly and the very members were exchanging defiant words and physical gestures to the chair.

The appellant's also argue that the Speaker acted ultra vires since she was functus officio by the time she suspended the members. A review of the record shows that in the course of the proceedings, it was brought to the attention of the Speaker that the report of the Committee on Legal and Parliamentary affairs was allegedly signed by non members. In the ensuing debate, she observed that she needed to assure herself as to the membership of the Committee. She observed as follows:

"...I will ascertain the issue which has been raised about membership on that Committee, particularly the number of members. I also would like to check the Daily Hansard because I was not here when the transfers were made. Therefore, I will suspend the proceedings for today up to 2 o'clock. I suspend the proceedings up to 2 o'clock but in the meantime, the following Members are suspended...They should not come back in the afternoon.

A question that needs to be answered is whether the Speaker was functus officio at the time of suspending the members.

Black's Law Dictionary defines the term functus officio as follows:

"**Without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."**

In my view, the Speaker had legal competence to act the way she did. She could have acted functus officio if she had suspended the members after adjourning the House and not merely suspending it. Accordingly in my view the Speaker was not functus officio when she suspended the members.

Lastly, the appellants argue that in suspending the members, the Speaker denied them an opportunity to represent their constituents. Whereas this might be so, I have already found that the Speaker duly exercised her powers to suspend the members. Since the Speaker's actions were lawful, it follows that suspension was proper.

In conclusion on this issue, I hold that members were properly suspended by the Speaker since she did it in accordance with the Rules.

vi. <u>Denying Members of the Public access to Parliament in the course of debating the Bill.</u>

Appellants' Submissions

Mr. Mabirizi submitted that proceedings of Parliament during the debating and passing of the Bill were not public since members of the public were denied access. He faulted the learned Justices of the Constitutional Court for holding that there was no evidence that the appellant or any other member of the public was chased away or denied access. Appellant argued that his contention of

being denied access to Parliament required no proof since the Attorney General admitted it by not controverting his evidence.

The appellant also argued that the applicable Rule was Rule 23 and not Rule 230 as argued by some of the Justices. In his view Rule 230 applies where the House is proceeding in public and not in isolation as it was done. He further argued that no Rules were exhibited on record as having been made by the Speaker under which the appellant was denied access. Furthermore that there was no evidence on record to show that he did not meet the standard set up by the rule to be in the gallery.

Respondent's Submissions

The Attorney General reiterated his submissions in the Constitutional Court [at pages 2154-2159 Vol K, of the record]. He added that Rule 230 of the Rules of Procedure of Parliament vests in the Speaker power to control the admission of the public to Parliament premises so as to ensure law and order as well as the decorum and dignity of Parliament.

The Attorney General also refuted the appellant's contention that the proceedings of Parliament were not public and that the court misapplied Rule 230 of the Rules of Procedure of Parliament. The Attorney General submitted that the Constitutional Court, after reviewing the evidence on record, the powers of the Speaker as provided in the Rules and the effect of the Appellant's non admission, properly found that the Speaker and the parliamentary staff and security acted properly and within the Constitution in making the orders they made as regards admission of the public to the parliamentary gallery.

Constitutional Court holding on the issue of Denying Members of the Public access to the House in the course of debating the Bill

Review of the Judgments of The Justices of the Constitutional Court shows that: (i) Whereas Rules 23 and 230 require sitting of Parliament and its Committees to be public, the Speaker has discretion on whom to admit to Parliament in order to ensure order as well as decorum and the dignity in Parliament; (ii) No evidence was adduced to their satisfaction that there was denial of public access to the gallery of Parliament; and (iii) There was tension and some chaos, some of which was originated by Members of Parliament themselves and from and within the Parliamentary Chamber itself. This caused extra-ordinary measures to be taken around all the premises of Parliament, including accessing the Parliamentary gallery.

Consideration of the Issue

The contention under this issue is that members of the public were denied access to Parliament in the course of debating the Bill introduced by the Hon. Magyezi.

It is not debatable that members of Parliament legislate for the people they represent. It would therefore follow that the people on whose behalf the members exercise the power to legislate should know how this power is being exercised and on what issues it is being exercised. Indeed in **Doctors for Life International v. the Speaker of the National Assembly and 11 ors, Case CCT 12 of**

2005, the Constitutional Court of South Africa emphasized the importance of the public accessing Parliament as follows:

> ***Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarise themselves with the lawmaking process and thus be able to participate in the future...All this is part of facilitating public participation in the law-making process.***

Rule 23 (1) recognizes the House being public as follows:

> ***Subject to these Rules, the sittings of the House or its Committees shall be public.***

The above provision notwithstanding, sub rule (2) provides an exception where the public might be shut out as follows:

> ***The Speaker may, with the approval of the House and having regard to national security, order the House to move into closed sitting.***

Sub rule (3) further provides as follows:

> ***When the House is in closed sitting no stranger shall be permitted to be present in the chamber, side lobbies or galleries.***

Lastly Rule 230(1) provides for admission of the public into the House as follows:

Members of the public...may be admitted to debates in the House under Rules that the Speaker may make from time to time.

Thus, whereas members of the public can be allowed access to the House, in certain instances, they can be denied access as highlighted in the Rules above. It would therefore follow that if justification for such denial exists for a member or members of the public, then the Speaker cannot be faulted for denying such members of the public access to the House.

There is also no doubt that unnecessary tension had been caused inside and outside the House from both sides of the political divide. It was therefore not surprising that extra caution was taken by the Speaker to ensure that order prevailed. Such caution, in my view, may have induced the Speaker to restrict access to Members of the public to the Gallery to avoid further disturbances. I cannot therefore fault the Constitutional Court for the decision it reached in this regard.

vii. <u>Signing of the Committee Report by Members who never participated in the Committee's Proceedings.</u>

Appellants' Submissions

The appellants submitted that there was ample evidence that members who did not participate in committee proceedings signed the report. The appellants faulted the majority Justices of the Constitutional Court for misconstruing the law, and as a result failing to nullify the report signed by members who never participated in the proceedings of the committee.

The appellants contended that Rule 187(2) of the Rules of Procedure relied on by Barishaki JCC to find that the committee had quorum does not apply because the Legal and Parliamentary Affairs Committee is not a select committee. He argued that Select committees are set up under Rule186 and are temporary Committees. Further the legal and parliamentary Affairs Committee is a sectoral Committee established under Rule 183(1) and 2(g). Furthermore, contrary to the Justices' stated 5 members' minimum, under Rule 184(1), the minimum number for a sectoral committee was 15. In counsel's view, had the Justices keenly looked at Article 90(2) & (3) of the Constitution, they would not have treated the matter the way they did.

The appellants also submitted that the majority Justices erred in relying on Article 94(3) which does not apply to committees of parliament. He argued that Article 94(3) deals with the entire Parliament and not Committees which are provided for under Article 90.

The appellants argued that the complaint before court was whether it was in line with the Constitution for members who never participated in the proceedings of the committee to sign a report. He contended that the learned Justices of the Constitutional Court veered off the rail when they started going into issues of vacancy and participation of non-members which were not in issue.

The appellants also submitted that the majority justices defied the Supreme Court decision of **Hamid V. Roko Construction Ltd, SCCA No.1/13** which if followed would nullify the report signed by strangers. Counsel pointed out that in **Hamid** (supra) this Court

held inter alia that the validity was not on numbers. Counsel further argued that Musoke, JCC'S finding that strangers had been briefed about the committee proceedings was without evidence and bad in law for promoting hearsay and legislators' reckless signing of legal documents.

Respondent's Submissions

The Attorney General submitted that the Committees of Parliament are provided for under Article 90 of the Constitution and Rule 183(1) of the Rules of Procedure of Parliament. Further, Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not by itself invalidate those proceedings. Furthermore, Rule 184 (1) of the Rules of Procedure of Parliament provides that each Sectoral Committee of Parliament shall consist of not less than fifteen Members and not more than thirty Members selected from among Members of Parliament.

The Attorney General further placed reliance on Rule 201 (1) of the Rules of Procedure of Parliament which provides that a report of the Committee shall be signed and initialed by at least one third of all the Members of the Committee. The Attorney General argued that the Members who constituted the Legal and Parliamentary Affairs Committee were listed in the report of the Legal and Parliamentary Affairs Committee and were 26 members.

In light of his submissions above, he contended that the requirement of the law in regard to quorum and non-validation of the report were considered and correctly adjudicated by the Constitutional Court and prayed that this Court upholds the same.

Constitutional Court holding on the Signing of the Committee Report by members who did not participate

Review of the Judgments of the majority Justices on this issue shows that the learned Justices held that: (i) the fact that people who were not known to be members of the Committee signed the report was not fatal to the process, though irregular. (ii) Even if the signatures of those members were deleted from the report, there would still be sufficient numbers of members who attended the Committee proceedings and signed the report.

Consideration of the Issue

The major contention under this issue is that members who were not known to be Members of the Legal and Parliamentary Affairs Committee and did not participate in the Committee's Proceedings signed the Committee Report. The appellants' contend that this was fatal since these actions made the Report a nullity.

A review of the Hansard of the House of 18th December 2017 shows that Hon Theodore Sekikuubo brought to the attention of the Speaker the fact that the report of the Committee on Legal and Parliamentary affairs had been signed by non Members to wit; Hon. Akampurira Prossy Mbabazi and Hon. Lilly Akello, who both sat on the committee of Defence and Internal Affairs.

Further review shows that after the matter became contentious as is evident from the Hansard, the Speaker suspended the House for a few hours to review the Hansard in order to satisfy herself about the membership of the Committee. Her findings, which she communicated to the House, showed that the concerned members had been transferred to the Legal and Parliamentary Affairs

Committee by the responsible party whip. It is indeed true that these members were transferred when the Committee had already started its work.

The question to be resolved is whether the Committee was properly constituted at the time when it started its work and at the time when it completed its work and presented it before the House.

Rule 184(1) provides for the composition of Sectoral Committees as follows:

> ***Each Sectoral Committee shall consist of not less than 15 members not more than thirty members selected from among members of Parliament.***

Rule 193 (1) provides for the quorum of the Committees as follows:

> ***Unless the House otherwise directs or these Rules otherwise provide, the quorum of a Committee of the House shall be one third of its members and shall only be required for purposes of voting.***

Lastly, Rule 201 makes it a requirement for a Committee Report to be signed as follows:

> ***A report of a Committee shall be signed and initialed by at least one third of all the Members of the Committee...***

The Committee Report in the present case, contains the list of the members that participated in the hearings of the Committee. Further review of the record shows that as at the time of the Committee receiving directions from the Speaker after the first reading of the Bill, the Committee was properly constituted.

Furthermore, at the time of signing it the requisite quorum as provided under the Rules was met since more than 15 members signed and initialed it. It would therefore follow that the Report as presented before the House was proper.

The above notwithstanding, I am of the view that members who had not participated in the proceedings of the Committee or those who came in later as a result of redeployment by the parties' chief whips ought to have refrained from signing the Committee Report. Their signatures did not however delegitimize the Committee's Report. My view is supported by the provisions of Article 94(3) which provides as follows:

> ***The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings***.

I note that some of the appellants argue that the above constitutional provision only applies in respect of the whole House. I respectively disagree with this contention. Proceedings of Parliament, in my view, are not only those which take place in the whole House. They include proceedings which take place in Committees as well.

In conclusion on this issue, it is my finding that the signing of the report by members that did not participate in the proceedings or came in later did not vitiate the Committee's Report.

viii. <u>Proceeding on the debate in the absence of the Leader of Opposition and other Opposition Members of Parliament.</u>

Appellants' Submissions

The appellants contended that the absence of the Leader of the Opposition, opposition chief whip and other opposition members rendered the proceedings invalid. They argued that Parliament was not properly constituted in the absence of the leader in opposition.

It was also the appellants' contention that the reasons given by the Constitutional Court for justification of proceeding without members of the opposition did not have a constitutional basis since the fear that Parliament may be taken at ransom by opposition when a decision is made that it is not properly constituted is without any legal basis. In counsel's view, this goes against the very purpose of multi-party democracy which is to promote tolerance of divergent minority views as opposed to a single party system which is prohibited in the Constitution.

Respondent's Submissions

The Attorney General reiterated his submissions in the lower court at page 2165-2166 Vol K of the record of appeal and prayed that this court adopts the same. He however pointed out that Rule 24 of the rules of Parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of Parliament shall be one third of all Members of Parliament entitled to vote. In his view, it followed that the business of parliament can go on in the absence of the Leader of Opposition and opposition

Members of Parliament as long as there is the requisite quorum in Parliament and under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

Constitutional Court holding on the Absence of Opposition Members of Parliament during the debate

All majority Justices agreed that absence of the Leader of Opposition and her fellow members of the opposition did not result in Parliamentary proceedings becoming invalid. They particularly noted that: (i) the members of the opposition walked out of the Chamber on their own volition. They noted the absurdity that would result by the Speaker suspending proceedings anytime a member of the opposition walked out; (ii) Despite the walk out by some members, there was still requisite Coram for Parliament to continue proceedings as provided for in the Rules; (iii) Article 94 was clear that Parliament may act notwithstanding vacancy in its membership; (iv) Later in the course of proceedings the Leader of Opposition and her entourage returned and participated in the proceedings.

Consideration of the Issue

The question that needs to be determined under this sub issue is whether the absence of the Leader of Opposition and other Opposition members led to proceedings in Parliament being a nullity, so that it can be argued that whatever was debated in their absence was null and void.

Article 78 (1) provides for the composition of Parliament. It suffices to note that under this provision, there is no category for 'Members

of the Ruling party, Members of the opposition, and independents (if any). Be that as it may, when it comes to the business of Parliament, my view is that for Parliament to properly be constituted in order to carry on business, the most important factor to consider is whether there is enough number of members to constitute the requisite quorum. Indeed, a review of the legal regime, whether constitutional, statutory or under subsidiary legislation, governing transacting of business in the House, shows that there must be quorum, depending on the subject matter in issue. The provisions do not say that the House must be composed of Members of the Ruling party and Members of the opposition. A review of some of these provisions would suffice.

Article 88 provides for quorum of Parliament as follows:

> ***(1)The quorum of Parliament shall be prescribed by the Rules of Procedure of Parliament made under Article 94 of this Constitution.***
>
> ***(2) For the avoidance of doubt, the rules of procedure of Parliament may prescribe different quorums for different purposes.***

Under Rule 24(1) it is provided as follows:

> ***The quorum of Parliament shall be one third of all Members of Parliament entitled to vote.***

It also suffices to note that even under Article 260 and 262 quorum is in respect of members regardless of their category.

It therefore follows that if the requisite number sufficient to constitute quorum is present, the business of the House will proceed. This implies that even in the absence of the Leader of Opposition and other members of the opposition, Parliament can still transact its business provided the remaining members constitute a quorum.

It was not argued anywhere that because of the absence of the members of the opposition, Parliament lacked quorum and that therefore its proceedings were in breach of the provisions relating to quorum under both the Constitution and its Rules of Procedure. This notwithstanding, I note that at the time of voting, when the quorum is more crucial as it is provided under the Constitution and the Rules, there was sufficient quorum.

I therefore find no merit in the appellants' contention.

ix. 'Crossing' of the Floor by Ruling Party Members to the opposition side in the course of debating the Bill.

Appellants' Submissions

The appellants argued that the Speaker was estopped from allowing members to cross the floor yet she had earlier punished others for doing the same. Counsel contended that the powers of the Speaker do not involve violating the Administration of Parliament Act and the Rules that prohibit crossing the floor.

Counsel faulted the learned Justices of the Constitutional Court for holding that the fact of crossing the floor was not in issue and that members did not cross for purposes of voting.

Counsel further submitted that the Speaker cannot exercise her general power in the face of clear provisions. He pointed out that Rule 9 prescribes sitting arrangements in the House and that Rule 82(1)(b) specifically prohibited members from crossing the floor of the House or moving around unnecessarily during a sitting.

Counsel contended that the finding that no evidence was adduced that the crossing prejudiced any members was unexpected of a constitutional court in light of the above stated constitutional provisions and Rules of Parliament which call for Members of Parliament to be accountable to the electorate. He argued that if there is no prejudice in casual crossing of the floor, why is it prohibited and punishable?

He reiterated his earlier assertion that it was wrong for the learned Justices of the Constitutional Court to assume that the point in issue before them was actual switching of political sides yet it was a breach of Rules of Procedure.

Respondent's Submissions

The Attorney General submitted that Rule 9 (1) of the Rules of Procedure of Parliament obligated the Speaker to as far as possible reserve a seat for each Member of Parliament. On the other hand, Rule 9(4) obligates that Speaker to ensure that each Member has a comfortable seat in Parliament.

The Attorney General submitted that since the members of the opposition walked out leaving empty seats, the Speaker was justified in the circumstances to permit Members of Parliament to sit on the available seats in the chambers of Parliament. The

Attorney General further argued that members taking up available seats as had been directed by the Speaker did not amount to their joining the opposition and did not contravene any rules of procedure of Parliament and therefore the Justices of the Constitutional Court rightly found so.

Constitutional Court holding on the issue of 'Crossing'

All the learned Justices of the Constitutional Court agreed that there was no crossing of the floor by the Ruling party members to the opposition. They particularly noted that: (i) 'Crossing the floor' is interpreted in the legal sense rather than mere physical movement for purposes of occupying available space; (ii) Crossing must be with the intention of joining the opposition or otherwise as envisaged under Article 83 of the Constitution; and (iii) It was not proved that by inviting Members of Parliament to sit on the seats left vacant by opposition Members, the Speaker had in essence allowed members to cross to the opposition.

Consideration of the Issue

The appellants allege that the members of the Ruling Party 'crossed the floor' and joined the opposition side when at the behest of the Speaker, they sat in the chairs reserved for the opposition who had walked out of Parliament.

The concept of 'crossing the floor' was restated by this Court in **Theodore Ssekikubo & Ors v. Attorney General, Constitutional Appeal No. o1 of 2015** where this Court pointed out that the term meant a member of Parliament abandoning one's party on whose ticket he or she had been elected and joining another or becoming

independent. It therefore follows that the term does not mean physical crossing the floor of the House and sitting where the party or parties on whose ticket one was not elected on sit or where independents sit.

Review of the Hansard shows that during one of the debates involving the Amendment Bill, members of the Opposition voluntarily walked out of the House. The Ruling party members remained in the House and continued debating. Seeing the empty seats and realizing that some of the Ruling party members were squeezed in their seats, the Speaker invited them to occupy the seats abandoned by the members of the opposition so that they could sit more comfortably. Debate proceeded normally, with the Ruling party members who sat on the side of the opposition continuing to support the position taken by the Ruling party on the matter.

Rule 82(1)(b) relied on by the appellants is not applicable in this case, since the members did not cross the floor in the legal sense, that is, leaving the party on whose ticket they were elected and/or joining another party or becoming independents.

I also note that Rule 9 provides for the sitting arrangement in the House. It is not disputed that seats on the right hand side of the Speaker are reserved for members of the party in Government and those on the left are reserved for members of the opposition parties in the House. It is not that the members of the party in Government came and occupied the seats reserved for the opposition. They occupied these seats after the members of the

opposition had abandoned the debate and walked out of the Chamber.

It also suffices to note that the same Rule mandates the Speaker to ensure that each member has a comfortable seat. It would therefore follow that the actions of the Speaker in inviting members of the governing party in Government to take seats vacated by the members of the opposition was to ensure that members were comfortable.

I therefore agree with the findings of the learned Justices of the Constitutional Court that there was no crossing of the floor in the legal sense of the term. I also hold that in allocating empty seats ordinarily occupied by members of the opposition the Speaker did not violate the Rules of Procedure.

x. Non-observance of the 14 Days Rule between the 2nd and 3rd Reading of the Bill.

Appellants' Submissions

Counsel for the appellants faulted the majority learned Justices of the Constitutional Court for finding that whereas the passing of the Amendment Act without observing the 14 days between the 2nd and 3rd reading contravened the Constitution, the contravention was not fatal. Counsel argued that this was not a correct approach. He contended that when the clauses in the Bill requiring 14 days separation were passed at the third reading they became part of the Amendment Act. Counsel further argued that Article 260(1) was quite categorical that such Bill shall not be

taken as passed unless the votes at the second and third reading are separated by fourteen days.

Counsel further submitted that in the ordinary meaning of the words 'a bill shall not be taken as passed', means that the Bill will not make it to 3rd reading where the House does not comply with the 14 days. Counsel also argued that having amended Article 1 of the Constitution by infection, the proper course was to separate the two votes at second and third reading by 14 days. Thereafter it would be referred to a referendum. Counsel contended that it was irrelevant that one year later the court declared some of the provisions unconstitutional. He argued that each of the two arms of government namely the Judiciary and the Legislature had its own functions and responsibilities noting that the one for the legislature was to ensure that there is a 14 days separation of the two votes. In his view, the legislature could not sit back and say, "These provisions will be struck down by the Constitutional Court; there is therefore no need for us to separate the two sittings with 14 days". He argued that the constitutional provisions must be complied with and that it could not be left to speculation what would happen in future.

Counsel reiterated his assertion that Article 263(1) was clear that *a bill [not some provisions of a bill] "shall not be taken as passed unless…..the votes on the second and third reading……separated by at least fourteen days…."* Thus, the motions of passing it at the third reading and sending it to the President for assent was all in vain. In his view, the bill remained and remains what it was- a Bill. He submitted that this Court gives effect to the words *"shall*

not be taken as passed" and holds that the failure to separate the two sittings was fatal to the Act. He argued that the Act cannot be validated and given constitutional cover when it never passed. In his view, this could mean validating a constitutional illegality.

Respondent's Submissions

The Attorney General refuted the appellant's contention that the Constitutional Court erred in holding that the failure to separate the second and third seating by 14 days was not fatal. He further refuted the appellant's submissions that the failure to submit a Certificate of the Electoral Commission envisaged in Article 263 (2) (b) invalidated the whole Act.

The Attorney General submitted that the issues of observance of the 14 days sitting between the second and third reading as well as the failure to submit a certificate of the Electoral Commission were ably determined by the Constitutional Court. In support of his contention he relied on the Judgments of Cheborion, JCC [at pages 2773 to 2774], and Owiny-Dollo, DCJ [at pages 2426-2427.]

He submitted that the majority learned Justices came to the right conclusion in holding that the non-observance of the 14 days sitting was not fatal. The Attorney General reiterated his submissions on this issue as contained in Volume 2 of the record of proceedings, from page 538 to 559.

He further argued that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14 days. Further that in the same vein, the Bill did

not contain any provision the amendment of which required its ratification by the people of Uganda through a referendum, thereby necessitating the issuance of a certificate of the Electoral Commission.

He pointed out that his submission above was supported by the findings of the Learned Justices of the Constitutional Court at pages 2385 and 2773. He further pointed out that as the learned Justices found, it is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution. Thus, having found that the amendments that were proposed during the Committee stage had an infectious effect on Articles 1, 8A and 260 of the Constitution and therefore null and void, the learned Justices were right to apply the severance principle and severed those Articles that offended the Constitution from those whose enactment would not require the separation of the second and third reading by 14 days as well as those ratification of such a decision through a referendum.

He invited Court to reject the assertion by the Appellants and uphold the findings of the majority Justices.

Constitutional Court holding on the issue of non observance with 14 days between the 2nd and 3rd Reading of the Bill

The learned Justices of the Constitutional Court found that some of the provisions of the Amendment Act amended by infection other provisions of the Constitution that required separation of 14 days between the 2nd and 3rd reading before they could be passed, for instance Article 1, 2 and 260. They observed that failure to observe

the 14 days Rule was a breach, and therefore those provisions of the Amendment Act could not stand. The majority Justices however held that the rest of the provisions that did not require the observance of the 14 days Rule could be upheld.

Consideration of the Issue

The bone of contention in this issue is failure by Parliament to observe the 14 days rule between the 2nd and 3rd reading of the Bill since it contained provisions which required a separation of these two readings by at least 14 days. This 14 days rule is provided under Article 263 (1) as follows:

> ***The votes on the second and third readings referred to in articles 260 and 261 of this Constitution shall be separated by at least fourteen sitting days of Parliament.***

A review of the Amendment Act and how it was passed shows that the Amendment Act itself and the provisions therein amended by infection Articles 1, 2 and 260 of the Constitution. These three articles are listed among those articles under Article 261 and whose amendment, in line with Article 263(1), would require that the second and third reading of the Bill is separated by at least 14 sitting days of Parliament. It would therefore follow that the failure to comply with the requirement of the 14 days rule amounted to a failure to comply with Article 263(1) the Constitution. This in my view was fatal.

I however note that the Bill as introduced by the Hon. Magyezi before the House did not contain any provisions which would have required a separation of 14 days between the second and third

reading. The provisions which required a separation of 14 days were introduced at a later stage.

Counsel for the appellants falsely imported words into Article 263(1) that "the bill shall not be taken as passed". These words are in clause 2 of Article 263 and not in close 1. Even so, the provisions which were irregularly added to Hon. Magyezi's bill at Committee Stage necessitated separating the votes on the second reading and third reading by 14 days. Parliament's failure to do so therefore caused a breach of the constitutional provision.

However, the bill was passed and assented to by the President, and became an Act of Parliament. The issue that faced the Constitutional Court was whether the whole Amendment Act should be struck down or the provisions which were irregularly added to the bill struck out. The court used the doctrine of severance to strike out the provisions in the Amendment Act which were irregularly added to the bill and saved those provisions which had no irregularity in their passage.

I considered the doctrine of severance earlier in my consideration of the application of Article 93 to the bill and found that the Constitutional Court did not err in applying the doctrine. The same considerations and conclusion I made equally apply to this issue.

xi. <u>Failure to comply with the 45 days Rule by the Legal & Parliamentary Affairs Committee to present the Report.</u>

Appellants' Submissions

Mr. Mabirizi argued that the 45 days within which the Committee was supposed to produce its report started to run after 3rd October and expired on 17th November 2017. He argued that by presenting the Report outside the 45 days, the Report was a nullity. Appellant further pointed out that the Committee did not seek extension of time within which to complete the work or validate the late presentation of the Report.

The appellant argued that had the learned Justices of Appeal determined this contention in line with Rules 128 (2), 140 and 215, they would have found that there was no valid report to rely on.

Respondent's Submissions

The Attorney General submitted that in his affidavit in rejoinder to the affidavit of Jane Kibirige, the Clerk to Parliament, Mr. Mabirizi submitted that the report of Legal and Parliamentary Affairs Committee was not valid since it had delayed in the Committee beyond 45 days contrary to Rule 128 (2) and 140 of the Rules of Procedure of Parliament.

The Attorney General submitted that it was crucial to note from the outset that the appellant did not specifically plead this issue in his petition but only brought it up in an affidavit in rejoinder. According to the Attorney General, this explains why he could not respond to it.

The Attorney General further argued that this also constituted a departure from pleadings and should be disregarded.

Without prejudice to his submission above, the Attorney General submitted that Rule 128 of the Rules of Procedure of Parliament

provides that whenever a Bill is read first time in the House, it is referred to the appropriate Committee for consideration, and the Committee must report to the house within 45 days.

He further pointed out that Rule 140 (1) provides that no Bill shall be in the Committee for more than 45 days. Further that Rule 140 (2) provides that if a committee finds itself unable to complete consideration of any Bill referred to it, the Committee may seek extra time from the Speaker

The Attorney General submitted that the basis of the appellant's argument was that the Bill was referred to the Committee on the 3rd of October, 2017 and the 45 days run out on 17th November 2017 yet the committee reported to the House on 14th December, 2017 after expiry of 45 days.

The Attorney General submitted that had this matter been raised in time, he would have led evidence to prove that the committee acted well within the provisions of Rules 128 and 140 of the Rules of procedure of Parliament in that whereas the Bill was referred to the committee on 3rd October 2017, the house was sent on recess on 4th October 2017. Further that during recess, no parliamentary business is transacted without leave of the Speaker, therefore, the days could not start running until the leave was obtained.

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Speaker on the 3rd November 2017. That both letters are annexed. Further that the 45 days started running from the 3rd November 2017. In the Attorney General's view, this meant that the days would expire on 16th December 2017. Thus,

the Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.

He added further that in any event noncompliance with the 45 days rule does not vitiate proceedings on a Bill. He placed reliance on Rule 140 which provides that where extra time is granted, or upon expiry of the extra time granted under sub rule 2, the House shall proceed with the Bill without any further delay.

The Attorney General submitted that the report of the committee was duly presented to the whole House within the period stipulated under Rules 128 and 140 and alternatively, if it delayed, which is denied, the delay did not vitiate or invalidate the enactment of the constitutional amendment Act No.2 of 2018.

Constitutional Court holding on the non observance of 14 days

Issue was not canvassed by the parties at the Constitutional Court. The Court in turn did not canvass it.

Consideration of the Issue

Review of the parties' pleadings shows that this issue only appears in Mabirizi's Affidavit in rejoinder. The Judgments of the learned Justices of the Constitutional Court show that they did not canvass this issue as well. The learned Justices cannot be faulted for failing to consider this issue. In **Kananura Andrew Kansiime v. Richard Henry Kaijuka, Civil Reference No. 15 of 2016**, this Court was faced with a similar issue of a party raising a new issue in rejoinder. In this case, a party had in his affidavit in rejoinder raised a new issue regarding certain alleged illegalities. In finding

no fault with the single Justice's failure to consider this issue, this Court held as follows:

> ***We have further noted that it was improper for Kananura to raise the issue of illegality in rejoinder, because he was only supposed to respond to matters that had been raised in the reply and not to raise new matters. As a result, Kaijuka was not able to respond to the new issues raised. In the circumstances, we cannot fault the single Justice for having failed to consider whether the intended appeal raised the issue of illegality and novel points of law.***

In the circumstances, I have found no basis for considering this issue.

xii. <u>Failure to close the Doors to the Chamber at the time of Voting.</u>

Appellants' Submissions

Counsel for the appellants submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament before voting on the 2nd reading of the Bill and during voting was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution and rule 98(4) of the Rules of Parliament. Counsel further submitted that the fact of failure to close the doors during voting was also admitted by the clerk to Parliament in her affidavit.

It was counsel's submission that the rationale of Rule 98 (4) was to bar Members who had not participated in the debate from entering parliament and/or participating in decision making by

way of voting. Counsel contended that rather than the Speaker complying with the Rules of Parliament by closing the doors, she not only left the doors wide open but also called for members who were outside the chambers during the time of debate to enter and vote.

Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how failing to close all the doors during voting made the enactment of the Act to be unconstitutional and that the rules of procedure were not made in vain. In counsel's view, they must at all material times be obeyed and respected save where they have been duly suspended and that noncompliance renders the entire process and the outcome thereof illegal.

Respondent's Submissions

The Attorney General submitted that Rule 98(4) of the Rules of Procedure of Parliament provide that the Speaker shall direct the doors to be locked and the bar drawn until after the roll call vote has taken place. Further that the Speaker disclosed the reason why she could not do it.

According to the Attorney General, this action by the Speaker was validated by Rule 8(1) where the Speaker can make a decision on any matter *"having regard to the practices of the House..."*

The Attorney General further pointed out that under Rule 8 (2) of the Rules of Procedure of Parliament the Speaker's ruling under sub rule (1) becomes part of the Rules of Procedure of Parliament until such a time when a substantive amendment to these rules is

made in respect to the ruling. The Attorney General contended that the action taken by the Speaker not to close the doors of the House during voting was within the ambit of these powers. The Respondent therefore submits that the court properly arrived at the decision they made.

Constitutional Court holding on the Speaker's failure to order the doors of the Chamber to be shut at the start of and during voting

The learned Justices of the Constitutional Court stated that Rule 98 (4) required the Speaker to direct that doors to the Chamber to be locked prior to voting. They further observed that: (i) it was not disputed that the Speaker did not order for the closure of the doors to the Chamber; (ii) Voting when the doors were opened offended the above Rule. However, their Lordships held that this did not violate the Constitution and/or vitiate the enactment of the impugned Act since: (i) the Speaker explained why the Rule could not be complied with; and (ii) All Members who were present and wanted to vote, voted and that there was no evidence to the contrary.

Consideration of the Issue

It is not in dispute that Rule 98(4) requires the Speaker to shut the doors during voting. This Rule provides as follows:

> ***The Speaker shall then direct the doors o be locked and the bar drawn and no Member shall thereafter enter or leave the House until after the roll call vote has been taken.***

Review of the Record shows that on Wednesday 20th December 2017 when the voting commenced and indeed during voting, the doors to the Chamber were open. It would therefore follow that there was breach in respect of the above provision. This notwithstanding, the Speaker before ordering the commencement of voting observed as follows:

> ***"...ideally I was supposed to have closed the doors under Rule 98(4). However that exists in a situation where all members have got seats. Therefore it is not possible to lock them out and that is why I did not lock the doors....."***

Clearly, the Speaker was aware of this Rule but advanced a reason, which in my view was sufficient, as to why she could not close the doors of the Chamber. Thus her failure to shut the doors was fully understandable and could not in any way lead to the conclusion that the enactment of the Bill was unconstitutional.

I therefore find no merit in the appellants' complaint.

xiii **<u>Discrepancies in the Speaker's Certificate vis-à-vis the Bill as Passed.</u>**

Appellants' Submissions

Counsel contended that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire Amendment Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill. Counsel submitted that the Speaker's certificate of compliance was

materially defective, ineffectual and thus rendered the presidential assent a nullity.

Counsel argued that the requirement of a valid Certificate of Compliance under Article 263 (2) of the Constitution was couched in mandatory terms. He pointed out that the speaker's certificate of compliance which accompanied the Amendment Bill was but full of glaring inconsistencies and discrepancies. He further pointed out that whereas the certificate clearly indicated that the Amendment Bill only amended Articles 61, 102, 104 and 183 of the Constitution, the bill itself indicated that parliament had amended in addition to the said provisions Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel vehemently averred that the discrepancies and variations which appeared between the Speaker's certificate of compliance and the Constitution (Amendment) Bill were gross both in content and form and thus contravened Article 263 (2) of the Constitution and S.16 of the Acts of Parliament Act. In counsel's view, this rendered not only the presidential assent to the bill a nullity but even the resultant Act.

Counsel also argued that the Constitutional Court wrongly concluded that the discrepancies only affected those provisions forming part of the Constitution (Amendment) (No. 2) Bill, 2017 amending Articles 77, 105, 181, 289, 289A, and 291 of the Constitution which were not included in the Speaker's certificate; and not the entire Act.

Counsel submitted that the Constitutional Court misdirected itself on the legality of the Speaker's certificate of compliance in light of the Supreme Court authority of **Ssemwogerere & Anor vs. Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002** where court held that:

"In the case of amendment and repeal of the constitution, the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent to the provision is and remains, even though it receives the Royal (sic) Assent, invalid and ultra vires."

While citing the foregoing position in the instant matter, Owiny – Dollo, DCJ, held that:

"This requirement, in my view, is not only about the issuance of a certificate of compliance; but is equally about its content, as is provided for in the Format for such certificate in the Schedule to the Acts of Parliament Act"

Counsel averred that the highlighted inconsistencies were deliberate and intended to subvert and fraudulently circumvent constitutional provisions which required a referendum for the amendment to be valid under Article 263 (1) of the constitution.

Respondent's Submissions

The Attorney General refuted the appellant's contention that the learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire Amendment Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent. He further refuted the Appellant's contention that the Speaker's Certificate of compliance was materially defective, ineffectual and that this rendered the presidential assent a nullity.

The Attorney General submitted further that the Constitutional Court came to the right finding in holding that the validity of the

entire Amendment Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent.

The Attorney General submitted that the learned Justices of the Constitutional Court individually dealt with the discrepancy and variances between the Speaker's certificate of compliance and found that the discrepancies were not fatal. In the Attorney General's view, majority Justices came to the right conclusion in holding that the discrepancy in the Speaker's certificate of compliance and the Bill was not fatal.

The Attorney General further contended that it was not in dispute that the Bill that was sent to the President for assent was accompanied by a certificate of compliance as required in Article 263 (2) (a) of the Constitution. He further argued that The Certificate however indicated that four (4) Articles of the Constitution were being amended and yet ten (10) Articles of the Constitution were amended. He noted that the Articles that were indicated in the Certificate were Articles 61, 102, 104 and 183 while the Articles that had been amended but excluded were Articles 77,105,181,289 and 291.

The Attorney General submitted that the decision of the majority Justices in upholding the validity of the certificate of the Speaker was a recognition that the certificate complied with the form prescribed in section 16 (2) and Part VI of the second schedule of the Acts of Parliament Act Cap 2 since the Articles that were being amended were enumerated thereunder.

The Attorney General further submitted that in holding that the other Articles that had been amended but not included in the Speaker's Certificate were unconstitutional, the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution.

The Attorney General invited Court to reject the assertion by the Appellants and uphold the findings of the majority that the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent was not fatal to the Bill.

Constitutional Court holding on the inconsistencies between the Speaker's Certificate and the provisions of the Bill as passed

The learned Justices of Appeal indeed acknowledged that there were discrepancies between the Speaker's Certificate and the provisions of the Bill as passed by Parliament. The majority Justices however held that this did not render the Speaker's Certificate invalid since: (i) it was issued in conformity with the format specified in Part VI of the 2nd Schedule to the Acts of Parliament Act; and (ii) it was duly signed by the Speaker. The Justices of the Constitutional Court noted that the Certificate only applied to the Articles stated therein [61, 102, 104 and 183]. Further, that the excluded Articles [77, 105, 181, 289, and 291] could not be held to have been properly amended because to constitute a valid enactment, they ought to have been included in the Speaker's Certificate.

Consideration of the Issue

The appellants contend that because there was discrepancy between the Speaker's Certificate and the Bill as passed in regard to the constitutional provisions that had been amended, the Amendment Act could not be held to have been correctly passed. The appellants further argued that because the Certificate listed only a few articles as having been amended, it was fatally defective and thus could not pass as a certificate envisaged under Article 263.

Article 263 (2) provides as follows:

A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if-

(a) It is accompanied by a Certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it;

It is not in dispute that the Amendment Act was accompanied by the Certificate of the Speaker at the time the President assented to it. It is also not in dispute that the Certificate accompanying the Amendment Act complied with the format laid out in the Acts of Parliament Act. What is in dispute is that the Certificate excluded other provisions as contained in the Amendment Act.

I agree with the findings of the Constitutional Court that the Speaker's certificate was defective. While it complied with the format, it did not comply with the content. The Speaker's certificate, according to Article 263(2), is required to certify, for purposes of presidential assent, that the bill in question has been passed in accordance with Chapter 18 of the Constitution. The Speaker knew, or should have known, that the amendment of the Articles she excluded from the certificate, that is Articles 77, 105, 181, 289 and 291, were not passed in accordance with Chapter 18.

However, this case must be distinguished from the case of **Ssemwogerere & Another vs. Attorney General** (supra). In the **Ssemwogerere** case there was no Speaker's certificate at all. In the instant case, however, there was a certificate which complied with the format. Secondly the Articles which the Speaker indicated in the certificate as having been passed in accordance with Chapter 18 of the Constitution were indeed passed in accordance with that Chapter. The omitted Articles were the ones which violated the Constitution in their passing.

Therefore, the Speaker's certificate which was clearly defective had some saving features in it. I do not, therefore, agree with the appellants' contention that because of its defect, the entire Amendment Act should be declared a nullity. The Articles which were excluded from the certificate were rightly declared unconstitutional by the Constitutional Court through the court's application of the doctrine of severance.

I find that the doctrine of severance which I discussed earlier under sub-issue (i) equally applies to the Speaker's certificate. In my view, defects in the certificate were not so grave as to render the whole Amendment Act a nullity. The amendment provisions which were not included in the Speaker's certificate were rightly declared by the Constitutional Court to be unconstitutional.

xiv **Alleged illegal assent to the Bill by the President [President signing the Bill without scrutinizing the contents of the accompanying Certificate vis-à-vis the contents of the Bill].**

Appellants' Submissions

On the alleged illegal assent to the bill by the President, counsel submitted that the act of the President assenting to the bill without scrutinizing the same to ascertain its propriety was in contravention of Articles 91(1) (2) and (3), and 263 of the Constitution and Section 9 of the Acts of Parliament Act. He also relied on the decision of the Supreme Court in the **Ssemwogerere case (supra)** where court held that;

> *"The presidential assent is an integral part of law making process. Under Article 262(2), the Constitution commands the President, to assent only if the specified conditions are satisfied. The command is mandatory, not discretionary. It*

does not allow for discretion in the President to assent without the Speaker's certificate of compliance."

He therefore submitted that the constitutional duty imposed on the President requires him to scrutinize the certificate of compliance and the accompanying Bill as to their regularity before appending his signature.

Constitutional Court holding on the illegal assent of the Amendment Act by the President

The learned Justices of the Constitutional Court who considered the issue of the Presidential assent and held that the Presidential assent in respect of the amendments excluded from the Speaker's Certificate of Compliance and the absence of the Certificate from the Electoral Commission in respect of the amendments that required a referendum, rendered those excluded amendments unconstitutional.

Consideration of the Issue

The appellants contend that the Presidential assent was illegal since the President acted on a defective Certificate. I have found that the Certificate was defective and that it should only apply to those provisions of the Amendment Act that amended the provisions listed in the Certificate. However, the provisions of Article 263 (2) are clear that the Certificates issued therein are to assure the President that amendments were carried out in accordance with the relevant provisions of the Constitution. The Speaker's certificate is what the President relies on to sign the bill, otherwise what other purpose would the certificate be intended to serve? In my view, it is not a constitutional requirement that the President should go behind the Speaker's certificate to assure

himself or herself that the bill was passed in compliance with the Constitution.

Issue 3

This issue was framed as follows:

> ***"Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda."***

Appellants' Submissions

Counsel for the appellants submitted that the Bill from which the Amendment Act emerged was passed amidst violence, orchestrated by the UPDF, UPF and other militias both within and outside Parliament. Counsel further submitted that this violence was not restricted to just inside and outside Parliament but was extended across the whole Country during public consultations. In counsel's view, this vitiated the entire process, and thus made the Amendment Act unconstitutional.

Counsel contended that the learned Justices of the Constitutional Court rightly established that the UPDF, the Uganda Police force and other militia wrongfully intervened in the entire process that led to the enactment of the Amendment Act. He however faulted them for holding that this interference [in the form of violence]

neither contravened nor was it inconsistent with the Constitution since it was not prevalent.

Relying on Article 3(2) of the Constitution, counsel for the appellants submitted that the unlawful invasion and/or heavy deployment at Parliament by combined forces of the UPDF, UPF and other militia before and on the day the Amendment bill was tabled before Parliament amounted to amendment of the Constitution by violent means. He further contended that this invasion also undermined Parliamentary independence and as such was inconsistent with and in contravention of the Constitution. He argued that all these actions were prohibited by Article 3(2) of the Constitution.

Counsel also submitted that letting this stand would be akin to validating the overthrow of the Constitution as was done in the case of **Uganda v. Commissioner of Prisons, ex parte Michael Matovu [1966] 1 EA** where Court applied the Hans Kelsen General theory of law, itself prohibited under Article 3(2) of the 1995 Constitution in validating the overthrow.

Regarding the alleged violence committed by the Security Forces against some MPs and other citizenry as a result of the enforcement of the Directive issued by the Police Director of Operations, counsel submitted that these actions of the Security Forces violated Article 1 of our Constitution since the people who are supreme were denied an opportunity to participate in the amendment process and/or were prevented from defending their Constitution. Relying on **Doctors for life** (supra), counsel

submitted that public participation in enactment of laws was very paramount.

Counsel also faulted the learned Justices of the Constitutional Court for failing to appreciate the chilling effect this violence had on other MPs that would have wished to oppose the amendment and/or other members of the public who wished to participate in the amendment process. Indeed counsel pointed out that the heavy deployment and unprecedented violence meted out against Members of Parliament within the precincts and chambers of the August House prompted the Speaker to write a letter addressed to the President of Uganda inquiring into the existence of armed personnel in the perimeters of Parliament.

It was also argued by the appellants that the violence inside Parliament which included the arrest, assault, and detention of members of Parliament and their forceful exclusion from representing their constituents was also inconsistent with Articles 23, 24, and 29 of the Constitution. Further that it was not the conduct of the person whose rights are limited that was examinable by the Court. Rather that it was the conduct of the person limiting the rights that was put to scrutiny by the Court. Counsel thus faulted the learned Justices of the Constitutional Court for rationalizing the deprivation of the MPs' rights under Articles 23, 24 and 29 instead of determining whether the limitation to members' rights was justifiable in a free and democratic state - a test the Justices themselves set.

Counsel concluded his submissions by inviting this Court to find that the violence meted out by the Security Forces inside and

outside Parliament in the course of passing the Amendment Act contravened the Constitution and therefore the Constitution ought to be nullified.

Respondent's Submissions

The Attorney General refuted the appellants' contentions and submitted that the learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Amendment Act did not amount to a breach of the 1995 Constitution to warrant the declaration of the whole process as unconstitutional. He invited this Court to uphold the decision of the Constitutional Court on this matter.

The Attorney General was emphatic that it was factually incorrect for the Appellants to allege that the learned Justices of the Constitutional Court found that the UPDF, UPF and other militia wrongfully intervened in the entire process leading to the enactment of the impugned Act. The Attorney General argued that it was the unanimous decision of the learned Justices of the Court that the intervention of the UPF was lawful and that there was never any reference to militias as alleged by the Appellants. He invited the appellants to always make factual references to the Judgments of the Court.

On the scuffle inside Parliament, the Attorney General referred to the evidence of the Clerk to Parliament and the Sergeant at Arms and submitted that the proceedings of Parliament on the 21st, 26th and 27th September 2017 were characterized by unprecedented

chaos, disorder and misconduct of some Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House on 27/09/2017. He further submitted that the suspended MPs chose not to heed the Speaker's orders to leave the House and this led to their eviction by members of the security forces under the command of the Sergeant-at-Arms.

Relying on Article 79(1) of the Constitution, the Attorney General submitted that Parliament had power to make laws on any matter for the peace, order and development and good governance of Uganda. Secondly, that under Article 94(1), Parliament had power to make rules regulating its own procedure, including the procedure of its committees.

On the alleged violence throughout the Country, the Attorney General submitted that an overwhelming number of Members of Parliament carried out their consultations with the people in an uninterrupted manner and indeed came and presented their findings to Parliament. He further submitted that the Directive issued by the Director Operations, UPF was not implemented across the whole country.

Regarding the argument that the MPs rights guaranteed under the Constitution were violated, the Attorney General relied on Article 43(1) of the Constitution and submitted that it was in public interest that the debate on the Bill needed to proceed and be conducted in a manner that promoted debate by members across the political spectrum as the matters therein were clearly of high national importance. He argued that the events that transpired on 26th and 27th September 2017 that led to the scuffle with security

agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces. He further argued that such use of force would have been unnecessary had the orders of the Speaker aimed at maintaining order in the House been adhered to by the offending Members of Parliament.

Regarding the appellants' argument that violence both inside and outside Parliament had a chilling effect on other members of the public that wished to participate and other Members of Parliament that would have wished to oppose the amendment, the Attorney General submitted that an overwhelming number of Members of Parliament carried out their consultations with the people in an uninterrupted manner and indeed were able to come and vote on the Constitution Amendment Bill (No. 2) of 2017.

Regarding the appellants' argument that because of the violence meted out against the MPs, force was used to amend the Constitution and thus there was breach of Article 3(2) of the Constitution, the Respondent contended that this was a new argument by the appellants raised on appeal. In the Attorney General's view, they were precluded from raising it before this Court since the grounds of objection must arise from the decision that is being appealed against which is not the case in this matter. In support of this proposition, the Attorney General relied on Rule 82 (1) of the **Judicature (Supreme Court Rules) Directions.**

Be that as it may, the Attorney General submitted that the amendment was done with the full participation of Members of Parliament and thus the appellants' contention that force was used

to amend the Constitution was untenable. The Attorney General further submitted that the appellants' contention that the forceful removal of the MPs on the 27th September 2017 amounted to a treasonous act under Article 3(2) was also untenable since the act of their removal was done in accordance with the Constitution by virtue of the powers vested in the Speaker under the Rules of Procedure of the Parliament of Uganda.

He prayed that this Court finds that the Appellants misconstrued the application of Article 3 (2) of the Constitution as the expulsion of the Members of Parliament was not a singular event but was a result of their consistent misconduct during the debate of the Bill which resulted in the Amendment Act.

Constitutional Court Holding

Review of the Judgments of the Constitutional Court shows that the learned Justices agreed and found that: (i) there was a scuffle inside the Parliamentary Chambers on 27/09/2017; (ii) the scuffle arose as a result of the suspended MPs' failure to exit the Chamber after being ordered to do so by the Speaker; (iii) in order to enforce compliance with the Speaker's order, the Parliamentary Sergeant-at-Arms with the help of the Security Forces used force to eject the suspended Members from the Chamber. In light of this, the learned Justices agreed that the forceful ejection though regrettable was necessary. They however, deprecated the use of the Army to eject the MPs noting that the Police could have handled the situation without UPDF getting involved.

Regarding the violence outside Parliament, the majority learned Justices observed that whereas it happened in certain instances it did not stop the MPs from gathering views and presenting them before Parliament and voting on the Bill.

In light of these findings, the majority came to the conclusion that the violence inside Parliament and outside Parliament did not contravene the Constitution.

Consideration of Issue 3

The appellants' main contention under this issue is that the violence both inside and outside Parliament violated various provisions of the Constitution. The provisions that were allegedly violated were Articles 1, 3(2), 23, 24 and 29. The appellants allege that Article 1 was violated in as far as the people of Uganda were prohibited from participating in the enactment process by stifling their right to give their views on the Bill. According to the appellants this amounted to denying them the right to participate in their governance.

Regarding Article 3(2), the appellants contend that the violence meted out inside Parliament in the course of enacting the Amendment Act amounted to violent amendment of the Constitution. With regard to Article 23, the appellants allege that the MPs right to liberty was violated when they were ejected from Parliament and arrested. Regarding Article 29, the appellants alleged that the manner in which the MPs were ejected from Parliament amounted to inhuman treatment which took away their human dignity. Lastly, with regard to Article 29, the appellants

allege that the MPs right of expression was taken away by their ejection from Parliament.

A review of the judgments of the learned Justices of the Constitutional Court shows that they comprehensively dealt with the issue of violence inside Parliament and the consequences thereof in as far as the Amendment Act was concerned. Further review of the judgments shows that the Justices provided a genesis of the events of 27/09/2017 that eventually resulted into the forceful removal of some MPs from the House by security operatives.

The above notwithstanding, a brief review would suffice in order to appreciate whether the actions of 27/09/2017 that resulted in the alleged violations as claimed by the appellants were warranted or not.

According to the copy of the Hansard of the Parliament of Uganda of 27/09/2017, the Speaker addressed the House on the issue of misconduct of some members. For emphasis, I have deemed it proper to cite the Hansard verbatim. She said:

> ***... Hon. Members, you may recall that this House has not been able to conduct business properly since the 21st of September. This is when Members were not willing to listen to their colleagues who had different opinions and the Deputy Speaker was forced to adjourn the House without conducting any serious business.***
>
> ***...***

At the sitting of yesterday, the unruly conduct of last week was repeated. The Speaker could not be heard in silence. Members were standing, climbing on chairs and tables, and they were dressed in a manner that violates Rule 73 of our Rules of Procedure. I made several calls to the Members to sit down and be orderly, but this was not adhered to. Some members crossed from one side to the other in a menacing manner, contrary to rule 74 of our Rules of Procedure. The Speaker could not address the House in silence as many Members were menacingly standing near the Speaker's Chair.

As I told you yesterday, this Parliament is a place to speak and exchange views, including listening to those you do not agree with. We cannot all have the same views; that is why one of the cardinal tenets of parliamentary etiquette, and indeed as provided for in our Rules of Procedure, is that we should always listen to each other. The actions by many of you, whom I am going to name I noted them yesterday and I should have named them yesterday but due to the noise, I could not. However, today I will name you.

The Speaker then proceeded to state her responsibility while referring to the Rules of Procedure. She cited among other rules Rule 7(2) which mandates the Speaker to preserve order and decorum in the House; Rules 77 and 79(2) that gives the Speaker power to order any member whose conduct is grossly disorderly to withdraw from the House; Rule 80 which permits the Speaker to

name a Member who is misbehaving; and suspending such a member from the service of the House.

The Speaker further cited Rule 8 which gives the Speaker authority to decide on the issues not expressly provided for. Thus, she observed that she ought to have done this on the 26/09/2017 but acknowledged that it was not possible because of the conduct of some members. She further observed that she noted down the names of the members that were shouting.

The Speaker then cited Rule 80(1) and proceeded to name and suspend the listed members from Parliament from the service of the House for the next three sittings. She further noted that the effect of the suspension was that a suspended member immediately had to withdraw from the Chamber and that such a member could neither attend Committees nor enter the precincts of Parliament.

Having read the names of the suspended members, they [suspended members] refused to exit the Chamber. She ordered them to exit the Chamber the second time but still they declined to exit the Chamber. To enforce her order, the Speaker ordered the Sergeant at Arms to remove the members that she had named. She called upon them to exit the third time. The suspended members still refused. She then suspended the House for 30 minutes and ordered that on her return, the suspended members should have left the House.

Further review of the evidence on record shows that when the Sergeant-at-Arms and his staff tried to eject the Members from the

House, the members became unruly and indeed some of them attacked the Sergeant-at-Arms and his team with among other things furniture and microphone sticks. This necessitated the Sergeant-at-Arms to call for back up in order to ensure compliance with the Speaker's order. Reinforcements in form of Security Forces came in and forcefully ejected the suspended members.

This scuffle continued outside Parliament where the suspended MPs that had been forcefully removed from Parliament were bundled and dumped in Police Patrol Cars and whisked away.

It suffices to note that all this action elaborated above happened before the motion seeking leave to introduce the private member's Bill for the Amendment Bill had been tabled or read. Thus, there was no Bill before Parliament to talk about. It would therefore follow that since the violence inside Parliament happened before the Bill was tabled, it would not be accurate to state that the amendments to the Constitution as contained in the Amendment Act were enacted under violence or amounted to a violent amendment of the Constitution.

Therefore, the appellants' argument that there was a violent amendment of the Constitution, which is prohibited under Article 3 (2), is untenable because there was no Bill pending before Parliament when violence in the House occurred. The appellants' argument could have made sense if after the introduction of the Bill members were coerced through violence to support it, or if the appellants adduced evidence showing that the members who voted one way or the other were coerced to do so. The appellants did neither of this.

I wish to note from the onset that in suspending and ordering the suspended members to exit the Chamber, the Speaker of Parliament was acting within her powers as provided by the 2012 Rules of Procedure of Parliament then in force. Indeed in her address to Parliament cited above, she referred to the Rules and gave a basis for invoking them to bring decorum in the House so that the business of the House could continue in a civil manner.

It is evident that there was deliberate effort to disrupt the proceedings of the House as evidenced from the Hansard.

> **Speaker:** ***Honourable members, take your seats. Hon Ssemujju, take your seat. Honourable members, the word 'Parliament' comes from the French word 'parle', which means a place where you speak. Therefore let us speak with our mouths, not fists. Please it is part of Parliamentary etiquette to listen to each other and I had invited the Minister to speak.***

Rule 85 thereof provides that:

> ***"When the Speaker addresses the House, any Member then standing shall immediately resume his or her seat and the Speaker shall be heard in silence"***

Rule 88 (6)

> "***Where a Member who has been suspended under this rule from the service of the House refuses to obey the direction of the Speaker when summoned under the***

Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force is necessary in order to compel obedience to his or her direction, and the Sergeant At Arms shall be called upon to eject the Member from the House."

The Speaker was therefore acting within her powers to call upon the Sergeant-at-Arms to eject members of Parliament who had made deliberations in the House impossible.

This court was invited to determine the constitutionality of the actions of the Sergeant-at-Arms together with the back-up security of the Uganda Police Force and Uganda People's Defence Forces in evicting the said Members of Parliament in light of Articles 1, 2, 3(2), 8A, 97, 208(2), and 211(3) of the 1995 Constitution.

The issue to be determined is whether the measures taken by the Sergeant-at-Arms and the security forces in implementing the order of the Speaker were 'acceptable and demonstrably justifiable' under Article 43(2) of the 1995 Constitution. In **Charles Onyango Obbo and Andrew Mujuni Mwenda vs. The Attorney General, Constitutional Petition No. 19/1997**, it was held:-

"To establish that a limit to rights and freedoms is reasonable and demonstrably justifiable in a free and democratic society, two criteria must be satisfied. First the objective that the measures responsible for the limit on a charter right or freedom are designed to serve must

be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

Secondly, once a sufficiently significant objective is recognized, then the party invoking it must show that the means chosen are reasonably and demonstrably justified. This involves a form of proportionality test... Although the nature of the proportionality test will vary depending on the circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups."

In **Charles Onyango Obbo & Anor v. Attorney General, Constitutional Appeal No. 2 of 2002**, Mulenga, JSC further elaborated on the provisions of Article 43 as follows:

The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudice" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right

in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution.

However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibit the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.

The term "free and democratic" as envisaged in Article 43 (2) (c) of the Constitution was expounded in **Constitutional Petition No. 22/2006, Paul Kafeero & Anor vs. the Electoral Commission and Attorney General**. Kitumba JCC (as she then was) cited with approval a Canadian case at page 12 para 4, in **The Queen Oakes [1987] (Const) 477 at 498-9** where it is stated:

"The court must be guided by the values and principles essential to a free and democratic society which I believe

embody to name but a few, respect for inherent dignity of human beings, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individual and groups in society. The underlying value and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect to be reasonable and democratically justified".

The evidence led by the Sergeant-at-Arms and the Clerk to Parliament was that on the 21st, 26th and 27th September 2017 the House experienced unprecedented disorder and misconduct from the MPs that eventually led to the Speaker issuing an order of suspension that was not adhered to by the members of Parliament.

The Justices of the Constitutional Court rightly found that the Speaker was empowered to maintain order, discipline and decorum in the House. Such powers obviously should include the power to exclude any member from Parliament for temporary periods, where the conduct of such a member is inconsistent with good order and discipline in the House.

The Attorney General correctly cited the case of **Twinobusingye Severino vs. Attorney General** Constitutional Petition No. 47/2011 where the Court stated:

"We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

Bearing in mind the provisions of Article 43 and the dictum of Mulenga, JSC above, the question that I need to answer is whether the limitations placed on the rights of the MPs were justifiable in the circumstances.

My first port of call is in the excerpt of the Speaker's communication to the House on 27/09/2017 I set out earlier. From the Speaker's communication, it is evident that prior to events of 27/09/2017 there had been unnecessary tension both inside and outside Parliament. Indeed on 21/07/2017 the Deputy Speaker is quoted by the Hansard saying ***'Hon. Members, from Saturday to Wednesday, there have been calls on the Media; on Television; Radio and even in print media, that there is***

going to be war in Parliament today afternoon.' He then proceeded to invite the Prime Minister to Speak. A few minutes into his speech, there was interruption by several members of the opposition who rose and sang the National Anthem. The Deputy Speaker pleaded with them in vain to take their seats. He then took time to counsel them on the etiquette expected of a Member of Parliament (despite interjections from members). Indeed in appreciation of the Deputy Speaker's counsel, Hon. Odonga-Otto rose up and stated as follows:

> ***Thank you very much, Mr. Speaker and thank you for the manner in which you are calling for calm in this House. Of course, we came charged and we are still monitoring what is going on.***

The same interruptions were repeated on 26/09/2017 this time before the Speaker herself. A review of the Hansard of 26/09/2017 shows the Speaker pleading with members to take their seats. Indeed in her communication she alluded to this conduct of the previous day, that is, 21/09/2017.

It is this conduct and the need to restore order in the House that prompted the Speaker to suspend the members who then refused to vacate the House. The consequence of this failure to comply with the order of the Speaker was the forceful removal of the suspended members. The actions of the suspended members prior to their suspension had stalled the business of the House. The Speaker could not be heard in silence. It would therefore follow that the rights of these members as provided in the above

provisions of the Constitution could be curtailed for purposes of enabling business of Parliament to proceed without interruption.

I also note that the appellants allege that this violence interfered with Parliamentary independence. I respectfully disagree with this assertion. First, the security forces entered the Chamber for purposes of evicting the suspended members from the House. Secondly, having evicted them, the security forces departed the Chamber. Indeed the business of the House was able to resume immediately in a calm atmosphere save for the members of the opposition who walked out voluntarily.

I, therefore, agree with the Justices of the Constitutional Court that the Sergeant-at-Arms and the security forces were justified in ejecting members of Parliament from the House for having refused to heed the call of the Speaker to leave the House and for making the conduct of the business of the House impossible. The Sergeant-at-Arms was in any case rightly acting on the orders of the Speaker.

While the behavior of the suspended members of Parliament was obviously unacceptable, the manner in which the security forces treated them after the MPs were removed from the House for misbehavior, according to affidavit evidence on record, was not justifiable if we follow the principle laid down by this court in **Charles Onyango and Another vs. Attorney General** (supra).

The MPs were not armed and there was no fear that they were going to storm back into the House by force. After their ejection they posed no problem to anybody. In spite of this, they were

arrested, bundled, dumped on security vehicles and taken to detention centres where they were kept. In the process some got seriously injured. All this, in my view, was neither necessary nor acceptable. It is, therefore, my finding that their constitutional rights under Article 24 were violated.

It is my view, however, that their remedy for this violation lies in bringing action under Article 50 of the Constitution for redress and not in nullifying the enactment of the whole Amendment Act on account of what happened to them. As I showed earlier, it is their conduct which led to their being removed from the House and what happened to them when they were outside the House must be separated from the proceedings of Parliament which they had thrown in total disorder and which resumed in an orderly manner after the scuffle inside the House had ended.

Consideration of alleged violence in the country during consultation.

The appellants' major argument under this issue was that violence had the effect of frustrating their consultation. I have already addressed this issue of consultation under issue 2. Evidence on record shows that indeed in certain cases consultation rallies by some members of the opposition were dispersed by Police. Clearly, this was a violation of the member's Constitutional right to assemble and move freely throughout Uganda as guaranteed by Article 29 of the Constitution. However, it is my view that considering that consultations took place uninterrupted in the whole country save for the limited cases where rallies were dispersed by the police as evidenced by members' reports on the

floor of Parliament and considering further that members debate proceeded freely and voted on the bill, it is my view that the violence that took place had little impact on the passing of the Amendment Bill.

The appellants also argued that the violence had a chilling effect on members and other citizens who wished to participate in the debating of the Bill. I also find this argument untenable. The evidence on record shows that members traversed their constituencies (save for a few), consulted their constituents and indeed freely expressed their views and voted in Parliament. This was regardless of whether they were pro or anti the Bill. Clearly, this was not evidence of a 'chilling effect' as alleged by the appellants.

The appellants' argument that Article 1 was violated is also untenable. Article 1 brings out the sovereign power of people to participate in their governance. This power can be exercised either directly or through their elected representatives. From the record, Members of Parliament who stood up to debate and vote on the Bill stated that they consulted their electorates. Further, there is evidence on record that people were consulted on the Bill whether by the Legal and Parliamentary Affairs Committee or the members themselves. I therefore find that Article 1 was not violated.

Lastly, I note that the appellants argued that the violence exhibited inside and outside Parliament amounted to amending the Constitution violently and thus contrary to Article 3(2) of the Constitution. The Attorney General argued that this was a new issue which this Court should not canvass.

Indeed a review of the pleadings on record shows that this issue was never canvassed. I am aware that this Court has in various instances held that a new matter can be considered at an appellate level. However, in the present circumstances, I have not found it necessary to consider it. Even if I had, considering all the circumstances leading to the suspension and the forceful eviction of the concerned members from the House, due to their misbehavior, this could not amount to the violent amendment of the Constitution.

In conclusion on this issue, it is my finding that: (i) the violence inside and outside Parliament did not amount to a violent amendment of the Constitution; and (ii) the forceful eviction of the affected members from the House was justifiable; (iii) During the process of removing affected members from the House and arresting them the security forces used excessive force and violated their human rights under Article 24. The dispersal of their consultation rallies also violated Article 29 of the Constitution. However, these violations were in limited areas of the country and did not affect the passing of the Amendment Bill by Parliament.

Issue 4

Issue 4 was framed as follows:

> ***"Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?"***

Appellants' Submissions

The appellants argued that under article 137 of the constitution, the Constitutional Court has no jurisdiction to apply the

substantiality test. According to the appellants, the work of the Constitutional Court was to determine whether the actions complained against were inconsistent with and/or in contravention of the Constitution and where it found so, then to declare so, give redress or refer the matter for investigation.

The appellants also argued that since this role was limited to only determining whether there was contravention of the Constitution and not the degree of contravention, there is no way the Constitutional Court could go ahead to investigate whether the contravention of the Constitution affected the enacted law in a substantial manner.

The appellants further contended that the illegalities and transgressions in issues 1, 2 and 3 were sufficient to lead to the nullification of the Amendment Act. In the appellants' view, the learned Justices of the Constitutional Court also erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of procedure of Parliament as well as the invasion of Parliament.

The appellants submitted that whereas its applicability is expressly provided for in electoral laws, in constitutional matters the test was totally different. The appellants argued that the Constitution being the supreme law of the land provided for no room of any scintilla of violation. They argued that it was an absurdity and indeed a paradox that the Constitutional Court, whose primary mandate and duty was to jealously guard and defend the sanctity of the Constitution was suggesting that there can be room for certain individuals and agencies of Government to violate the Constitution with impunity, more so the Parliament of

Uganda which was charged with the duty of protecting it and promoting democratic governance in Uganda under Article 79 (3).

The appellants also argued that the Constitutional Court misunderstood the substantiality test as laid down by the Supreme Court and therefore misapplied it to the facts of the Constitutional Petition. In the appellants' view, the result was a wrong decision. Appellants reiterated their contention that the test of substantiality as applied by the Supreme Court in Presidential Election Petitions was not applicable to constitutional matters.

Lastly, the appellants argued that even if the 'substantiality' test was to apply, which was not the case, there was no legal and factual basis for not nullifying entire process amidst several unanswered questions.

Attorney General's submissions

The Attorney General refuted the appellants' contentions. He argued that the learned Justices of the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion.

Relying on inter alia **Black's Law Dictionary**, the **Merriam-Webster Law dictionar**y and the decision of this Court in **Kizza Besigye v Yoweri Museveni Kaguta, Election Petition No.1 of 2001**, the Attorney General submitted that the substantiality test was a tool of evaluation of evidence. He argued that to fault Court for applying the substantiality test for evaluation of evidence while determining a constitutional petition was tantamount to saying that a court interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it. In the Attorney General's view, such proposition was absurd.

The Attorney General further argued that the test could either be derived directly from the law or could be adopted by a Judge while evaluating the evidence before him or her. Thus, the Attorney General argued that whether it is the Constitutional Court, or an ordinary suit, it was trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

Relying on the case of **Nanjibhai Prabhudas & Co. Ltd versus Standard Bank Ltd [1968] E.A 670**, the Attorney General argued that the substantiality test was applied by Court in holding that Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature.

Turning to the present case, the Attorney General submitted that the learned Justices applied the substantiality test and found that the non-compliance in the form of procedural irregularities were not of a fundamental nature, as to render a law null and void.

The Attorney General further submitted that it was important to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. In his view, the Court's evaluation of evidence and resulting decision was not exclusively based on the quantitative test. Rather, he argued that the Court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation were not sufficient to satisfy nullifying the entire process.

The Attorney General also posed a question to the effect that *'what then is the standard of proof in dealing with Constitutional matters, most especially where the matters touch on amendment and*

breaches of the Constitution? Is the standard of proof different from the usual proof on the balance of probabilities?'

In trying to answer this self made question, he contended that it was not in dispute that the common law concept of burden of proof that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. In this case, he argued, it was common ground that it is the Appellants who bear the burden of proving to the required standard that, there were such irregularities/violence that affected the result of the entire passing of the Bill into law and should be nullified.

He argued that the form of evidence presented during the hearing of the Petition was both affidavit and oral evidence. A scrutiny and evaluation of the above evidence, according to the Attorney General, did not support the Petitioners' assertion of such widespread/massive irregularities and violence that would have led Court to nullify the entire resultant Act.

He supported the conclusion of the Court that the evidence neither disclosed any profound irregularity in the management of the legislative process for the enactment of the Amendment Act nor proved that the participation of some Members of Parliament was gravely affected. In his view, the parts that were so affected were rightly severed by the Court.

In this particular case, the Attorney General argued that the Constitutional Court was right to inquire into the extent of the alleged massive irregularities and in so applying the qualitative and quantitative test, it considered whether the errors, and irregularities identified sufficiently challenged the entire legislative process and could therefore lead to a legal conclusion that the Bill

was not passed in compliance with the requirements of the Constitution.

In conclusion, the Attorney General invited this Court to uphold the finding of the Constitutional Court that certain irregularities/errors were mere technicalities and were not fatal to sufficiently invalidate the entire process of enactment of the Amendment Act.

Constitutional Court holding on the issue

A review of the Judgments of the majority learned Justices at the Constitutional Court shows that they applied the substantiality test majorly in determining the effect of the alleged violence orchestrated by the Police in the process of consultation and the effect of a directive issued by the Police Director of Operations prohibiting Members of Parliament from consulting outside their constituencies. They found that in certain instances, there was interference with the consultation process by the police and the army and that the Police Directive was also enforced in certain places. They however found that this interference and enforcement was in isolated places and did not affect the consultation process substantially. They also applied the substantiality test in determining that the failure to comply with some of the Rules of Procedure of Parliament though irregular was not fatal to the process of enacting the Amendment Act. A classic example of this was in their holding on the failure of the Speaker to order for the doors to the Parliamentary Chamber to be closed during voting. Another instance of application of the substantiality test was in the Court's finding that the signing of the Committee's Report by members of the Committee that did not participate in the Committee's proceedings though irregular was not fatal.

Consideration of the issue

The question that I need to answer under this issue is whether the learned majority Justices of the Constitutional Court erred when they applied the substantiality test in determining the petitions before them.

This Court in **Amama Mbabazi v. Yoweri Kaguta Museveni & 2 ors, Presidential Election Petition No. 01 of 2016** comprehensively analyzed the substantiality test. The Court noted inter alia that the application of this test in Presidential Elections Petitions was statutorily provided for under our laws. The Court further noted that in its earlier Judgments in 2001 and 2006, it had held that *'a Court cannot annul an election on the basis that some irregularities had occurred, without considering their mathematical impact.'* This Court maintained this position but emphasized that:

> ***We must however emphasize that although the mathematical impact of noncompliance is often critical in determining whether or not to annul an election, the Court's evaluation of evidence and resulting decision is not exclusively based on the quantitative test. Court must also consider the nature of the alleged noncompliance. It is not every violation that can be evaluated in quantitative terms. But whatever the nature of the violation alleged, the quantum and quality of evidence presented to prove the violation must be sufficient to satisfy the Court that what the Constitution envisaged as a free and fair election, as the expression of the consent and will of the people on who should govern them, has been circumvented. Annulling of***

presidential election results is a case by case analysis of the evidence adduced before the Court. If there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been qualitatively devoid of merit and rightly be described as a spurious imitation of what 10 ***elections should be, the Court would annul the outcome. The Courts in exercise of judicial independence and discretion are at liberty to annul the outcome of such a sham election.***

Thus, from the above case it is clear that in applying the substantiality test, both the quantitative test and qualitative test are applicable.

I am aware that this test is specifically provided for in respect of election petitions and that in the present case we are dealing with a Constitutional Petition. I note that neither Article 137 of the Constitution nor the **Constitutional Court (Petitions and References) Rules, 2005** provide a yardstick for determining whether a law, act or omission contravenes the Constitution. Be that as it may, it is trite under our legal system that a person who alleges a certain fact usually has a duty to prove to Court that indeed such state of affairs as alleged exists. (See sections 101, 102 and 103 of our Evidence Act.) Such a party usually does this by adducing evidence before Court.

In the present case it was the appellants that had a duty at the Constitutional Court to prove that they were entitled to a declaration that the Amendment Act was inconsistent with the Constitution. To do this, they adduced evidence which in their opinion was sufficient to prove their assertions. As I pointed out

earlier, it was not a guarantee that once they had prayed for such a declaration and adduced their evidence, it would follow that Court would grant their prayer. The Court had the discretion to either grant it or not to grant it. To exercise its discretion one way or the other, the Court had to evaluate the evidence adduced before it. In regard to this particular matter, the main issue at hand (in regard to the application of the substantiality test) concerned the impeding of Members of Parliament from making consultations in regard to the Bill which was later enacted into the Amendment Act.

To prove that there was impediment to the consultation process through violence, the appellants relied on affidavit evidence of among others Members of Parliament who alleged that they themselves and/or their colleagues were violently impeded by the police and other security personnel from consulting the people. The appellants also relied on the letter written by the Police Director of Operations ordering among others the District Police Commanders to ensure that Members of Parliament only consult in their respective constituencies.

Having analyzed this evidence, the Justices found that this impediment, unconstitutional as it was, occurred in isolated places in the country. They also found that majority of Members of Parliament (both on the Government and opposition sides) made consultations and presented their findings on the floor of Parliament.

The appellants argued that once this finding of impediment, however minor, was made by the Constitutional Court in respect to consultation, the Constitutional Court should have stopped there and made a declaration of unconstitutionality. I respectfully find this argument without merit. In my opinion, the Court had a duty to evaluate the evidence before it as a whole. I should add that in my view they rightly did so in this respect. Having found

that in certain isolated instances there was interference with the consultation process the Justices were also alive to the other evidence on record which showed that in the majority of instances a bigger percentage of the Members of Parliament consulted their constituents on the provisions of the Bill that was later enacted in the Amendment Act. Should the Court have turned a blind eye on this evidence before it? In my view, it could not. The Court had the duty to weigh the evidence before it jointly and arrive at a just decision. This, in my view, is where the substantiality test as a tool of evaluation of evidence comes in.

I should also note at this stage that the application of the substantiality test is not only permissible where it is provided for statutorily as the appellants appear to suggest but is also applied in other instances where it was not provided for in a statute. In this aspect, I find the East African Court of Appeal case of **Prabhudas (N.) & Co. v. Standard Bank, [1968] EA, 671** cited by the Attorney General quite persuasive. In the above case, the respondent had been served with a copy of Summons rather than a Notice of the Summons. The East African Court of Appeal agreed with the respondent that *'service of the summons on the defendant instead of a notice was incorrect.'* Having so found, Newbold, P. who wrote the lead Judgment of the Court [and with whom others concurred with] posed the following question:

> ***"The question then is, did that incorrect action result in the service being a nullity?"***

In holding that this irregularity could not among other things, nullify the Judgment of Court arising therefrom, the learned Justice, in reaching this conclusion opined as follows:

> ***"The Courts should not treat any incorrect act as a nullity, unless the incorrect act is of a most***

fundamental nature. Matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as of so fundamental a nature that it results in a complete nullity and vitiates everything following would appear to me to be completely unreal unless there is a very good reason for this distinction between the service of the summons and the service of a notice." [Emphasis mine].

In the present case, the argument is not that the procedure in enacting the Amendment Act was irregular because there was no consultation at all. Rather the appellants' argument is that the procedure in enacting the Amendment Act was irregular because in certain instances the consultation process was interfered with by the Police and other security agents. I had earlier in issues 2 and 3 found that the impediments, unlawful as they were, happened in isolated cases. The bulk of the Members of Parliament freely consulted their constituents and reported their findings on the floor of Parliament. Perhaps I should also add that no evidence was adduced by the appellants to show how long this impediment to consultations in these isolated instances lasted or persisted? Was it for a day, week or month?

Bearing in mind the persuasive ratio decidendi in **Prabhudas (N.) & Co** (supra), I am of the view that the learned majority Justices of the Constitutional Court did not err in applying the substantiality test while evaluating the whole evidence before them before coming to the conclusion that the isolated incidents of violent impediments to consultation could not lead to the nullification of the Amendment Act.

The appellants also faulted the learned Justices of the Constitutional Court for applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with the Parliamentary Rules of Procedure. I also find this argument by the appellants untenable.

I held in issue 2, while bearing in mind **Prabhudas (N.) & Co** (supra) that irregularities differ in degree. Some can be so fundamental while others can be minor. Thus, in my view, it would for instance be stretching the need for strict compliance too far by nullifying an Act of Parliament simply because the Speaker did not close the Doors to the Chamber of Parliament at the time of commencing voting and/or during voting, especially when she advanced a reason for failing to do so. The same argument would apply on the issue of signatures. I canvassed this in issue 2 as well. Even if the 2 signatures of the members of the Committee that did not participate in the proceedings of the Committee were to be expunged from the Committee Report, the requisite minimum number of signatures that would be necessary to validate the Committee Report as provided for in the Rules would still be met.

In conclusion, it is my finding that the learned Justices of the Constitutional Court did not err when they applied the substantiality test in determining the petitions before them.

Issue 6:

Whether the Constitutional Court erred in law and fact in holding that the president elected in 2016 is not liable to vacate office on attaining the age of 75 year

Appellant's Submissions

Mr. Mabirizi submitted that the President ceases to be qualified to hold office on attaining the age of 75 years. He argued that the Constitutional Court erred when they found that the qualification requirements were only restricted to the eligibility to be elected. He contended that Articles 102 (c), 83 (1) and 105(3) must be read together to arrive at this conclusion and that the qualifications cannot be separated from the disqualifications of the President and members of Parliament.

He relied on the case of **Ssemwogerere vs. Attorney General** (supra) for the proposition that constitutional provisions relating to the same subject must be given meaning and effect in relation to other provisions. He argued that Article 83(1) (b) provides that a member of Parliament shall vacate his or her seat in Parliament if such circumstances arise that if that person were not a member of Parliament, it would result in that person being disqualified for election as a member of Parliament under Article 80 of the Constitution. That this should equally apply to the President.

The Attorney General supported the decision of the Justices of the Constitutional Court who, he argued, rightly directed themselves to the law when they found that Article 102 (b) which provides for the qualifications of a person wishing to stand for election as President, only relates to the qualifications prior to nomination for election and not during the person's term in office.

He contended that prior to the amendment of Article 102 (b) of the Constitution under Constitutional Amendment Act No. 1 of 2018, a person qualified for election as President if that person was above thirty-five years and not more than seventy-five years of age and

that the Constitutional Court unanimously agreed that the said provision was clear and unambiguous and purely related to qualifications prior to nomination for election and not to vacation of office.

Consideration of the issue

Article 105(1) prescribes the tenure of office of the holder of the presidential office. It states inter alia that:

"(1) A person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years."

Clause 3 provides for vacation of office:

"(3) The office of President shall become vacant-

(a) on the expiration of the period specified in this article; or

(b) if the incumbent dies or resigns or ceases to hold office under article 107 of this Constitution."

In dealing with this issue, the Constitutional Court unanimously agreed that the requirement for not having attained 75 years of age only applied to the nomination and not during the tenure of office. Owiny-Dollo, DCJ, stated as follows:

> "***The defining provision for this issue is Article 105 (3) (a); and we take it that 'on the expiration of the period specified in this article', means until the expiration of the 5 years for which the President was elected. What this means is that a President who attains the age of 75 years, while serving a 5 year term would still***

continue in office until the expiration of the term. We find the requirement of age as a qualification for being elected President is at the point of election; and not at the end or during the incumbency. A President who is elected on the day he or she attains the age of 74 years would be entitled to stay in office for the next five years. This means he or she can stay in office up to the age of 79 years!"

I respectfully agree with the Justices of the Constitutional Court. Article 105 (3(a)) is clear and unambigious. It should therefore be given its plain and ordinary meaning. In ***S vs. Marwane 1982 (3) SA 717 (AD)***, at p.745, MILLAR JA of the Appellate Division of the South African Supreme Court stated, with regard to acceptable approach to interpretation of a Constitution, as follows:

"...when construing a particular provision therein, they would give effect to the ordinarily accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring absurdity; or unless there were indications in the Act – considered as a whole in its own peculiar setting and with due regard to its aims and objects – that the legislator did not intend the words to be understood in their ordinary sense. ...

Mr. Mabirizi argued that on the attainment of the age of 75 years, a person holding the office of the president ceases to possess the qualifications necessary to hold that office and that for that reason

alone he or she should vacate office. He relied on the provisions of Article 83(1(b)) to support his argument.

Article 83(1(b)) states as follows:

(1)A member of parliament shall vacate his or her seat in Parliament-

(b) if such circumstances arise that if that person were not a member of parliament would cause that person to be disqualified for election as a member of parliament under article 89 of this constitution.

Article 80 states as follows:

"Qualifications and disqualifications of members of parliament.

(1). A person is qualified to be a member of parliament if that person-

(a)Is a citizen of Uganda

(b)Is a registered voter ; and

(c)Has completed a formal education of advanced level standard or its equivalent……"

(2). A person is not qualified for election as a member of Parliament if that person –

(a) is of unsound mind

(b) is holding or acting in an office the functions of which involve a responsibility for or in connection with the conduct of an election…."

I respectfully do not agree with this argument. The Constitution clearly makes provisions relating to vacation of office of the President as aforementioned. In my view if vacation of office on

attaining the age of 75 had been intended by the framers of the Constitution, they would have included it among the provisions for vacation of office of the President.

I, therefore, find no merit in Mr. Mabirizi's argument and agree with the finding of the Constitutional Court on this issue.

Issue 7

Issue 7 was framed as follows:

"7a. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, "injudiciously" (sic) exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?"

Appellants' submissions

The appellants argued that their right to a fair hearing was compromised in a number of ways by the Constitutional Court. They argued that this right was non derogable and had received judicial consideration in a number of decisions of this Court.

Instances of the Court breaching this right was evident, inter alia, in: (i) ordering appellants to proceed with submissions before cross examination of the respective witnesses; (ii) restricting the appellants and their counsel on what was to be asked in cross examination in contravention of Section 137(2) of the Evidence Act; (iii) excessive interjections by the Court thus the Court descending into the arena and in certain instances proposing answers to witnesses; (iv) failure to give the appellants the right to make a

rejoinder after the Attorney General had made a reply; (v) omitting the authorities cited; and (vi) applying and granting an unpleaded remedy of severance; and (vii) framing sub-issues of *'whether severance can be applied'* and *'whether the non-compliance affected the Act in a substantial manner'* which did not arise out of the pleadings.

The appellants also argued that the Constitutional Court "injudiciously" exercised their discretion by: (i) failing to invoke their power to summon key Government Officials and individuals that played a key role in the process leading to the enactment of the Amendment Act. Such key people included the Speaker and the Deputy Speaker, the Minister of Finance, Hon. Raphael Magyezi and the Chairperson of the Legal and Parliamentary Affairs Committee; (ii) awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which, according to the appellants, was manifestly meagre considering the nature and significance of the matter; (iii) failing to award professional costs to some of the appellants on the ground that they represented themselves; (iv) .

The appellants also contended that there were other actions of the Court which were irregular. According to the appellants, these included: (i) maltreatment of some of the appellants. For example one of the appellants submitted that he was ordered to vacate the bar and ended up presenting his case from the dock; (ii) failing to give reasons for dismissing an application by one of the appellants requesting Court to summon the Speaker of Parliament; (iii) failure

to make a decision on an application to strike out the affidavits of Mr. Keith Muhakanizi and Gen. David Muhoozi; and (iv) failure to determine the issue of constitutional replacement.

The appellants contended that the above actions and omissions of the Constitutional Court led to a miscarriage of justice since the above irregularities limited the Constitutional Court's scope of investigation thereby failing in its duty vested under Article 137 (1) of the Constitution and thus came to a wrong decision.

In light of this, appellants contended that the failure by the court to give them a fair hearing and the manifest procedural irregularities rendered all the proceedings and the outcome null and void. They invited this Court to declare so. Without prejudice to the above, they prayed that this Court also be pleased to order a retrial before the Constitutional Court.

Attorney General's submissions

The Attorney General refuted the appellants' contentions. He submitted that the appellants did not satisfy or otherwise meet the threshold required for this Court to fault the Constitutional Court for the way it conducted the hearing of the Petitions. He prayed that this Court finds the issue entirely without merit.

On the issue of fair hearing, the Attorney General contended that: (i) no prejudice was occasioned on the appellants by the Court permitting cross examination after submissions had commenced. He argued that the Appellants had an opportunity to extensively submit on the matters raised during the cross examination. Further that the Appellants did not object to the mode adopted by

the Court and this is therefore an afterthought; (ii) the Court duly and within its discretion established ground rules for cross-examination and that the Appellants had the opportunity to duly cross examine the witnesses presented. Further, that beyond making general submissions that the cross-examination was guided by the ground rules established by the Hon. Justices, the Appellants had failed to demonstrate how they were prejudiced or otherwise denied a fair hearing in the circumstances; (iii) the appellants could only submit in rejoinder in regard to new matters raised during the course of the Attorney General's submissions; (iv) Court gave the appellants ample time to present their cases and the alleged extreme and unnecessary interference was because Court was seeking clarification on the proper construction of the contents of documents and enquiring into the legality of the passage of the Constitutional Amendment Bill, No. 1/2018 as part of its duty under Article 137(1) of the Constitution; (v) the Court had discretion to regulate cross examination and guide litigants to cross examine witnesses on pertinent matters related to the litigation and surrounding circumstances. In the Attorney General's view, the court has the authority to limit cross examination on matters that are speculative, irrelevant and otherwise inconsistent with the Evidence Act, Cap. 6.

Further, that the court may make enquiry of the witnesses even beyond the enquiry made by the lawyer cross examining the witnesses for the purpose of clarification and obtaining wholesome testimony depending on the circumstances of the case. He prayed that this Court finds that the Justices of the Constitutional Court were fully justified in making their enquiry; (vi) All the appellants'

pleadings, submissions and authorities were considered and indeed each and every Hon. Justice of the Constitutional Court acknowledged these in their respective Judgments; (vii) On the allegation that the Constitutional Court erred when they allegedly proposed and granted a remedy of severance which was not pleaded by the Respondent, the Attorney General submitted that the core role of the Constitutional Court under Article 137(1) of the Constitution is to interpret its provisions while Article 137(3)(b) and 137(4) provide for the grant of redress within the discretion of the Court based on the circumstances pertaining. Accordingly, while declarations are its primary duty, the Court may grant redress including the remedy of severance either at the pleading or prayer of counsel or a litigant or exercising its own discretion.

Further, that the Court has the discretion to require Counsel or litigants to address it even on unpleaded issues and remedies and even to accordingly frame issues for Counsel and litigants to address. Severance is a well-established legal remedy and there is no bar to the Hon. Justices of the Constitutional Court exercising their discretion to grant the remedy of severance.

It was also the Attorney General's contention that he addressed the Constitutional Court on the remedy of severance and that the Appellants had every opportunity to address the Hon. Justices of the Constitutional Court on the issue of severance, did not suffer any prejudice and were duly accorded a fair hearing; (vii) the learned Justices of the Constitutional Court duly heard and determined the Consolidated Petition after according all parties an equal chance to present their respective cases and the record of

proceedings demonstrates that the appellants fully participated in the proceedings and had ample time to present their case;

On the alleged "injudicious" exercise of discretion, the Attorney General submitted that: (i) With the exception of the Speaker of Parliament, nowhere in the record did the appellants apply under Rules 12(2) or urge the Court to exercise its discretion to summon the witnesses cited. In the Attorney General's view, the appellants' submissions were simply an afterthought; (ii) Court was exercising its discretion to award costs the way it did.

Regarding other actions of the Constitutional Court that were allegedly irregular, the Attorney General contended that: (i) all the appellants were treated courteously and that the record of appeal clearly demonstrates that the Appellant who represented himself was accorded every opportunity to present his case including; - conferencing, making applications, cross-examination of witnesses, submissions and receiving Judgment and suffered no prejudice whatsoever or derogation of his right to a fair hearing. In the Attorney General's view, no eviction occurred; (ii) a review of the record demonstrates that Court gave its reason why it did not find it necessary to summon the Speaker.

It was also the Attorney General's contention that the designated custodian of the records of Parliament is the Clerk to Parliament who fulfilled her duty by making the Hansard and Certificate of Compliance available to Court and that the appellants had an opportunity to cross examine her at length.

In conclusion, the Attorney General submitted that the appellants participated at each and every stage of the proceedings in the Constitutional Court and duly received a fair hearing in accordance with Article 28 of the Constitution. He further emphasized that the procedures adopted by the Constitutional Court were entirely within its discretion and did not in any way prejudice the Appellants or occasion derogation of their right. The Respondent, submitted that the Appellants had not proved any of their respective Grounds of Appeal and prayed that the Consolidated Appeals should be dismissed with costs.

Consideration of Issue 7

The appellants raised a number of complaints against the conduct of the learned Justices of the Constitutional Court in the course of the petition hearing. They alleged that the court violated, inter alia, their right to a fair trial, unjudicially exercised their discretion and committed other procedural irregularities falling outside the ambit of fair hearing and discretion.

I will first determine the alleged violation of the right to a fair hearing. Article 28 of the Constitution provides for this right and there is a plethora of authorities of this Court that have expounded on this right. The appellants allege that their right to a fair hearing was violated through various acts of the Constitutional Court as I highlighted earlier.

A review of the record shows that no prejudice was occasioned on the appellants by the Court permitting cross examination after submissions had commenced. I agree with the Attorney General

that the Appellants had an opportunity to extensively submit on the matters raised during the cross examination and that the Appellants did not object to the mode adopted by the Court with regard to the Rules laid down by it regarding the mode of proceedings.

Regarding the issue of rejoinder, I note that the appellants were allowed by the Court to make concluding remarks wherein the appellants comprehensively addressed issues raised by the Attorney General. The above notwithstanding, I agree with the Attorney General's contention that the issue of rejoinder could only be restricted to new matters raised by the Attorney General.

I also note that the Constitutional Court gave all parties ample time to present their cases. The alleged interjections as alleged by the appellants, in my view, were no more than the Court seeking clarification on certain issues and guiding the parties to stay focused on the issues at hand.

Further review of the Judgments of the Justices of the Constitutional Court shows that indeed they acknowledged the great efforts that the parties put in the case. They were also very appreciative of the authorities cited by the parties. However, it is not incumbent upon Court to accept and use every authority cited by the parties.

On the allegation that the Constitutional Court erred when they allegedly proposed and granted a remedy of severance which was not pleaded by the Respondent, I note that under Article 137 of our Constitution, the Court after making a finding can grant a

remedy. In my view, if such remedy lies in the application of the severance doctrine, then Court cannot be faulted for applying it.

In conclusion, it is my finding that the learned Justices of the Constitutional Court duly heard and determined the Consolidated Petition after according all parties an equal chance to present their respective cases and the record of proceedings demonstrates that the appellants fully participated in the proceedings and had ample time to present their case.

Alleged Unjudicial exercise of discretion

Mr. Mabirizi alleged that this was manifest in three main instances: (i) failing to summon key players that participated in the passing of the Amendment Act; (ii) awarding meagre costs; and (iii) failure to award professional fees to some of the appellants.

A review of the record shows that indeed with the exception of the Speaker of Parliament, the appellants did not apply to the Constitutional Court to summon the listed witnesses. The appellants cannot therefore turn around and fault Court for not calling witnesses when they did not bring the request before it.

On the issue of costs, it is trite that costs are awarded at the discretion of the Court. The appellants, in my view, have failed to make out a case before this Court showing how the Court unjudicially exercised its discretion in awarding costs the way it did.

Other actions of the Constitutional Court that were allegedly irregular

The appellants alleged that the learned Justices: (i) failed to give reasons why they declined to summon the Speaker of Parliament, (ii) failed to make a decision on an application to strike out the affidavits of the Secretary to the Treasury and the Chief of Defence Forces; (iii) failed to determine the issue of constitutional replacement; and (iv) maltreated some of the appellants.

On the alleged failure to advance reasons for declining to summon the Speaker, at page of the Record, the following passage appears:

> ***"We have taken into account the fact that this is not an ordinary Petition. We have five consolidated Petitions seeking answers to a number of issues that are of great public importance. The peculiar circumstances of these Petitions require that we stretch our discretion and grant the Application to call for cross examination of the witnesses whose names have been set out and whose affidavits are on record. We decline to grant an order calling the Speaker of Parliament for examination as we have found no reason to do so. The detailed reasons for our decision shall be set out in the final Judgment or Judgments".*** [Emphasis mine.]

From the above excerpt, it is clear that the Court advanced a reason why it did not summon the Speaker. The reason was that they found no reason to do so. In my view, the only ground on which the learned Justices can be faulted is in respect to their failure to furnish the detailed reasons for their decision but not for failing to furnish a reason for not summoning the Speaker.

I, however, note that only one out of the five Justices on the Coram made a Ruling with regard to the application to strike out the affidavits of the Secretary to the Treasury and the Chief of Defence Forces. To this end, I find that the Court erred in failing to make a Ruling on this aspect. Further review shows that the learned Justices of the Constitutional Court did not resolve the arguments on constitutional replacement. To this extent they also erred.

Regarding the maltreatment, I note that the major contention was by one appellant who contended that he was directed by the Court to vacate the bar. It is not in contention that the bar is reserved for Advocates. It is also not in contention that the appellant concerned was not an advocate. Nevertheless, it is my view that the court should have, prior to the hearing, organized an appropriate place for the appellant to sit since the court knew well in advance that he was going to represent himself. Still, I find that in spite of the court ordering him to vacate his seat at the bar the appellant was afforded all the necessary facilities to present his case in court without any further inconvenience.

In conclusion, the appellants' contentions under this issue substantially fail.

Issue 8

"What remedies are available to the parties?"

Appellants' Submission

The appellants' major prayer was that the appeal should be allowed in the terms and prayers specified in their memoranda of

appeal. Specifically they prayed that the Amendment Act be annulled and that the Attorney General pays costs of this Appeal and in the Court below.

Without prejudice to the above prayer, the appellants submitted that since the Constitutional Court committed procedural irregularities in the course of the hearing, a retrial before the Constitutional Court should be ordered.

Attorney General's Submission

In the Attorney General's view, the Constitutional Court was right in relying on the provisions of Article 2 of the Constitution while applying the principle of severance. He observed that our Constitution allows for the application of the doctrine of severance under Article 2(2). He therefore contended that the majority Justices of the Constitutional Court properly applied the principle of severance when they upheld sections of the Amendment Act that had been validly passed into law and invited this Court to uphold the decision of the Constitutional Court.

While acknowledging that this Court under Rule 31 of its Rules can order a retrial, vary or reverse an order of the Constitutional Court, the Attorney General submitted that the appellants had not made out any case on appeal to justify this Court granting the said orders.

In the premises, the Respondent prayed that this Court finds that the appeal lacks merit and dismisses the appeal with costs.

Consideration of the Issue

I have already analyzed the issue of retrial in the preceding issue and I have found no basis for this Court to order a retrial.

I also discussed the issue of applying the principle of severance by the Constitutional Court earlier and reached a conclusion that the Court did not err in applying the principle.

Costs

I note that the appellants prayed for costs and indeed submitted on the same before this Court. This is a public interest matter. The issue of award of costs in public interest litigation matters was succinctly addressed by this Court in ***Kwizera Eddie v. Attorney General, Constitutional Appeal No. 01 of 2008*** and ***Muwanga Kivumbi v. Attorney General, Constitutional Appeal No. 06 of 2011.*** The position of the Court in these two decisions is that costs, even in constitutional matters, ordinarily follow the event, as provided for under section 27 of the Civil Procedure Act.

What then is the event in this appeal? I have in the course of my analysis found that the appellants' appeal substantially fails. It would therefore follow that the appellants should be condemned in costs. I however find that the appellants through their cases both in this Court and in the Constitutional Court have ensured that constitutionalism prevails. In the circumstances, I find that this is a proper case for this court to exercise its discretion and not condemn the appellants in costs. I would therefore order that each party bears its own costs.

Since the Attorney General did not cross appeal on the order of award of costs by the Constitutional Court, the order of costs made by the Constitutional Courts is upheld.

Conclusion

In conclusion, I make the following findings:

On issue 1, it is my finding that the learned Justices of the Constitutional Court did not misdirect themselves on the application of the basic structure doctrine.

On issue 2, it is my finding that the learned majority Justices of the Constitutional Court did not err in law and fact when they held that the process of enacting the retained provisions of the Amendment Act did not contravene the Constitution and the Rules of Procedure of Parliament.

On issue 3, it is my finding that the learned Justices of the Constitutional Court erred by not finding that the members of Parliament who were arrested and detained after their suspension were maltreated by security forces and their right to freedom from torture and human dignity violated. However, it is my finding that this in itself did not affect the passing of the Amendment Act.

On issue 4, it is my finding that the learned Justices of the Constitutional Court did not err in law when they applied the substantiality test in determining the consolidated constitutional petitions before them.

On issue 5, it is my finding that the learned majority Justices of the Constitutional Court did not misdirect themselves when they held that the provisions of the Amendment Act removing the age

limit for the President and District Chairman was not inconsistent with the provisions of the Constitution.

On issue 6, it is my finding that the Constitutional Court did not err in law and in fact in holding that the President elected in 2016 is not liable to vacate office upon attaining the age of 75 years.

On issue 7, it is my finding that the appellants' right to a fair hearing was not compromised.

In light of the above findings, I would dismiss the appeal and make the following declarations and orders:

(1) That sections 1, 3, 4 and 7 of the Constitution (Amendment) (No. 01) Act, 2018 were passed in compliance with the Constitution of Uganda.

(2) The order of the Constitutional Court regarding professional fees and disbursements is upheld.

Lastly, each party will bear its own costs of this appeal in this court.

Dated at Kampala this ..... day of ..... 2019.

.....
JUSTICE JOTHAM TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT