THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL APPEALS Nos. 02 of 2018, 03 of 2018 AND 04 of 2018

CORAM: (Hon Justice Bart Katureebe C.J, Hon Justice Arach-Amoko JSC, Hon Justice Eldad Mwangusya JSC, Hon Justice Opio Aweri JSC, Hon Justice Lilian Tibatemwa-Ekirikubinza JSC, Hon Justice Mugamba JSC, Hon Justice Jotham Tumwesigye JSC

1. CONSTITUTIONAL APPEAL NO. 02/ 2018

MALE H. MABIRIZI ……. APPELLANT

VERSUS

ATTORNEY GENERAL ……. RESPONDENT

3. CONSTITUTIONAL APPEAL NO. 03/2018

1. HON GERALD KAFUREEKA KARUHANGA }
2. HON JONATHAN ODUR }
3. HON. MUNYAGWA S. MUBARAK }} :::::::::::::::::::::: PETITIONERS
4. HON. ALLAN SSEWANYANA }
5. HON. SSEMUJJU IBRAHIM NGANDA }
6. HON. WINIFRED KIIZA }

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

3. CONSTITUTIONAL APPEAL NO. 04/ 2018

UGANDA LAW SOCIETY ……. PETITIONER

VERSUS

ATTORNEY GENERAL ……. RESPONDENT

JUDGMENT OF HON. JUSTICE OPIO-AWERI, JSC

INTRODUCTION.

This is a consolidated appeal from the Constitutional Court wherein the appellants are challenging the constitutionality of Constitutional Amendment No.1 of 2018 regarding the lifting of the Age limit qualifications to become president and District Chair persons.

Background:

On the 27th day of September 2017, Mr. Raphael Magyezi, a Member of Parliament representing Igara County West Constituency, Bushenyi District, moved a motion in Parliament seeking leave to table a private member's Bill to amend the Constitution. Leave was granted and he introduced Constitutional (Amendment) Bill No. 2 of 2017 wherein he sought to amend Articles 61,102(b),104(2), (3), 104(6) and 183(b) of the Constitution. The objectives of the Bill were as follows;

(i) To provide for the time within which to hold Presidential, Parliamentary and Local government council elections under Article 61,

(ii) To provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102 (b) and 183 (2) (b).

(iii) To increase the number of days within which to file and determine a presidential election petition under Article 104 (2) and (3).

(iv) 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,

(v) For related matters.

Objectives 3 and 4 were recommendations made by this court in **Amama Mbabazi Vs Yoweri Kaguta Museveni & 2 Ors Presidential election Petition No. 1 of 2016.**

Prior to the tabling of the impugned Bill on the 19th day of September, 2017, the Deputy Speaker of Parliament, the **Rt. Hon. Jacob Oulanya**, while presiding over Parliament assured members that the Constitution (Amendment) Bill was not going to be introduced by way of amending the Order Paper. Further, on the 20th day of September, 2017, the Deputy Speaker who again chaired the proceedings, informed Parliament that he had received two notices of motion relating to Constitutional amendment and that they would be referred to the Business Committee for re-scheduling. The first notice, together with the motion, was submitted by Hon. Patrick Nsamba Oshabe, Member of Parliament for Kassanda North.

On 26th September, 2017, the Speaker of Parliament, the **Rt. Hon. Rebecca Alitwala Kadaga**, however, amended the Order Paper to include the motion by Hon. Raphael Magyezi where he sought leave

of Parliament to introduce a private member's Bill to amend the Constitution and to amend Article 102 (b) of the Constitution removing the presidential age limit, among others.

Thereafter, the shadow Minister for Constitutional Affairs, Hon. Medard Lubega Sseggona questioned the Speaker as to why Hon. Raphael Magyezi's motion which was submitted on 21st September, 2017 was being placed on the Order Paper ahead of Hon. Patrick Nsamba's motion, which had been submitted prior, on 18th September, 2017, and had met all the requirements but the Speaker went ahead with her earlier stand on the matter.

In the course of the passage of the Bill in Parliament, more specifically at the stage of the second reading of the Bill, when the House was sitting as a Committee of the whole House, two separate motions were moved to amend the Bill. The first motion sought to amend the Constitution by extending the tenure of Parliament and Local Government Councils from five to seven years; with a rider provision that the amendment would be effective from 2016 when each of the two legislative organs assumed office. The other motion sought to reinstate the Presidential term limit, which a previous Parliament had lifted from the Constitution. As expected members of the opposition parties in Parliament, some independent members and a few ruling party members strongly opposed the move to have the Constitution amended. However, the majority of the Ruling NRM Party members supported the motion vigorously. The bill, after the aforementioned amendments was passed into law and assented to by the President on 27th December 2017. It became the Constitution

(Amendment) Act No. 1 of 2018 with its commencement date as 5th January 2018.

7 Aggrieved by the Constitution (Amendment) Act (No. 1) of 2018, nine petitions were filed under Article 137(3) of the Constitution and Rule 13 of the Constitutional Court (Petitions and References) Rules, S.I 91 of 2005 seeking various declarations, orders and other remedies. The Constitutional Court however dismissed four of them either due to the parties and their counsel being absent or voluntary
14 withdrawal of the petitions by the parties. The remaining five Constitutional Petitions were consolidated for the purpose of being heard and determined together due to the similarity of the issues each one raised.

The Petitioners' (now appellants') case was that the Amendment Act in question was enacted in violation of the Constitution both as to the content of its provisions and also as to the process through
21 which the same was enacted.

The respondent's response was that there was nothing unconstitutional about the Act, neither regarding its contents nor the process through which it was enacted by Parliament.

The Petitioners (now appellants) prayed for the following declarations:

a) The Constitution (Amendment) Act No.1 of 2018 be annulled
28 *having been passed in contravention of the procedural requirements laid down in the Constitution.*

b) *In the alternative but without prejudice to paragraph (1), Sections 2, 3, 5, 6, 7, 8, 9 and 10 of the Constitution (Amendment) Act No.1 of 2018 be annulled.*

c) *The inclusion of the extension of the terms of the 10th Parliament and the current Local Government Councils in the Constitution (Amendment) Act No.1 of 2018 without consultation with the electorate and following due process was unconstitutional and contravened* ***Articles 1, 8A and 259 (2) (a) of the Constitution.***

d) *The invasion and/or heavy deployment at the Parliament by the UPDF and Uganda Police Force and other militia in using violence, arresting, beating up and torturing Members of Parliament was unconstitutional and contravened* ***Articles 1, 8A, 23, 24, 29, 79, 208(2), 209, 211(3) and 212 of the Constitution***

At the joint scheduling conference held prior to the hearing of the consolidated petitions, the following issues were agreed upon namely;

1. *Whether sections 2 and 8 of the Act extending or enlarging of the term of life of Parliament from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 8A, 61(2) & (3), 77(3), 77(4), 79(1), 96, 105(1), 233(2)(b), 260(1) and 289.*

2. *And if so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 8A, , 77(3), 77(4), 79(1), 96 and 233 (2) (b) of the Constitution.*

3. *Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.*

4. *If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.*

5. *Whether the alleged violence/ scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.*

6. *Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as hereunder:-*

a) Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.

b) Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/ or in contravention of Article 93 of the Constitution.

c) Whether the actions of Uganda Peoples Defense Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining

the said Members is inconsistent with and/ or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.

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d) Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/ or in contravention of Articles 29 (1) (a), (d), (e) and 29(2) (a) of the Constitution.

e) Whether the alleged failure to consult on sections 2, 5, 6, 8
14 *and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.*

f) Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2) (b) of the Constitution.

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g) Whether the Constitution (Amendment) Act 2018 was against the spirit and structure of the Constitution under paragraph 12 of the National Objectives of State Policy.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was
28 *inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.*

a) Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the

provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

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b) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition Members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

14 *c) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2) (b), 71, 74, 75, 79, 82A, 83 (1) (g), 83 (3) and 108A of the Constitution.*

d) Whether the alleged act of the Legal and Parliamentary Affairs
21 *Committee of Parliament in allowing some committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.*

e) Whether the alleged act of the Speaker of Parliament in
28 *allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.*

f) *Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.*

g) *Whether the action of Parliament in:-*

i. *waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded.*

ii. *of closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every member of Parliament could debate on the said Bill.*

iii. *failing to close all doors during voting.*

iv. *failing to separate the second and third reading by at least fourteen sitting days are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.*

8. *Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.*

9. *Whether the Presidential assent to the Bill allegedly in the absence of a valid Certificate of Compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.*

10. Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2) (a) of the Constitution.

11. Whether section 9 of the Act, which seeks to harmonize the seven year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.

12. Whether sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

13. Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 105 of the Constitution of the Republic of Uganda.

14. What remedies are available to the parties?

Findings of the Constitutional Court.

The court made the following findings;

By unanimous decision, the court found that sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extensions of the tenure of Parliament and Local Government Councils by two years, and for the reinstatement of the Presidential term–limits unconstitutional for contravening provisions of the Constitution.

That accordingly, sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, be struck out of the Act.

.By majority decision, the court further held that sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, which removed age limits for the President, and Chairperson Local Council V, to contest for election to the respective offices, and for the implementation of the recommendations of the Supreme Court in Presidential Election Petition No. 1; Amama Mbabazi vs Yoweri Museveni, have, each, been passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

The Constitutional Court awarded professional fees of Ug Shs. 20m/= (Twenty million only) for each Petition (and not Petitioner). The Court however noted that this award did not apply to Petition No. 3 of 2018 since the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person.

The Court further awarded two–thirds disbursements to all the Petitioners; to be taxed by the Taxing Master.

The petitioners were aggrieved by part of the decision of the Constitutional Court hence severally lodging appeals in this Court. The appellant in Constitutional Appeal No. 02 of 2018 lodged a memorandum of appeal containing 84 grounds of Appeal. The appellants in Constitutional Appeal No. 03 of 2018 on the other hand lodged a memorandum of appeal containing 24 grounds of appeal

and the appellant in Constitutional Appeal No. 04 of 2018 lodged a memorandum of appeal containing 3 grounds of appeal.

7 At the pre-hearing conference, the several appeals were consolidated into one appeal because of the similarities in their points of contention. The parties agreed that all the above grounds be reduced into the following issues;

1. **Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine?**
14 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. ?**
21 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 appeal erred in law when they**
28 **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 age limit for**

the president and local Council v offices was not inconsistent with the provisions of the 1995 Constitution. ?

7 **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?

14 **7b. if so, what is the effect of the decision of the Court.**

8. What remedies are available to the parties?

<u>Representation</u>

The Appellant in Constitutional Appeal No. 02 of 2018 represented himself.

The appellants in Constitutional Appeal No. 03 of 2018 were represented by **Mr. Lukwago Elias and Mr. Rwakafuzi and assisted by**
21 **Mr. Mpenge Nathan and Mr. Nalukola Elias.**

The appellant in constitutional Appeal No. 04 of 2018 was represented by **Mr. Wandela Ogalo assisted by Mr. Moses Kiyemba.**

The respondent was represented by **William Byaruhanga, the Hon. Attorney General, Mwesigwa Rukutana, the Hon Deputy Attorney General, Mr. Francis Atoke the Solicitor General, Ms. Christine Kahwa the Ag. Director Civil Litigation, Mr. Martin Mwambutsya**
28 **Commissioner Civil Litigation, Mr. Phillip Mwaka, Principal State Attorney Mr. George Karemera, Principle Senior State Attorney, Mr.**

Richard Adrole, Senior State Attorney Mr. Geoffrey Madete State Attorney, Ms. Imelda Adongo, State Attorney, Mr. Johnson Natuhwera, State Attorney, Ms. Jacky Amusungut, State Attorney, Mr. Sam Tusubira, State Attorney and Mr. Allan Mukama, State Attorney.

Principles of constitutional interpretation relevant in this Appeal.

I shall adopt the principles of constitutional interpretation as set out in the judgement of Justice Kenneth Kakuru(JCC) which will guide me in resolving the raised issues;

They were laid as follows:-

1) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. See:- *Article 2(2)* of the Constitution. See:- also The Supreme Court decision in Presidential Election Petition No.2 of 2006 *(Rtd) Dr. Col Kiiza Besigye Vs Y.K. Museveni, Supreme Court Constitutional Appeal No.2 of 2006.*

2) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See:- *Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998.(SCU)*

3) The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See:- *P.K Ssemogerere and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 1 of 2002 and The Attorney General of Tanzania vs Rev. Christopher Mtikila [2010.].EA 13.*

4) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible. See:- *Okello Okello John Livingstone and 6 others Vs The Attorney General and another, Constitutional Court Constitutional Petition No. 1 of 2005, Dr. Kiiza Besigye vs Attorney General: Constitutional Court Constitutional Petition No.1 of 2006 and South Dakota vs. South Carolina 192, U.S.A 268, 1940.*

5) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

6) Where the language of the statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. See: *The Attorney*

General Versus Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997.

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7) The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation. See: *Okello Okello John Livingstone and 6 others Versus the Attorney General and Another, Constitutional Court Constitutional Petition No.4 of 2005.*

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8) The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

9) In searching for the purpose of the Act, it is legitimate to seek to identify the mischief sought to be remedied by the
21 legislation. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We are obliged to understand the provisions within the context of the ground to detect if any, of the related provisions and of the Constitution as a whole, including the underlying values of the Constitution are promoted and protected. Although the text is often the
28 starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

10) In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. See:- *Apollo Mboya Vs Attorney General and others* (Supra).

11) It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone. All constitutional provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the greater purpose of the instrument. See: *Smith Dakota Vs North Carolina, 192 US 268(1940)*.

12) The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in *Article 8A(1)*.

See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

Bearing the above principles in mind, I shall now proceed to consider the parties' submissions and resolve the issues in contention. I shall resolve the issues in the order of presentation.

i.e. Issue No.1,2,3 ,4, 5,6, 7and lastly 8 simultaneously.

Before I proceed with the discussion of the merits of the issues raised in this appeal, I have to deal with preliminary objections raised by the parties. The first one was raised by Mr. Mabirizi who objected to the written submissions of the Attorney General on the ground that it was presented outside the scheduled time frame directed during the pre-hearing session. We considered this objection and found that under Rules 2 (2) of our Rules, we should in the interest of justice to both parties, validate the submissions to enable the matter to be heard on its merits.

The 2nd objection arose from the Attorney General who objected to the entire memorandum of appeal filed by Mr. Mabirizi offended Rule 82 of the Supreme Court Rules.

The 2nd objection by the Attorney General was that the petition by Mr. Mabirizi did not conform to the requirements under Article 137 of the Constitution.

Mr. Mabirizi opposed the objections vehemently.

After pursuing the submissions of the parties on the above objections and considering the importance of the matter before Court, I found that the objections should not succeed.

It is true that under Rule 82, this Court does not allow grounds which are argumentative and narrative to stand:- see **Hwang Sung Ltd v M & D Timber Merchandise and Transporters Ltd C.A No. 2 of 2018 (SC).**

It is true from the perusal of Mabirizi grounds of appeal that he raised 84 issues, some of which are argumentative and narrative. However, this objection was raised very late in the proceedings. It should have been raised during the pre-hearing stage.

This court should not forget that this petitioner is a lay person although he is a trained lawyer. As a Court of Justice and of last resort I would not strike out this appeal. That would tantamount to punishing the litigant other than doing justice.

With regard to Article 137 of the Constitution, it is my view that the petition clearly conforms to the same in that it clearly describes the act or omission complained of and the provisions of the Constitution which have been offended: see **ISMAIL Serugo v KCCA and another SCCA NO. 2 OF 1998.**

For the above reasons, I overrule the preliminary objections.

Issue no.1

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

Appellants' submissions

This issue was submitted on only by the appellants in Constitutional Appeal No.03 of 2018.

Counsel submitted that the thrust of the basic structure doctrine is that it attempts to identify the philosophy upon which a constitution

is based. He explained that the Basic Structure doctrine has also been instrumental in shaping the constitutional jurisprudence of different countries across the world. Counsel relied on the case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC** where it was held as follows; **"According to the doctrine, the amendment power of Parliament is not unlimited; rather it does not include the power to abrogate or change the identity of the constitution or its basic features."** The other case is **Minerva Mills v. Union of India, AIR 1980 SC 1789,** where court unanimously held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a Constitution.

He further quoted a case in Taiwan, the Council of Grand Justices of Taiwan announced interpretation No. 499 and stated that; **"Although the amendment of the Constitution has equal status with the Constitutional provisions, any amendment that alters the existing constitution concerning governing norms and order, and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the constitution itself. As a result such amendment shall be deemed improper."**

Bangladesh, in the case of **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, the supreme court held:- **"Call it by any name, basic structure 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… Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".**

In South Africa, the South African Constitutional Court in the case of **Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)** while discussing the applicability of the basic structure doctrine noted 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 (2004) AHRLR 157** held that:- "Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity or the existence of the Constitution attained."(Sic)

Counsel contended that the learned justices of the Constitutional Court misconstrued the application of the basic structure doctrine when they held that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure doctrine and as such Sections 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. He submitted that the learned Justices accorded the basic structure doctrine a narrow and restrictive application 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

Counsel for the appellant further associated himself with the finding of **Kakuru JCC** that the question of whether or not the doctrine of basic structure applies, depends on the constitutional history and the Constitutional structure of each country. He relied on the **dissenting judgment of Kasule, JA in Saleh Kamba & others Vs. Attorney General & others; Constitutional Petition No. 16 of 2013** wherein the learned Justice held that in interpreting a constitution, court ought to take into account the history of a given country.

He further urged this court to adopt the observations of Justice Kakuru JCC on what constitutes the basic structure of the 1995 Constitution.

Counsel argued that the majority justices of the constitutional Court overlooked the pillars of the 1995 Constitution which are reflected in the preamble to the constitution. He submitted that courts in various jurisdictions relied on the preamble of the various constitutions to determine the basic structure of the constitutions. He cited cases

such as **British Caribbean Bank v The Attorney of Belize Claim No. 597/2011**, **Kesavananda case(supra)** and **Minerva case(supra)** inter alia.

Counsel therefore invited this honourable court to take cognizance of the fact that the framers of the 1995 constitution deemed it necessary to enshrine within the text of the constitution such provisions as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well as in the National Objectives and Directive Principles of State Policy. He added that age limit was among the provisions designed to guarantee orderly succession to power therefore its amendment/ removal destroyed the basic features of the 1995 Constitution.

Counsel submitted that aside from being part of the basic structure of the 1995 constitution, Article 102 (b) was also intended to place the destiny of this country in the hands of a mature but not very old president; one who falls within the bracket of 35 to 75 years. That the framers recognized the dangers of entrusting the state structure in the hands of a teenager of, say, 18 years or a frail elder of, say, 90 years as the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour.

Finally on this issue counsel prayed that this honourable court be pleased to answer issue 1 in the affirmative.

Respondent's submission.

Counsel submitted that the learned Justices of the Constitutional
7 Court correctly found that sections 3 and 7 of the impugned Act do not derogate from the Basic Structure of the 1995 Constitution.

Counsel argued that the doctrine was defined in the case of **Kesavananda Bharati vs. The State of Kerala Petition (Civil) 135 of 1970;(A.I.R 1973 SC 1461) Vol 5 Tab DD page 64,** where **S.M. Sikri, C. J** defined the Basic Structure in the following terms:

"The basic structure may be said to consist of the following features:

14 *1. Supremacy of the Constitution;*

2. Republican and Democratic form of Government;

3. Secular character of the Constitution;

4. Separation of Powers between the Executive;

5. Federal character of the Constitution;

Counsel contended that the Constitutional Court unanimously found that the framers of the 1995 Constitution clearly identified provisions
21 of the Constitution which are fundamental and form part of the Basic Structure of the 1995 Constitution. He explained that the framers carefully entrenched these provisions by various safeguards for protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions.

According to counsel, the Safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament,

and a referendum, in fulfilment of the provisions of Articles 260 and 261 of the Constitution.

7 Counsel contended that Articles 69, 74(1), 75, 260 and 261 of the 1995 Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. That only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

He argued that the Constituent Assembly that took a considerable
14 amount of time to debate and eventually include the peoples' views in what eventually became the 1995 Constitution, was alive to the fact that our society is not static but dynamic and over the years, there would arise a need to amend the Constitution to reflect the changing times.

He further contended that Article 79 of the 1995 Constitution primarily gives Parliament the power to make laws that promote
21 peace, order, development and good governance in Uganda.

He further stated that Article 259 of the Constitution empowers the parliament to amend the Constitution in accordance with the procedure laid down in Chapter Eighteen.

Counsel submitted that it was therefore within the powers of Parliament to enact sections 3 and 7 of the Constitutional Amendment Act 1/2018 into law and this did not in any way
28 contravene the basic structure of the Constitution neither was it inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

Counsel submitted that no wonder the majority justices of the Constitutional court held that Sections 1, 3 and 7 of the impugned Act were enacted within the reach of the amending powers of the parliament.

In conclusion, counsel prayed that this court upholds the majority justices' observation that Article 102(b) does not form part of the basic structure of the i995 constitution.

Court's Considerations.

The gist of this issue and question for this court to answer is whether Article 102(b) of the Constitution forms part of the basic structure of the 1995 constitution of the republic of Uganda. The basic structure doctrine is well laid in the locus classicus case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC** where court observed as follows;

"According to the doctrine, the amendment power of Parliament is not unlimited; <u>rather it does not include the power to abrogate or change the identity of the constitution or its basic features</u>."

The basic structure of a Constitution was said by court in that case to include the following;

1. **Supremacy of the Constitution;**
2. **Republican and Democratic form of Government;**
3. **Secular character of the Constitution;**
4. **Separation of Powers between the Executive;**
5. **Federal character of the Constitution;**

Basic structure is to the effect that an amendment of the constitution should not alter or destroy the foundation upon which the constitution lies and that parliament has to operate within its powers from within the constitution. Such features that form the foundation of the constitution are so fundamental that even if parliament followed the right procedures of conduct, it just cannot amend them. A basic structure feature is one such that its amendment could be like redrafting the constitution. I associate with the observations of Justice Chowdhury in the case of ***Anwar Hossain Chowdry*** case (supra) where he stated thus:

"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 ... 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 Basic structure doctrine is basically the identity of the constitution. Courts are the guardians and interpreters of the Constitution and are the arbiters of all the amendments made by Parliament. Amendment of the constitution was/is provided for in the constitution to enable the people overcome the difficulties which may be encountered in future. Times change with the variance in the social, economic and political conditions of the people thereby requiring an amendment to carter for the changing needs. The powers to amend the constitution are a strict preserve of the legislature however, the constitution has features that can never be

amended by the parliament. Courts have the mandate to strike down constitutional amendments and Acts of parliament enacted by the Parliament which seek to alter the basic structure of the constitution.

Findings of the lower court.

Kakuru JCC made a finding that;

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves. My view expressed above is fortified by the following provisions of the Constitution.

Articles 1 and 2: These Articles establish the foundation of the Constitution upon which all other Articles are anchored therefore in my view cannot be amended, not even by a referendum. Doing so would offend Article 3(4).

Article 3. This article is really unique, and I have not seen or known of any other Constitution with a similar Article, which effectively renders inapplicable to Uganda the Kelsen Theory of pure law. Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been enacted through a flawless procedure. I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the constitutionality test."

Justice Owiny Dollo observed that:

"…Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the

Constitution, I am unable to fault it for the process it took to effect these amendments.

Justice Remmy Kasule held that;

"…The framers of the 1995 Constitution that is the Constituent Assembly, in their wisdom saw it fit to have the age limits of one who is to stand for election as President of Uganda, under the category of the qualifications of the President. They provided for these qualifications under Article 102 of the Constitution. They did not put this Article 102 amongst those Articles that have to be amended after first getting the approval of Ugandans through a referendum.'' (N.B: This decision is reflected in issue 5)

Justice Elizabeth Musoke held that;

"….I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 181 are not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution.

Justice Cheborion Barishaki also held that those section the amended

Article 102 is not part of the basic structure of the constitution.

I associate with Justice Kakuru's observation as to what constitutes the basic structure of the constitution of the republic of Uganda. He observed as inter alia as follows;

"1. **The sovereignty of the people of Uganda and their inalienable right to determine the form of governance for the Country.**

2) The Supremacy of the Constitution as an embodiment of the sovereign will of the people, through regular free and fair elections at all levels of political leadership.

3) Political order through adherence to a popular and durable Constitution.

4) Political and constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.

5) Arising from 4 above, Rule of law, observance of human rights, regular free and fair elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.

6) Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State.

7) Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.

8) Natural Resources are held by government in trust for the people and do not belong to government.

9) Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.

10) Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of law as to deprive a party."

Article 102(b) provides that

Qualifications of the President;

A Person **is not qualified from elections as a president** unless that person is;

a) A citizen of Uganda by birth.

b) Not less than thirty five years and not more that seventy five years of Age.

c) A person qualified to become a Member of Parliament.

(Emphasis mine)

This article was meant to provide for the minimum and the maximum age within which one can qualify to become president of Uganda. The appellants submitted that court should read Article 102(b) in line with the preamble of our constitution. The preamble reads as follows;

The Preamble.

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable

national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY."

I agree that preamble expounds on what the basic structure of this constitution is by highlighting the struggles Uganda has been through in the past due to the various undemocratic governments that were subjected to its people. I however observe that the Article 102(b) doesn't constitute a salient feature of our constitution. I believe that the scrapping of the age limits from the constitution created desperation from the people to hang on to Article 102(b) as a ray of hope to prevent the history that was tainted with leaders for life repeating itself. Be that as it may, the framers of the Constitution constructed the provision to gauge the age appropriate for one to be entrusted with the office of the presidency of this great nation and not as a safeguard of against impunity of leaders or a determinant in the form of governance of this country.

I agree with majority of the lower court justices that the Articles that cannot be amended by the Parliament were entrenched under Article 260 of the Constitution and that Article 102(b) was not part of them.

I do not agree that with the contention that removing the age limit would put this country at the risk of having leaders who would be either too young or too old to rule. The rail guard is Article 2 which grants power to choose leaders on the people of Uganda. In any case, our historical problems have not been that to past leaders have been either too young or too old.

I therefore hold that Section 3 of the Constitutional Amendment Act No.1 of 2018 does not constitute the basic structure of the 1995 constitution of the Republic of Uganda. The issue is hereby answered in the negative.

Issue Two

- **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.**

Appellants' submissions on issue two;

Counsel submitted that the procedure and manner of passing the entire Constitution (Amendment) Act No. 1 of 2018 was flawed and/or tainted with illegalities, procedural impropriety in violation of

Articles 28, 42, 44, 79, 91, 92 and 259 of the Constitution and the Rules of Procedure of Parliament.

7 Further that Parliament breached its duty under Article 94 to follow the provisions of the Constitution and its own Rules of procedure. He cited the case of **Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14** and **Law Society of Kenya vs Attorney General & Anor [2016] eKLR** where court emphasised that when any of the stages in the procedure of enactment of a law is flawed, then that vitiates the entire process and the laws that emerge therefrom.

14 The parties highlighted the procedural irregularities in contention and submitted on them separately as follows;

Charge on the Consolidated Fund contrary to Article 93 of the Constitution

<u>Appellants' submissions</u>

The appellant's main contention was that it was erroneous for the Constitutional Court after making a finding that the impugned Act
21 violated the provisions of Article 93 of the constitution and later declined to nullify the entire Act on ground that the non-compliance only affected Sections 2, 6, 8 and 10 of the impugned Act. Counsel stated that the said Sections which were introduced by way of amendments imposed a charge on the consolidated fund.

Counsel submitted that having found some of the provisions in the challenged Act contravened Article 93 of the Constitution, the
28 Constitutional Court would have come to no other conclusion than nullifying the whole Act.

He explained that the words "**Parliament shall not proceed**" contained in Article 93 of the constitution should be given their ordinary meaning that they simply prohibit Parliament from proceeding on a Bill or motion. That the words in their ordinary interpretation mean "**to Stop, Do not go forward".** Parliament proceeded with debating the Bill, voted on the bill and passed it and the same Bill was then sent to the President for assent.

Counsel argued that whether the offending provisions are later found to be unconstitutional does not change the fact that Parliament proceeded with the Bill and motion in contravention of the Constitution.

Counsel contended that the provisions of the Constitution deal with a Bill. The Speaker was required under Rule 113 (2012 Rules) to make a ruling. That it was the responsibility of the Speaker to decide whether a bill contravened Article 93 to which she ruled that Article 93 was not applicable because the House was dealing with a committee report and not the Bill. Counsel submitted that at that moment, the house was proceeding under a motion for second reading and as such Article 93(b) was applicable.

That the House debated the motion and the Speaker reminded members that she had earlier put the question that the bill be read for the second time and called for a vote and the members voted. Counsel argued that that amounted to proceeding and making a decision on a motion. Counsel submitted that when Hon. Tusiime brought in the amendments to enlarge the terms of both parliament and local councils, the Speaker ought to have made a ruling striking those amendments out and informing the House that the hands of

Parliament were tied by the Constitution and they could not proceed with debate in respect of the motions introduced by Hon. Tumusime. Instead, the Speaker allowed the matter to proceed to debate and at the end she put the question and members voted on a motion which created a charge on the Consolidated Fund.

Furthermore, counsel argued that the report of the committee of the whole House contained the provisions which created a charge on the Consolidated Fund. Hon. Magyezi moved a motion for adoption of the report.

Counsel also faulted the Constitutional Court for not addressing its mind to the provisions of the Constitution and the Public Finance Management Act and thereby came to the wrong conclusion that section 3 of the impugned Act did not create a charge on the consolidated fund.

He stated that Section **76** of the **Public Finance Management Act** requires every Bill introduced in Parliament to be accompanied by a certificate of financial implications which indicates the estimates of revenue and expenditure over a period of two years after coming into effect of the Bill when passed into law.

He explained that the Certificate of Financial Implications in respect of the Bill states that the planned expenditure will be accommodated within the medium term expenditure framework for ministries, departments and agencies concerned. In so stating, the minister appears to concede that the Bill will have some sort of expenditure. The Minister then states whether there are no additional financial obligations beyond what is provided in the

medium term. Expenditure framework "medium term" is defined in the Act as a period of three to five years.

Counsel submitted that a medium term expenditure framework is a primary document which contains the consensus on policies, reform measures, projects and programmes that Government is committed to implementing during a specific period of between three and five years. It draws on a larger objective such as vision 2025. It may identify priority areas scheduled for implementation during the period, specify economic growth percentage, expected policy goals, project sources of financing etc. In short, it is just a plan.

Counsel stated that the Consolidated Fund is provided for in **Article 153** of the **Constitution** and **Section 2** of the **Interpretation Act**.

Counsel submitted that Section 76 of the **Public Finance Management Act** was ignored and not used to determine whether the Bill created a charge on the Consolidated Fund under Article 93 of the Constitution. That therefore the court erred when it whole heartedly embraced the Certificate of Financial Implication as the test of whether the Bill created a charge on the Consolidated Fund.

In respect to the 29 million facilitation, counsel argued that **Article 156** of the **Constitution** requires 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 ...."

Article 154 of the **Constitution** also provides that no monies shall be withdrawn from the Consolidated Fund except….where the issue of those monies has been authorized by an Appropriation Act."

That the Appropriation Act is 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 did not come from the Consolidated Fund but the account of Parliament. 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 removing 29 million shillings from the Consolidated Fund albeit unconstitutionally.

Counsel further stated that to hold otherwise would mean that expenditure on Magyezi bill was provided for in the 2016/17 Budget since it was introduced in September 2017. That it would mean that at the time of preparing the budget estimates in 2016 Parliament was aware of this bill and made provision for it which does not seem logical. The logical conclusion is that the Ministry of Finance provided the money. 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. The burden to do so lay with the Respondent but it failed to do so.

Counsel invited this Court to make a finding that this exgratia 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 the or by Government, that had financial implications as provided therein.

The Attorney General 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 Implication. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implication 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, 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, the 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 titled The Constitution (Amendment) (No. 2) Bill of 2017.

The Attorney General further submitted that evidence [at page 613 para 26 Vol 1 of the record] shows that the Hon. Raphael Magyezi moved the House so that the bill could be read for the 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 the Hon. Raphael Magyezi after the Rt. Hon. 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 Judgment of Kasule, JCC and quoted the learned Justices holding thus:

> *"This Court accepts this Certificate of Financial Implications as being valid in law as a correct certification by Government, through the Ministry of Finance, that the proposed amendments in the original Bill satisfied the provision of Article 93 of the Constitution, the Public Finance Management Act and the appropriate Rules of Parliament."*

The Attorney General further referred to the same Judgment of Kasule, JCC at page 257 para 1738 of the record, were his lordship observed as follows:

> *"Article 93 of the Constitution and Section 76 (1) of the Public Finance Management Act, 2015 compulsorily require every Bill presented to Parliament to be accompanied by a certificate of financial implications from the Minister of Finance.*

The Attorney General also referred us to the Judgment of Cheborion, JCC [at page 614 para 21 of the record/ where his lordship held thus:

> *"As a consequence, I find that the Bill which was introduced by Hon. Magyezi in respect of amendment of Article 61, 102, 104 complied with the requirements of Article 93 of the Constitution and section 76 of the Public Finance and Management Act 2015 while the amendments introduced by Hon. Nandala Mafabi and Hon. Tusiime did not comply."*

Lastly, the Attorney General referred this Court to the Judgment of Kakuru, JCC [at page 458 para 12 Vol 4 of the record] where his Lordship held as follows:

> *"None of the Petitioners presented any serious challenge to the constitutionality of the original Bill as first presented. I have already found that it was not in contravention of or inconsistent with Article 1, 2 and 8A of the Constitution. There was evidence that a Certificate of Financial Implications was properly obtained and was indeed available before the motion to introduce the said bill was proceeded with upon in Parliament."*

The Attorney General also pointed out that a similar position was reached by Musoke, JCC in her judgment [at page 707 para 1401 Vol. 4 of the Record of Appeal.]

Having highlighted the findings of the Constitutional Court as indicted above, the Attorney General submitted that the Justices of the Constitutional Court were right to strike out the provisions of the impugned Act that did not comply with the Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of severance.

The Attorney General invited this Court to uphold the decision of the Constitutional Court that the Bill presented by Hon. Magyezi did not contravene Article 93 of the Constitution.

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 impugned Act inconsistent with Article 93 of the Constitution

In conclusion, 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 made provision for 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.

7 The Attorney General invited this Court to uphold the learned majority Justices' decision that the money given to members of Parliament as facilitation did not contravene Article 93 of the Constitution.

Court's consideration

Article 93 of the Constitution reads as follows;

Restriction on financial matters.

14 **Parliament shall not, unless the bill or the motion is introduced on behalf of the Government;**

(a) Proceed upon a bill , including an amendment bill, that makes provision of the following;

(i) ……..

(ii)The imposition of a charge on the consolidated fund or other public fund of Uganda or the alteration of any such charge

21 **otherwise than by reduction.**

(iii) ……

(iv) ……

(b) Proceed upon a motion, including an amendment to the motion, the effect of which would make provision for any of the purposes specified in paragraph (a) of the article.

Section 76 of the Public Finance Management Act provides for cost

28 estimates of Bills introduced in Parliament. It is emphatic that every bill introduced in Parliament shall be accompanied by a Certificate

of Financial Implications issued by the Minister. The requirement of a Certificate of Financial Implications is also stated in the Rules of Procedure of Parliament of Uganda. See Rule 107 of the Rules.

From the submissions above and in due consideration of the holdings of the Constitutional court on the same, i shall proceed as follows. Both parties are aware of the financial limitations paused by the constitution in regards to bills introduced by private members. The appellants claim that the constitutional court having held that the amendments created a charge on the consolidated fund by reduction could not have held that it is only the offending sections of the bill that are unconstitutional. The constitutional court relied on the doctrine of severance to separate the parts of the Act which offended Article 93 and saved the remaining parts of the Act. A detailed analysis on severance is in my considerations on issues 5 and 8. Be that as it may, I believe that the question here is whether at the time of the introduction of the bill it offended the Constitution.

The records show that on 3/10/2017, Hon. Rapheal Magyezi laid on the table the Constitution amendment No. 2 bill of 2017. The same was duly accompanied by a Certificate of Financial Implications from the Minister as required by law. The Certificate was issued on 28/9/2017.

The Magyezi bill had the following objectives:-

1. To amend the Constitution of the Republic of Uganda with Articles 259 and 262of the Constitution.

a) To provide for the time within which to hold Presidential, Parliamentary and Local Government Council Elections under Article 1.
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 no of days within which to file and determine a Presidential Election under Article 104 (2) 8 (3);
d) To increase the number of days within which the electoral Commission is required to hold a fresh Elections where a Presidential Election is annulled under Article 104 (6); and
e) For related motion introducing the above bill was seconded and justified and accordingly brought for 1st reading.

It is not in dispute that on 29/9/2017 the proposed bill was published in the Gazette and on the same day a Certificate of Financial Implication was issued by the Hon. Minister of Finance. After 2nd reading the bill proceeded to the Committee of the whole House where each clause was debated.

It was at this stage that new clauses were introduced which related to extension of two years and also the extension of the term of Local Government by two years and the reintroduction of Presidential term limits.

From the above analogy, I find that the majority of the Justices of the Constitutional Court were right to hold that at the time of proceeding with the Bill tabled by Hon, Magyegi, the same did not offend the Article S 79 of Act Financial Management Act and the Rules of Procedure of Parliament.

The provision that created a change on the consolidated fund were introduced much later and did not amount to an amendment of the Bill. The term amendment implies such an addition or change within the lines of the original instrument as will affect an improvement or better carry out the purpose for which it was framed, see Anwar Hossain (supra).

In my view, the Constitutional Court was right to sever the above provisions as they were strangers to the Magyezi's bill.

With regard to the 29,000,000/= I entirely agree with the Attorney General the same did not amount to a fresh charge on the Consolidated Fund Evidence adduced by the Secretary to the Treasury and the Clerk to Parliament was to the effect that the above sum had already been appropriated for use by the Parliament. It was now drawn from the Consolidated Fund.

Act 93 of the Constitution does not concrn itself with money used in processing the bill like allowances/facilitations paid to members of Parliament to process the Bills.

In conclusion, I find that the learned Justices of the Constitutional Court were right to conclude that the original bill by Hon. Magyezi was not inconsistent with Article 93 of the Constitution, Section 79 of FMA and Rule 107 of the Rules of Parliament.

Suspension of MPs

Appellants' submissions

On the Suspension of some members of parliament and other illegalities committed by the speaker during the Parliamentary sitting of 18th December 2017, counsel submitted that on the 18th December 2017 when parliament convened to consider the report of the legal and parliamentary affairs committee, three honourable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling and instead arbitrarily suspended the 1st, 2nd, 3rd, 4th and 5th Appellants and other Members of Parliament from parliament in contravention of Article 1, 28(1), 42, 44 (c) and 94 of the Constitution.

He argued that the Hansard clearly 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 to wit; Hon. Akampurira Prossy Mbabazi and Hon. Lilly Akello, who both sat on the committee of Defence and Internal Affairs had signed it. Whereas Hon. Ssentamu Robert and Hon. Betty Amongi raised another point of procedure that the matter concerning the impugned Bill was before the East African Court of Justice and that proceeding with the same would amount to breach of the subjudice rule, however the Rt. Hon. Speaker declined to pronounce herself on the matter and instead adjourned the proceedings. Before Members could leave the chambers, the Speaker made an arbitrary order suspending the 1st to 5th Appellants together with another MP without assigning any

reason whatsoever as required under the Rules nor did she state the offences committed.

Counsel argued that these illegalities were elaborately presented before the Constitutional Court but the court held that the participation of the new members that were added to the Committee, even if irregular, cannot invalidate the Committee report because even if their number was deducted, the majority report still had enough signatures to pass it and that the action taken by 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. The Speaker grossly violated the Rules of Procedure of Parliament and that she did not accord the said MPs a fair hearing before suspending them; she did not assign any reason for their said suspension; and that 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 case

The Attorney General contended that Rule 7 of the Rules of
7 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
14 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
21 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 him/herself in a disorderly manner was suspended, Rule 89 required that such a member had to immediately withdraw from
28 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 computed from the next sitting of Parliament.

In light of his submission, the Attorney General submitted that the Appellant misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances in 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 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.

7 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, '*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 provides that the Speaker may at any time suspend a sitting or adjourn the house.

14 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
21 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.

Court's considerations

The contention is the legality of the suspension. The speaker suspended the MPs on the basis of the powers conferred upon her in
28 Rules 7(1) and 2, 77,79,80,86 and 88.

Rule 82(1) c of the Rules of Procedure of Parliament provide that;

"While a Member is speaking, all other Members shall be silent and shall not make unseemly interruptions."

Further, Rule 84 is to the effect that in all other matters, the behaviour of members shall be guided by the code of conduct of members of parliament prescribed in appendix F. Rules 87, 88 and 89 provide for circumstances under which a member may be suspended from the House and the procedure to be adopted by the speaker.

The speaker has the obligation to ensure decorum and orderly proceedings in the House. The hansards reflect the situation in the House on the fateful day. Tempers were so high and many members were acting contrary to their expected manner in the House and it is my view that the speaker did suspend some members in accordance with the Rules mentioned herein. Once the conduct of a member is disruptive of the proceedings and is deemed to offend the decorum of the House, the Speaker has the authority to suspend the said Members.

It is trite that Members of Parliament are expected to behave in a Honourable manner to the House and themselves. This was observed by the Constitutional Court in **Severino Twinobusingye VS Attorney General, Constitutional Petition No. 47 of 2011**.

…….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 administration not only to the Institution of Parliament but also to those who, inter-alia elected is the fountain of Constitutionalism and therefore, the Honurable Members of Parliament are enjoined by virtue adhere to the basic tenets of the Constitution in their

deliberations and action……Parliament should avoid acts which are a kin to mob justice because such acts undermine the respect and integrity of the National Parliament.

Records shows that Honurable Members were intolerant and very defiant to the authority of the Speaker despite being cautioned and reminded of the Rules of Procedure of Parliament, I therefore find that the Speaker was right to suspend those members of Parliament who misbehaved in Parliament. Because they acted definatly and knowingly, they could not accuse the Speaker for not giving them a fair hearing. Record shows that the Speaker shouted for ORDER invain, meaning there was sheer contempt of the authority of the Speaker. I accordingly agree with the Justices of the Constitutional Court that the Speaker of Parliament Acted firmly and properly in suspending the said members of parliament for contempt in the House. The Right Hon. Speaker was not ultra-vines her powers when she suspended the MPS because she was in the course of proceedings.

Failure to close doors to the chambers at the time of voting the Bill.

On the Failure to close the doors to the chambers at the time of voting on the bill, counsel 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 which fact was also admitted by the clerk to Parliament in her affidavit. According to counsel the rationale of this Rule 98 (4) is to bar Members who had not participated in the debate to enter parliament and participate in decision making. The speaker however

not only left the doors wide open but called for members who were outside the chambers during the time of debate to enter and vote.

7 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. 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
14 illegal.

He argued that closing the doors was not at the speaker's discretion as the majority justices held looking at the provisions of Article 89(1) of the Constitution which requires "voting in a manner prescribed by rules of procedure made by Parliament under Article 94 of this Constitution.

Respondent's case;

21 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 in not doing stated [at pages 373 of the record citing Hansard dated Wednesday 20th December 2017] that:

> *"…ideally I was supposed to have closed the doors under Rule*
> 28 *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….."*

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.

Court's considerations.

I agree that the Rules dictate that the House doors have to be closed during the voting process. It is evident from the hansards that the speaker was alive to this rule however since it is also on record that the House was full and some members were outside, this was not their fault and therefore could not be denied a chance of participate in the voting process.

I find that the failure to close doors during voting did not contravene the constitution or vitiate the process. The Speaker was alive to the Rule and did advance valid reasons for not closing the door. I find that Constitutional Court was right to hold the way they did.

Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill.

7 On the Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill, counsel contended that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned 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.

14 Counsel submitted that the Speaker's certificate of compliance was materially defective, ineffectual and it rendered the presidential assent a nullity. The requirement of a valid certificate of compliance under Article 263 (2) of the Constitution is couched in mandatory terms.

It was apparent that the speaker's certificate of compliance which accompanied the impugned Bill was but full of glaring
21 inconsistencies and discrepancies. Whereas the certificate clearly indicated that the impugned bill not 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 for the appellants vehemently averred that the discrepancies and variations which appeared between the
28 speaker's certificate of compliance and the constitutional (amendment) bill were gross both in content and form; thus in contravention of Article 263 (2) of the Constitution and S.16 of the

Acts of Parliament Act and rendered not only the presidential assent to the bill a nullity but even the resultant Act.

7 However the Constitutional court reached a wrong conclusion 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
14 Supreme Court authority of **Ssemwogerere & Anor v 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 Assent,
21 *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"

28 Counsel averred that the highlighted inconsistencies were deliberate and intended to subvert and fraudulently circumvent constitutional

provisions which required for a referendum for the amendment to be valid under Article 263 (1) of the constitution.

Illegal assent to the Bill by the President

On the 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.

Respondent's case

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 impugned 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.

7 The Attorney General submitted that the Constitutional Court came to the right finding in holding that the validity of the entire impugned 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
14 variances between the Speaker's certificate of compliance and found that the discrepancies were not fatal. In the Attorney General's view, the majority learned 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 concluded that it was not in dispute that the Bill that was sent to the President for assent was accompanied by a
21 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
28 291.

The Attorney General submitted that 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 to be 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 justices 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.

Court's considerations;

The exclusion by the Speaker, of Articles 77,105,181,289 and 291, from the Certificate of Compliance accompanying the Constitution (Amendment) Bill sent for presidential assent was not fatal. A Certificate of compliance is provided for in **Article 263(2)(a)** which states 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.**

In the case of **Paul Semwogerere & Others vs Attorney General (supra), Justice Oder** held that;

7 **"It is my view that the Constitutional procedural requirements for the enactment of legislation for amendment of the Constitution are mandatory conditions, which cannot be waived by Parliament as mere procedural or administrative requirements. They are conditions to be complied with. <u>Mandatory Constitutional requirements cannot simply be waived by Parliament under its own procedural rules".</u>**

The certificate sent to the President accompanying the Bill had some
14 Articles and excluded other articles contained in the Bill. It is my opinion that the contents of the certificate have to rhyme with the contents of the Bill which was lawfully passed. I therefore agree with the learned Justices of the Constitutional court that the effect of such a certificate is that only the mentioned provisions complied with the provisions of chapter eighteen. These copies were sent for the presidential assent to which he assented.

21

My considered view is that the Speaker's Certificate was not defective as it applied to the parts of the Bill which was lawfully passed. Article 263 (2) provides assurance that the Bill was passed in accordance with the law. I find that the Presidential assent of the Bill which contained provisions which were excluded in the Certificate of Compliance nullity and of no consequence.

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Failure to comply with the 14 days sitting between the 1st reading and the 2nd reading.

Appellants' case;

Appellants fault the majority learned Justices for finding that the passing of the Act without observing the 14 days between the 2nd and 3rd reading contravened the Constitution but did not find the contravention fatal. They argued that that was not a correct approach. That when the clauses in the Bill requiring 14 days separation were passed at third reading they became part of the Act. However Article 260(1) states that such Bill shall not be taken as passed unless the votes at the second and third reading is by fourteen days.

They argued that 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.

Appellants submitted that each of the two arms of government namely the Judiciary and the Legislature has its own functions and responsibilities. That it is the duty of the legislature is to ensure that there is a 14 days separation of the two votes and therefore cannot 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*". They submitted that constitutional provisions must be complied with and cannot be left to speculation what will happen in future.

They stated that the motions of passing it at third reading and sending it to the President for assent was all in vain. That the bill

remained and remains what it was- a Bill. Counsel prayed court to give effect to the words "shall not be taken as passed" and hold that the failure to separate the two sittings is fatal to the Act. That the Act cannot be validated and given Constitutional cover when it never passed. That means validating a constitutional illegality.

Respondent's case;

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], 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 as well as the failure to accompany the Speaker's certificate of compliance and the Bill with a certificate from the electoral commission was not fatal.

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, that having found that the amendments that were proposed during the Committee stage that 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 Appellant and uphold the findings of the majority Justices.

In light of his submissions above, the Attorney General submitted that the majority learned Justices of the Constitutional Court did not err in law and fact when they held that entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 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) and pray that court finds as such.

Court's considerations

My view is that the amendments were adopted in the bill did not became part and parcel of the bill. The said amendments of the bill contained sections which required a space of 14 days between the 2nd and 3rd readings of the bill in Parliament. This is because the amendments created a charge on the consolidated fund. The original Magyezi Bill did not create a charge. Therefore, there was no need to separate the same by 14 days.

Denial of public access to the Gallery

Mr. Mabirizi submitted that being denied access to parliament was not refuted by the respondent. That according to **Section 57 of the Evidence Act, Order 8 rule 3 of the Civil Procedure Rules**, **MBABAZI V. MUSEVENI & 2 ORS**, the absence of any evidence in rebuttal to an allegation stands. Therefore, the finding of Barishaki, JCC stating that no other person saw Mabirizi being chased from parliament did not prove the allegation was erroneous.

Respondent's case

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 appellants' 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
7 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.

Court's considerations

14 I agree that open participation of the public is provided for in the rules of procedure of parliament however it is subject to the speakers discretion provided for in Rule 230(3) to control the admission of members of the public into the House. While Rule 230 (1) provides for the admission of the Public into the house, Rule 230 (B) provides for restriction of admission.

21 The philosophy behind public access to Parliament is that since Parliament legislate on behalf of the people, it is prudent to allow members of the public to know this power is being accounted by Parliament. This principle was discussed by the Constitutional Court of South Africa in Doctors for Life International vs The Speaker of the National Assembly and 11 others, Case CCT 12 of 2005.

28 "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 and debated and made. It enable members of the public to familiarise themselves with the law-making process and then be able to participate in the future".

Therefore while it is true that members of the public are guaranteed access to Parliamentary Proceedings, there are cetain circumstances where they are denied access as per Rules of Parliament. The Speaker is vested with discretion to control the admission of the public to the House to ensure Law and Order as well as the decorum and dignity of Parliament.

In the instant case, there was evidence that during the debate, there was a lot of tension and disorder in the House which necessitated caution. The Constitutional Court was therefore right to find that the Speaker and the Parliamentary Staff and the Security acted properly and within the Constitution in making the orders they made as regards admission of the public to the Parliamentary gallery

Debating in absence of the leader of opposition

Mr. Mabirizi contended that the absence of leader of the opposition, opposition chief whip & other opposition members & allowing ruling party members to sit on opposition side was well pleaded without any rebuttal That parliament was not properly constituted in absence of the leader in opposition.

Mr. Mabirizi argued that the reasons given by the Constitutional Court for justification of proceeding without opposition have no 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. That it actually 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

7

Court's considerations

The evidence on record shows that the leader of opposition voluntarily exited the House well knowing that the majority Committee Report was to be presented by the Chairperson of the Legal Affairs Committee.

14 Be that as it may, business in the House is predicated on quorum not on category of members of Parliament. In the instant case, there was no question of quorum. The Leader of Opposition and other members of Parliament simply walked away in protest. The Constitutional Court was right to hold that this kind of conduct tantamounted to holding Parliament at ransom.

21 Further, it is on record that the leader of opposition actually came back into the House shortly afterwards and was present during the presentation of the Majority Committee Report.

There is no merit in this ground.

Signing of the Report by Non committee members

Appellants' case

28 Mr. Mabirizi submitted that there was ample evidence that members who did not participate in committee proceedings signed the report. That the majority justices misconstrued the law & acted casually in failing to nullify the report signed by members who never participated in the proceedings of the committee. 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. Select committees are set up under Rule186 and they are temporary Committees. That the legal and parliamentary Affairs Committee is a sectorial Committee established under Rule 183(1) & 2(g). Contrary to the justices stated 5 members' minimum, under Rule 184(1), the minimum number for a sectoral committee is 15. 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 appellant submitted that the majority justices erred in relying on Article 94(3) which does not apply to committees of parliament because Article 94(3) deals with the entire Parliament and not Committees which are provided for under Article 90. Article 257(1)(u) provides "Parliament" means the Parliament of Uganda;" and does not include committees

He further 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 where inter alia court made it clear that the validity is not on numbers. MUSOKE, JCC'S finding that strangers had been briefed about the committee proceedings was without evidence & bad in law for promoting hearsay and legislators' reckless signing of legal documents. That the strangers could not sign a report after expiry of the maximum 45 days with which the report was required.

Respondent's case

On this point, the Attorney General submitted that the Committees
7 of Parliament are provided for under Article 90 of the Constitution and Rule 183(1) of the Rules of Procedure of Parliament. Further, that 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, that Rule 184 (1) of the Rules of Procedure of Parliament provides that each Sectorial Committee of Parliament
14 shall consist of not less than fifteen Members not more than thirty Members selected from among Members of Parliament.

The Attorney General further relied on Rule 201 (1) of the Rules of Procedure of Parliament which provides that a report of the Committee shall be signed and initiated 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
21 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.

Court's considerations

28 I agree with the appellants that inclusion of non-members in the report was irregular however, be that as it may, I uphold the majority justices' holding that the quorum was met even if such strangers

were to be removed. It is true that the signing of the report by strangers was brought to the attention of the House by Hon. Sekiikuubo. These members were redeployed to the Legal and Parliamentary Committee when the Committee had already commenced it work. It was irregular for them to have signed the report. They could have signed out of ignorance.

In my view this could not vitiate the report because by the time the report was signed, the committee had the necessary quorum.

Further more I agree with the Justices of the Constitutional Court that under Article 94 (3) of the Constitution, the presence or participating of a person not entitled to present or to participate in the proceedings of Parliament shall not in itself, invalidate those proceedings. I accordingly find no merit in this issue.

Crossing of the floor by ruling party Members to the opposition side.

It is important to note that at the particular time, members of opposition had walked out of the House and their seats were free. I believe that the speaker simply told the Members of Parliament to fill up the empty seats during the proceedings and this did not amount to crossing of the floor.

It must be noted that crossing the floor is not merely switching seats. In **Theodore Ssekikuubo v Attorney General, Constitutional Appeal No. 1 of 2015**, this Court held that the term meant abandoning one's party on whose ticket a member is elected to Parliament and joining or becoming an independent members.

In the instant case, that did not happen, what took place was that during the debate on the bill many opposition members got

disgruntled and walked out of the House. The remaining ruling members who remained in the House took over the seats on the opposition side upon being advised by the Speaker of Parliament.

That could not amount to crossing the floor of Parliament as envisaged in law.

It is within the powers of the Speaker, depending on the circumstances obtaining at a particular moment, to permit Members of Parliament to sit at particular places in the Chamber of Parliament. This Court received no credible evidence to the effect that the Hon. Speaker prejudiced any Member of Parliament, by the way she permitted members to sit in Parliament during the debate of this Bill.

Proceeding on the bill in absence of the leader of opposition and other opposition members

Business of Parliament can go on in the absence of the leader of the opposition, opposition chief whip and opposition members of parliament as long as there is the requisite quorum in Parliament. Indeed under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

The Leader of the Opposition, Opposition Chief Whip and other opposition members walked out voluntarily when the impugned Bill was tabled for debate. Further, in the course of debating the Bill, the Leader of Opposition and the other Honourable Members returned to parliament and participated in the debate of the Bill.

Smuggling of the motion to introduce the impugned Bill onto the order paper

7 **Appellants**

Regarding the issue of Smuggling of the motion to introduce the impugned Bill onto the order paper, counsel submitted that the Bill leading to the enactment of the impugned 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 by virtue of the fact that the same was smuggled onto the order paper.

14 That in his lead judgment on this issue, Owiny Dollo, DCJ held that the Speaker enjoyed wide, and almost unfettered, discretionary powers to determine the Order of Business in the House and as such 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 of Owiny Dollo, DCJ was
21 an erroneous conclusion which is 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. In the proviso to the said rule the Speaker is only given a prerogative to determine the order of business in Parliament.

He contended that the evidence on record specifically under
28 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 Rt. Hon. Deputy Speaker assured the house that there was not

going to be any ambush to MPs as far as handling the impugned Amendment Bill was concerned because there was a lot of anxiety and that the order paper will reflect the day's business. On 20th September 2017 the Rt. Hon. Deputy Speaker repeated the same thing and assured Members that nothing would be done in secrecy since all business has to go through the Business Committee under Rule 174. However, the bill was never presented in the Business Committee for appropriate action and consideration.

He therefore argued that the Members of Parliament were taken by surprise on the 26th day of September 2017 when Rt. Hon. Speaker amended the order paper on the floor of the house to include a motion by Hon. Magezi that sought leave to introduce a private member's Bill to amend the constitution. Efforts made by the shadow Minister of Justice and Constitutional Affairs, Hon. Medard Sseggona MP Busiro East and other MPs to raise procedural matters specifically the fact that there were other motions which had preceded this one were futile.

Counsel contended 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. In Rule 29 that there must be a weekly order paper including relevant documents that shall be distributed to every Member through his/her pigeonhole and where possible, electronically. All these Rules were flagrantly violated.

Respondent's case

The Attorney General refuted the appellants' contention that the Bill from which the impugned 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), the 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 was undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill 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 she 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) old and 24(q) new that provides for an Order of precedence and therein the 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 It 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 prior. 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 required procedure, up to its enactment.

Court's considerations,

Article 94 of the constitution provides that ;

"Subject to the provisions of this constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees.

Clause (4) of the same is to the effect that the speaker shall determine the order of business in Parliament and shall give priority
7 to government business. **Rule 25** re echoes the above provision. It further provides in **sub rule (2)** that the business for each sitting as arranged by the business committee shall be set out in the order paper subject to the speakers overall owners to determine business for the day.

It follows therefore that the speaker has the key powers to determine the business on the order paper. I find no irregularity.

14 **Waiver of Rule 201**

there is no dispute that Parliament has the right to suspend its own rules if the motion to do so is seconded under rule 16 of the Rules of Procedure. Although it is true that the motion to suspend rule 201(2) was not seconded, this was not fatal to the subsequent legislative process.

21 The proceedings in the exhibited Hansard of Parliament indicate that the Speaker pointed out to the members that they had received copies of the report on their ipads four days prior to the sitting in question. Although the electronic transmission of the committee report to the Members of Parliament does not adequately satisfy the requirements of Rule 201(2), I am of the view that the spirit of the rule was complied with.

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The purpose of the rule is clearly, to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament. The

Members of Parliament obtained copies of the Report in issue four days before debating the same. Consequently, the purpose of rule 201(2) was achieved.

The requirement for secondment in the said rule is merely directory and not mandatory given the purpose of "secondment" as I will briefly explain.

The motion moved by the Deputy Attorney General, to suspend the operation of rule 201(2) was carried through since it was never objected to by any one and the house proceeded to act on the same by commencing debate of the Committee Report.

The bone of contention is whether the debate could continue without the motion being seconded. The motion was moved when the Parliament was sitting as a committee of the Whole House and under Rule 59(2) of the rules of Parliament, there is no requirement for secondment of motions moved in committee meetings.

I have perused Article 79 (1) (2) which empowers Parliament to make laws in Uganda. I have also considered Article 262 that allows Parliament to amend provisions of the Constitution, as well as the Rules of Procedure of Parliament that regulate debate and proceedings in Parliament. I have not come across any specific provision, and none was cited to us as making it 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 the Members of Parliament. In my view,

the only condition precedent set under Article 262 is the requirement for the Bill to be supported by 2/3 of all the Members of Parliament.

Be that as it may, from the Hansard, 124 Members of Parliament had contributed before the Speaker closed the debate. The Leader of opposition raised her concern about being denied an opportunity to give the views of her people. In reply, the Speaker blamed her for wasting time that should have been used for more Members to debate.

I find that the Leader of Opposition equally frustrated the Speaker's effort to have more members contribute to the debate. This however, did not adversely affect the passing of the Act.

ISSUE 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?"

Appellant's submissions;

Violence within the chambers of parliament.

The appellants contended that the incumbent used force, violence and unlawful means to amend the constitution contrary to article 3(2) of the Constitution which prohibits the use of violence and unlawful means to amend or overthrow the Constitution and that the

forceful removal of the MPs on the 27th September, 2017 amounted to a treasonous act under Article 3(2) of the 1995 Constitution.

7 They faulted the Constitutional Court for failing to make specific findings on whether the acts of violence against the Members of Parliament and the public had a chilling effect on those who wished to participate in the consultations and eventually on the way members of parliament who would otherwise have voted against the amendment voted for fear of being harmed.

They further contended that the constitutional court erred when it
14 found that the affected members of parliament misbehavior led to the loss of the right to personal liberty, and that had they found that the members of parliament had not misbehaved, they would have reached a different conclusion.

They submitted that the constitutional court's finding that the invitation of the security backup from the police was unnecessary and unfounded.

21 Counsel submitted that the learned trial Justices of the Constitutional Court erred in law and fact when they held that the violence inside and outside Parliament during the enactment of the Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Counsel for the 3rd appellants faulted the Constitutional Court for its failure to make specific findings on the contravention of articles 23,
28 24 and 29 of the constitution therefore leading to the lack of any declarations or redress as required by Article 137 of the Constitution

for the contraventions. He argued that the 3rd appellant specifically made pleadings and adduced evidence to that effect. He referred this court to Constitutional Petition No. 3 of 2018 paragraph 1(f) of the petition in which it was averred that the acts of security forces in entering Parliament assaulting, arresting and detaining members of Parliament was inconsistent with Articles 23, 24 and 29 of the Constitution which guarantee freedom from inhuman and degrading treatment and freedom of speech among others. He argued however that the respondent's answer did not traverse this averment.

He further argued that the violence inside Parliament included the arrest, assault ,detention of members of Parliament and their forceful exclusion from representing the Constituents and that the actions complained of violated several provisions of the Constitution. Appellants further argued that the respondent did not adduce any evidence to the contrary but merely denied that the actions of the security forces in entering Parliament and removing members of Parliament did not contravene Articles 23, 24 and 29 of the Constitution.

He contended that the respondent did not lead any evidence to the contrary and that the appellant's evidence remained unchallenged which required the court's pronunciation on the matter.

The appellants contended that the Constitutional Court erred when it failed to find that the actions of the security forces against the members of parliament contravened Article 24 which deals with

respect for human dignity and protection from inhuman treatment and that the MPs immunities and privileges as guaranteed under Article 97 were taken away and that had the learned justices in the lower Court addressed themselves to the pleadings and affidavits they would have held that there was contravention of Article 24 and would have made a declaration to the effect and given redress.

He contended that although majority justices accepted that there was evidence of the contraventions complained of, they wrongly justified the violations as being justified under Article 43 which permits certain limitations of rights in specific circumstances.

The appellants opposed the court's reliance on article 43 as justifications for the contraventions arguing that entry into Parliament by security officers, arresting, assaulting and detaining members does not fall under the circumstances under which a person's right to personal liberty is permitted especially since members were not only evicted but held without charge in places of detention. He cited the case of **Onyango Obbo and Anor vs. Attorney General** for the limitations permitted under article 43 of the constitution. He further argued that the onus was upon the respondent to show that the limitation to liberty was necessary in order to protect the fundamental rights of others or in public interest and that the limitations met the standard of being demonstrably justifiable in a free and democratic society and that the respondent failed to discharge this burden.

Suman Mugenyi circular.

Counsel for the appellants contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting and that the said directive was complied with by all police personnel. The Police in blocking the said consultations invoked the directive of the Director of operations, Asuman Mugenyi, which directive was unanimously declared unlawful, arbitrary, obnoxious, unfortunate and unconstitutional. This was so because the effect of the said directive was to curtail and restrict the conduct of consultative meetings. The same was calculated and aimed at muzzling public participation and debate on the proposed amendment bill.

Counsel for the appellants specifically in Constitutional Appeal No. 3 of 2018 submitted that opposition members of Parliament were denied the opportunity and right to engage the people over the bill and specifically Article 102(b). He submitted that public gatherings for members who were perceived to be against the constitutional amendment especially opposition members of Parliament were blocked, and those that defiantly held these public gatherings were violently dispersed by the police and other security agencies. He further contended that Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment. He referred court to the affidavits of Hon. Winfred Kiiza, Hon. Odur Jonathan Hon. Karuhanga, Hon. Ssewanyana and Hon. Munyagwa, Hon. Betty Nambooze volume 1 of the record of Appeal). These affidavits were all to the effect that the police disrupted the joint consultative meetings on the Constitution

(Amendment) Bill, 2017 citing the directive issued by Asuman Mugyenyi, the Head of Operations, Uganda Police Force.

He contended that whereas the Constitutional Court unanimously correctly declared unconstitutional and unlawful, the directive by Asuman Mugenyi, the same court erred when it found that there was no evidence to demonstrate that the directive was ever implemented and that it had adversely affected the entire consultation process.

Respondent's submissions.

The learned Attorney General on the other hand supported the decision of the Learned Justices of the Constitutional Court who found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act, 2018 did not amount to a breach of the 1995 Constitution of the Republic of Uganda sufficient to justify a declaration of the whole process as unconstitutional.

The respondent firstly argued that this issue raised by the appellants about Article 3(2) was never raised in the Constitutional Court and therefore offends rule 82 (1) of the Judicature (Supreme Court Rules) Directions having not been raised at the Constitutional Court level. In the alternative, he argued that the Constitution was amended in accordance with the law contrary to the allegations of the appellants and that the said amendment was done with the full participation of the Members of Parliament after consultation and this contention should be dismissed. He thus prayed Court to find

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 Constitutional Amendment Act No. 1 of 2018.

The Attorney General referred court to the evidence of Ms. Jane L. Kibirige, the Clerk to Parliament, Mr. Ahmed Kagoye, and the affidavit by Twinomugisha Lemmy and the Hansard of Parliament that clearly illustrates that the proceedings of Parliament on the 21st, 26th and 27th September 2017 were characterized by unprecedented chaos, disorder and misconduct from the Hon. Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House. He argued that it was the defiance of the speaker's orders to exit the parliamentary chamber that necessitated the intervention of the army and the Uganda Police Force.

He relied on rule 80, 85, 88(6) rule of Part XIV of the Rules of Procedure which requires that when the speaker of the Parliament of Uganda was enacted that provide for Order , and also requires the Sergeant at Arms to enforce the orders of the speaker. He argued that the appellants' submission that the suspension and eviction of the Members of parliament contravened the members' right to personal liberty and freedom of association and freedom from inhuman and degrading treatment is untenable because the said rights though guaranteed under the constitution are not absolute. He relied on Article 43 that prohibits enjoyment of guaranteed rights in a manner that is prejudicial to the rights and freedoms of others in public interest. He thus argued that in the

instant case the public interest was the much needed debate on the Constitutional (Amendment) Act No. 1 of 2018

7 He referred this Court to the Hansard of Parliament where the Rt. Hon. Speaker clearly explains the reason for the suspension of the twenty five (25) MPs. After issuance of the suspension order, the Members of Parliament chose to refuse to leave the House and this forced the Sergeant at Arms to order the security forces to forcibly remove them from the House.

The respondent argued that it is not true that the Justices of the
14 Constitutional Court failed to address the allegation that the violence had a chilling effect on members of the public that wished to participate and other members of Parliament which had the effect of vitiating the entire process of the enactment of the Constitution (Amendment) Act No. 1 of 2018. He contended that their lordships of the Constitutional Court considered the evidence of Mr. Frank Mwesigwa and other evidence on record regarding the
21 consultation process that shows that the consultation process was free from violence to reach the conclusion that although there was indeed violence, intimidation and restrictions imposed on Members of Parliament and the public during the process of enacting the impugned Act, there is no evidence that the entire process was vitiated as a result.

Respondent's submissions on violence.

28 The Respondent submitted that the Learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution

(Amendment) Act, 2018 did not amount to a breach the 1995 Constitution of the Republic of Uganda sufficient to justify a declaration of the whole process as unconstitutional and therefore prayed this Honorable Court to uphold the decision of the Constitutional Court.

The learned Attorney General submitted that the evidence on record clearly illustrates that during the conduct of the debate of Constitutional (Amendment) Bill No. 2 of 2017 MPs behaved in a manner unbecoming of members of parliament and that these actions eventually culminated into the defiance to the orders of the Speaker to conduct the debate.

Resolution.

The appellant argued that the incumbent president used force and unlawful means to amend the constitution contrary to article 3(2) of the Constitution**.** The respondent argued that this issue was never raised in the Constitutional Court and that therefore it offends rule 82 (1) of the Judicature (Supreme Court Rules) Directions I having not been raised in the Constitutional Court.

I will first of all point out that the respondent's assertion that this point was not raised at the constitutional court is not true. Paragraph 15 of the affidavit in support of the petition of Ssewanyana Allan MP, Makindye West Constituency clearly covers this point.

I will now determine the issue as to whether violence was used in the enactment of constitutional (amendment) Act, No. 1 of 2018.

Article 3(2) of the Constitution states as follows;

"Any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law."

The appellants rightly submitted that a Member of Parliament is entitled to enjoy the rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and be accorded the privileges accruing to him or her as such under the 1995 Constitution.

Article 97 (1) that provides that;

"The speaker, deputy speaker, members of parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of parliament or any of its committees shall be entitled to such immunities and privileges as parliament shall by law prescribe."

Parliamentary Privilege is defined by **The Collins Dictionary** as the legal immunity allowing law makers to speak without being subject to the usual laws of slander.

The term privilege therefore does not mean any special benefits or entitlements enjoyed by members of parliament or state legislators. It is rather the immunity from ordinary law to enable legislators carry out their primary functions of legislating, debating and inquiring more freely, effectively and independently.

In the case of **Tejkiran Jain vs. N. Sanjeeva Reddy** (1970 (2) SCC 272, the Supreme Court of India in dealing with judicial immunity and privilege stated that the immunity is in respect of anything said in Parliament.

The appellants argued that the privilege and immunity of the members of parliament were breached when they were violently thrown out of the August house by security operatives under the watch of the sergeant arms.

I disagree with that submission. Immunity and privilege is limited to only speech and as such are not protected under article 97(1) of the Constitution. The events that transpired in Parliament during the proceedings of the 21st, 26th, and 27th September as captured in the affidavits of Jane Kibirige, the Clerk to Parliament and Ahmed Kagoye, the Sergeant at Arms and the affidavit evidence of Hon. Betty Nambooze, Hansard of Parliament evidence were on speech related. The Rt. Hon. Speaker of Parliament called upon members of parliament to maintain order and decorum and allow the debate process to proceed in vain. The speaker's powers during proceedings in Parliament are provided for in **Part XII of the Rules of Procedure of parliament** specifically **Rule 77 and 80(6)** provide for maintenance of decorum and discipline. They provide interalia that;

Whereas a Member of Parliament has a right to participate in proceedings of Parliament, to enable him or her express the will of the people he/she so represents, this right is not absolute. It is subject to limitations if his / her conduct is disruptive to parliamentary proceedings

Article 79(1) of the Constitution gives *Parliament power to make laws on any matter for the peace, order and development and good governance of Uganda.*

Article 94(1) provides that;

"Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees."

Rule 85 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) provides that;

"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 83 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."

All the aforementioned laws were enacted that provide for Order in the House. The Hansards on page 4702 reflect the following events;

> **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.

It is further indicated in the transcript of the 27th day of September, 2017, where the Speaker stated as follows;

"Speaker: 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."

The Speaker invoked her powers under Rule 7(2), 77, 79(2) and 80 of the Rules of Procedure of Parliament to name and order the immediate withdrawal from the House of any member whose conduct is grossly disorderly, and to suspend any misbehaving member. She named 25 Members of Parliament and invited them to exit the House within 30 minutes. The Sergeant at Arms was instructed to ensure that the suspended members exit the chambers of parliament. In the process of execution of the order of the Rt. Hon. Speaker, there was a scuffle arising out of failure by the named Members of Parliament to exit the House, which caused their forceful

eviction by the staff of the Sergeant at Arms and security officers, who caused the Members of Parliament subsequent arrest and detention.

What happened during the eviction can be gleaned from the interjection of Hon. Winfred Kiiza who stated:-

> ***"Madam Speaker, I cannot just pretend that life is as usual. I cannot pretend that it is business as usual. What has just happened to Members in this Chamber, Madam Speaker, is something we should not just ignore. Members were brutally moved out of the Chamber by the SFC_ (interjections)."***

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 Rt. Hon. Speaker were 'acceptable and demonstrably justifiable' under Article 43(2) of the 1995 Constitution. **Charles Onyango Obbo and Andrew Mujuni Mwenda versus the Attorney General, Constitutional Petition No. 19/1997**, where 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 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."

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 cited with approval a Canadian case at page 12 para 4, the Supreme Court in **The Queen Oakes [1987] (Const) 477 at 498-9** said:-

"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 rights, commitment to social justice and equality, <u>accommodation of a wide variety of beliefs</u>, 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".

7 The evidence led by the Sergeant at Arms and the Clerk to Parliament that on the 21st, 26th and 27th September 2017 the House experience 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 Hon. MPs.

The justices of the Constitutional Court rightly found that the Rt. Hon. Speaker is empowered to maintain order, discipline and decorum in
14 the House. Such powers obviously should include the power to exclude any member from Parliament for temporary periods, where the conduct of or actions of such a member is unbecoming. This is necessary for the smooth operation of the multiparty system of politics

The role of the Speaker as a pivot under Part XIII of the Rules of Procedure cannot be overemphasized for all matters parliamentary.
21 She is charged with maintaining internal order and discipline in its proceedings.

The Attorney General correctly cited the case of **Twinobusingye Severino vs. Attorney General Constitutional Petition No. 47/2011** @ 24 Court observed interalia that;

> *"We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say*
> 28 *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."

Under the 1995 constitution, MPs enjoy rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and enjoy the privileges as enshrined in the 1995 Constitution. However, the enjoyment of such rights as illustrated above is valid only if it is done in a manner that is "***acceptable and demonstrably justifiable in a free and democratic society*"** as illustrated in Article 43(1):

"In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest."

Article 43(2)(c) defines ***public interest*** under this Article ***not to permit any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.***

The ambit of what is acceptable and demonstrably justifiable" under Article 43(2) of the 1995 Constitution was defined in the case

of **Charles Onyango Obbo & Andrew Mujuni Mwenda vs. Attorney General in C.P. 15/1997 @ 33.**

"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 must show that the means chosen are reasonably and demonstrably justified. This involves a form of PROPOTIONALITY 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."

The orders of the Speaker to maintain decorum should have been adhered to by the offending Members of Parliament.

I will refer to the judgment of Her Lordship Justice Elizabeth Musoke where she states that;-

"It is clear from the available evidence that public interest was curtailed when a group of Members of Parliament by their conduct made it impossible for the debate process of the Bill to proceed peacefully. There was need for reasonable force to be used to ensure that order was restored within the precincts of Parliament."

The Respondent prayed court to invoke employ the principle of harmony and completeness in the interpreting the Constitutional provisions relating to this issue. He rightly relied on the case of **Hon. Lt. (Rtd) Kamba Saleh & Another Versus Attorney General & Four Others Consolidated Petitions Constitutional Petition No. 16 of 2013 where it was held that**.

"The entire constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness."

The immunity and privilege of members of parliament do not extend to disruption of other peoples' representatives right to debate and the disruption of the conduct of Parliamentary business.

The Rt. Hon. Speaker clearly had the powers that are derived from the 1995 Constitution to suspend the MPs who had participated in the violence in the chambers and the order was executed during the sitting of the House.

The Appellants misconstrued this *Article 3 (2) of the Constitution* as this was a singular event that came about due to the misconduct of the MPs whereas the debate, passing and eventual enactment of the Constitutional (Amendment) Act No. 1 of 2018 was a process.

The public interest was the debate in Constit*utional (Amendment) Bill No. 2 of 2017* which needed to be conducted in a manner that promoted debate by members across the political spectrum as the

matter were clearly of high national importance and so the speaker did as expected to maintain decorum in the house.

Violence outside the house.

Public participation is an essential and integral part of our Constitution as provided for under Article 1.

Article 1(1) provides interalia that;

"All power belongs to the people who shall exercise their sovereignty in accordance with the Constitution."

It is against this background that on the 3rd October, 2017, after the bill was presented for the 1st reading and later referred to the committee on Legal and Parliamentary Affairs, the Speaker of Parliament advised the members of the House to consult with the people in their respective constituencies in the process of enactment of the impugned.

However on the 16th October, 2017, Asuman Mugenyi sent out a circular to all police stations country wide which read as follows;

"…..DATE: 16 OCT 17

REF: OPS/234/214/01(.) CONSULTATIVE MEETINGS BY MPS ON ARTICLE 102(b) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA.

AS YOU ARE AWARE, THERE IS A PROPOSAL TO AMMEND ARTICLE 102(b) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA TO REMOVE PRESIDENTIAL AGE LIMITS (.) MPS ARE TO CONSULT IN THEIR RESPECTIVE CONSTITUENCIES TO SEEK THE VIEWS OF THE ELECTORATE (.)

DURING THE CONSULTATIVE MEETINGS ENSURE THE FOLLOWING; - (.)

1. *MPS SHOULD STRICTLY CONSULT IN THEIR CONSTITUENCIES*
2. *THOSE MPS MOVING OR INTENDING TO ,OVE IN ORDER TO SUPPORT COUNTERPARTS OR CONSULT OUTSIDE THEIR CONSTITUENCIES MUST BE STOPPED ® MUST BE STOPPED(.)…"*

The wording of the said circular is very clear and unambiguous. Members of parliament were to be confined to their respective constituencies in as far as consultation with the people on the Constitutional (Amendment) Bill 2 of 2017 was concerned.

The appellants led evidence to prove that the said directive was enforced especially against members of the opposition. Hon. Odur Jonathan, MP Erute County South in his affidavit in support stated that on the 24th October, 2017 a consultation gathering at Adyel Division in Lira District that was being attended by himself 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 among others was violently dispersed by firing live bullets and tear gas.

The Uganda Police Force should be non-partisan and should also try as it might to avoid the perception of being partisan

However, despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of the members of Parliament, in the manner that came out in evidence, the evidence on record points to the fact that the ramifications of the interventions did not vitiate the process in Parliament that

resulted in the enactment of the Constitution (Amendment) Act in any way.

Hon Robert Kyagulanyi is on record as having traversed the whole country; whereas he established that the majority of the people wanted the Constitution to be left intact. Parliament continued with its business, apparently after realising the folly of turning weapons at each other. On the evidence, there was always a full House when the Speaker put the question for a vote.

Hon. Betty Nambooze deponed in paragraph 16 of her additional affidavit that she was intercepted by security personnel who pounced at her and dragged her towards the southern wing, violently threw her down and she landed on her back where they continued beating and kicking her. She had to undergo spinal surgery for Posterior spinal decompression and fusion L4-L5 for lumbar canal stenosis which was attributed to excessive force inflicted on her.

Counsel for the appellants argued that the violence had a chilling effect on the members of parliament and other persons who wished to participate in the proceedings. Much as I agree that this prevented some people in the affected constituencies from being consulted, appellants did not however lead any evidence to show the violence affected the way any of the opposition members of parliament voted. It is on record that all opposition members of parliament voted against the enactment of Constitutional (Amendment) Act No. 1 of 2018 and therefore this is proof that the said intimidation did not in any way affect their zeal.

In the end, I find that the violence though evidenced in some instances, it did not affect the enactment. The members of parliament such as Namboze Bakileke who were manhandled and tortured to the extent of sustaining grievous bodily harm were indeed violated against and therefore should seek redress under article 50 of the constitution which provides for enforcement of rights.

This ground must therefore fail.

Issue four

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

Appellant's case

The appellants submitted that under Article 137 of the Constitution, the constitutional court has no jurisdiction to apply the substantiality test. Counsel's argument was that the court is limited to determining whether the Act / act in question is in contravention with the provisions of the Constitution and not the extent of contravention nor whether the contravention affected the resultant action in a substantial manner.

He stated that the substantiality test applies in cases where it is expressly provided for by the law for example the Presidential Election Act and Parliamentary Election Act. He added that nowhere is it provided for in the Constitution.

Counsel further contended that substantiality cannot be applied because there was no legal and factual basis for not nullifying the entire process amidst several unanswered questions like why was the

bill introduced by a private member and not by the Government which is to be answered and determined by this court.

Counsel contended that that the constitution being the supreme law of the land provides no room for any form of violation. Counsel argued that the justices of the Constitutional Court breached their primary mandate of jealously guarding the constitution by creating room for certain individuals and agencies of government to violate the constitution with impunity. Counsel relied on the case of **Paul K. Semogerere & 2 Ors Vs Attorney General SCCA No. 1 of 2002** where it was held that the constitutional procedural requirements are mandatory.

Respondent's case

The respondent submitted that the constitutional court correctly applied substantiality test and in so doing reached a proper conclusion.

Counsel defined the term substantial in the **Black's Law Dictionary** as "Being significant or large or having substance."

He submitted that in the case of **Kiiza Besigye vs Yoweri Kaguta Museveni Election petition No. 1 of 2001** court relied on the substantiality test to determine whether the procedural irregularities and noncompliance's of the electoral commission had a substantial effect on the election results.

He further argued that the substantiality test is used as a tool of evaluation of evidence therefore faulting the court of applying the substantiality test is an absurdity as it would be barring them from using a tool of evaluation while determining a matter before it.

Counsel cited the case of **Nanjibhai Parabudas & Co. Ltd vs Standard Bank Ltd (1968) E.A 670** where court held that court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself nullity unless the incorrect act is of the most fundamental nature.

Counsel explained that there was general compliance with the constitutional requirements and procedure for the enactment of the impugned Act.

Counsel submitted that 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 was not sufficient to nullify the entire process.

He explained that the qualitative requirements appraise the entire legislative process prior to and during tabling motion for leave , tabling bill for first reading, consideration by the committee, debate, voting and assent to the Bill and thus there was substantial compliance.

Counsel stated that the two tests were expounded on in the cases of **Winnie Byanyuma vs Masiko Winnie Komuhangi & Ors HTC-OO-CV-EP-004-2001** where it was observed that;

"the quantitative test was said to be the most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair."

That dependant on that, the justices of the Constitutional court found that the few instances of irregularities did not adversely affect the process of passing the impugned Act.

Counsel further argued that the question for this court to determine is whether the court was wrong to use that test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

That the appellants did not adduce credible evidence to show that such violence and intimidation affected the validity of the impugned bill.

Counsel further argued that it is trite under common law that whoever alleges must prove therefore it is the appellants who bore the burden of proof to prove the alleged facts to a certain standard of proof.

Counsel contended further that the form of evidence that was presented in the constitutional court was both oral and affidavit evidence which evidence after thorough scrutiny did not support the appellants' several allegations neither did they disclose any profound irregularities in the management of the legislative process of the enactment of the said Act or that the participation of some members was gravely affected.

He concluded by inviting court to uphold the findings of the lower court that the alleged irregularities are mere technicalities.

Court's considerations

The appellant's case is that the substantiality test does not apply in
7 matters of constitutional interpretation. The constitutional Court used this test in various areas of resolution especially when evaluating the evidence regarding procedure and violence.

The Constitutional Court is a creature of the constitution and its jurisdiction is well laid in Article 137 of the Constitution and it provides that;

137; *Questions as to the interpretation of this constitution*.

14 **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**

(2) …….

(3) A person who alleges that;

(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

21 **(b) Any act or omission by any person or authority,**

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

(4) …….

(5) ……..

(6) ……..

28 The nature of jurisdiction embodied in Article 137 is rather plain. The function of the constitutional court is to hear a constitutional petition,

evaluate the evidence forwarded by both parties and make declarations as to whether the alleged provisions of the constitution were contravened or not.

The jurisdiction of the constitutional court is also encompassed in Article 2 of the Constitution which provides that if any other law or any custom is inconsistent with any of the provisions of the constitution, the constitution shall prevail and the other law or custom shall to the extent of the inconsistency be void. It follows that after the constitutional court has declared an Act or act unconstitutional, it shall be null and void. I agree with the submissions of the appellants that nowhere in the constitution does the constitutional court have powers to determine the substantiality of the contravention or how fatal the contravention is nor its effect.

The constitutional court is the custodian of the constitution and constitutionality. Its main duty is to ensure the rigidity of the Constitution and compliance with of laws and actions with the Constitution.

In exercising its duties the Constitutional Court is guided by Article 126 (2) € of the Constitution, which is to administer substantive justice Article 137 (3) and (4) outlines the jurisdiction of the Constitutional Court as follows:-

(3) Any person who alleges that

a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

b) Any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this

Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of the article, the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may;

a) Grant an order of redress, or

b) Refer the matter to the High Court to investigate and determine the appropriate redress.

It is clear from the above provisions that once a petition is presented, the Court automatically grants a declaration. The court has discretion to grant or not to grant a declaration. The court also retains discretion whether to grant a redress or not. In exercising the above discretion, it is trite that Court looks at the evidence adduced by the petitioner to determine whether the same is substantial to warrant a declaration or redress sought. This is the essence of substantiality test. I agree with the learned Attorney General that substantiality was a tool of evaluation of evidence available to the Constitutional Court while determining the Constitutional Petition.

In the instant case, the Constitutional Court applied substantiality test and found that there wasn't sufficient evidence to prove that the scuffles and interferences affected the entire process of passing the impugned bill into law. The burden of proof was on the petitioners to adduce substantial evidence.

I do not agree with the contention of the petitioners that substantiality test only applies in election petitions and not in Constitutional Petitions. This is because both petitions require quantum and quality of evidence presented to satisfy court that what the Constitution envisaged was violated. See; **Amama Mbabazi v Yoweri Museveni & 2 others, Presidential Election No. 1 of 2016**.

In conclusion, I agree with the contention of the Attorney General that the evidence did not disclose any profound irregularity in the management of legislative process for the enactment of the impugned Act nor did it prove that the participation of some members of parliament was gravely affected, after applying the substantiality test. The parts that were so affected were rightly served by the Constitutional Court.

This issue is answered in the negative.

ISSUES 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?"

<u>Appellants' Submissions</u>

Counsel argued that despite the appellants' submissions in the lower court, the court did not consider the appellant's arguments that Section 3 of the impugned Act contravened Articles 8A and 38 of

the Constitution. Counsel submitted that if the court had considered the Appellant's case, it would have come to a different conclusion.

7 He explained that the aforementioned provisions are to effect orderly succession and peaceful transfer of power as a principle of democracy. He cited the case of Sekikubo vs Attorney General which deals with application of democratic principles.

Counsel further contended that the evidence on record proves that consultations were marred with violence, harassment, humiliation, assault and detention, all of which negate a conducive atmosphere
14 to genuinely seek the views of the people.

He contended that, had the Court held that orderly succession is one of the principles of democracy, it would have come to the conclusion that given our history, removal of the age limit is in conflict with orderly succession and peaceful transfer of power and therefore inconsistent with Articles 1 8A and 38 of the Constitution and hence nullify the Act.

21 Appellant submitted that the constitutional Amendment Act No.1 of 2018 is a constitutional replacement. He explained that what is at stake is the qualifications of a fountain of honour. He submitted that since the office of the presidents is vested with too much powers and functions, the office should not be held by a too young person or a very old person.

He argued that in Columbia, the president Alvaro Uribe instigated a
28 constitutional amendment with the purpose of making him eligible to run for president for the third time. The amendment was considered as re writing the constitution and therefore unconstitutional.

Mabirizi contended that Constitutional Amendment Act No.1 of 2018 was brought purposely to enable the president who by the next election will be 75 years and not eligible to be contest. He stated that it was an illegal intention and this court should not uphold an illegality.

He argued that Parliament lacked power to make the amendments removing the age-limit, a very essential component in our Constitution.

That majority justices justified their decision not to nullify removal of age-limits on the reasoning that the framers of the Constitution never treated the provisions of Article 102 on age limit for president as a fundamental feature of the Constitution. In this, they underestimate the decision of the framers to include it in the Constitution, hence weakening their basis of including the provision.

He concluded that, upholding of section 3 of the Act will disharmonise the constitution so as to render among others articles 51(3), 144(1)(a) & (b), 146(2)(a) & 163(11) unconstitutional, which is against the spirit of the Constitution and will open a flood-gate of private members' bills to amend those articles which have age restrictions.

Respondent's Submissions

Counsel submitted that it was not true that sections 3 and 7 of the impugned Act which scrapped the age limit qualification for election to the office of the President and district Chairperson amended Article 1 of the Constitution by infection. They further

contend that Parliament also amended Article 21(3) of the Constitution creating another form of discrimination to wit; age.

7 Counsel for the respondents contended that the Justices of the Constitutional Court correctly directed themselves to the law by holding that amendment of articles 102(b) and 183(2)(b) did not in any way infect Article 1 of the Constitution.

He cited Article 1 which states that, all power belongs to the people who shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair
14 elections of their representatives or through referenda.

That Parliament is enjoined to make laws under Article 79 and 259 and this power is exercised through bills passed by Parliament and assented to by the President.

Counsel submitted that the Justices of the Constitutional Court were unanimous and rightly held that this power extends to Articles 102 and 183. The Justices of the Constitutional Court rightly observed that
21 Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b).

He contended that, contrary to the appellants' argument in C.A No. 3/2018 that the amendment takes way the sovereignty of the people of Uganda enshrined under Article 1, the respondents agree with the finding of the Court that in amending Articles 102 (b) and
28 183 (2) (b), the sovereignty of the people is not infected at all.

In contrast, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to

the office of the president. According to counsel, the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

Counsel agreed with the finding of the Constitutional Court that the amendment of Article 102 (b) did not in way infect the provisions of Article 21 (3) of the Constitution.

Counsel submitted that the Justices of the Constitutional Court considered the evidence adduced and rightly came to the conclusion that amendment of articles 102 and 183 did not in any way contravene and or infect Article 21 (3) of the Constitution.

Counsel concurred with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. He averred that Article 102 (b) provides that; - a person is not qualified for election as President unless the person is not less than thirty-five years and not more than seventy-five years of age. According to counsel, the amendment of Article 102(b) did not undermine any of the 63 provisions of the Constitution cited by the petitioner or any other provision of the Constitution. Counsel contended that the learned Justices of the Constitutional Court rightly directed themselves to the law in holding that amendment of Article 102 (b) did not amount to Constitutional replacement of Article 1.

Counsel submitted that Article 1 (1), 1 (4) illustrates that power belongs to the people and is exercised through elections of their representatives. According to counsel, the Justices of the

Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). He cited Article 259 of the Constitution which vests Parliament with powers to amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in Chapter Eighteen. That this power extends to Articles 102 and 183. Counsel entirely concurred with the Constitutional Court that the qualifications for election to the office of the President and Local Council V Chairpersons can and should be amended by the people's representatives where circumstances that necessitate the change arise. He added that the appellant's argument that upholding section 3 of the Amendment Act will disharmonize Articles 51(3), 144(1)(a) and (b), 146(2)(a) and 163(11) of the Constitution is speculative and lacks merit. He stated that upholding the appellant's argument would curtail the right of Members of Parliament to bring bills in accordance with Article 94 (4)(b) of the Constitution.

Counsel argued that the amendment of Article 102 (b) was not a Constitution making process that requires a Constituent Assembly. According to counsel, it was an amendment process which the peoples' representatives are empowered to do in accordance with Chapter Eighteen of the Constitution.

Counsel agreed with the finding of the Constitutional Court that the amendment of Article 102(b) and 183 did not contravene any provisions of the Constitution.

He further submitted that the 3rd appellant raised no grounds in reference to this particular issue and that therefore their submissions offend rule 82 of Judicature (supreme Court Rules) Directions which are mandatory. He prayed that the 3rd appellant's submission be disregarded by court.

Counsel submitted that without prejudice to the above, the appellants argued that had the Constitutional Court considered their submissions in regard to the infection of articles 8A and 38 of the Constitution by the amendment to Article 102 (b), Court would have come to a different conclusion.

Counsel emphasized that the Constitutional Court considered all the evidence and authorities that were adduced and made a finding that the enactment of section 3 was not inconsistent and or in contravention with Articles 1, 8A and 38 of the Constitution.
The appellants contended that parliament did not carry out consultation prior to enactment of the Constitutional Amendment Act No. 1 of 2018 which amounted to violation of the people's sovereignty under Article 1, 8A and 38.

Article 8A (1) provides that Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

Article 38 provides that every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law. It further provides that

every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organizations.

Counsel contented that, whereas there was no legal requirement for consultation prior to amendment of articles 102 and 183 but none the less, there is evidence on record that consultations were conducted throughout the country and that parliament sought the people's views prior to amending the said articles the Court considered all the evidence adduced in regard to the issue of consultation and participation of the people in the enactment of Constitutional Amendment Act No. 1 of 2018 and came to a conclusion that the Members of Parliament carried out consultations prior to enactment of sections 1, 3, 4 and 7 of the Act

He pointed out that the appellant conceded that indeed there was consultation in respect of the removal of age limit. He invited court to take notice of the appellants' agreement that indeed there was consultation in total compliance with articles 38 and 8A and uphold the Constitutional Court's decision on this issue.

Counsel submitted that court further held that the said consultations were adequate basing on the evidence adduced. That the Justices of the Constitutional Court were not convinced by the appellants argument that there was no adequate consultation and that the process of consultation was marred with interference and restrictions which hindered proper consultations. Court cited various incidents from the Hansard and the evidence adduced in court which proved that the Members of Parliament had held adequate consultations.

Counsel submitted that on the whole, circumstances permitted the honourable members of parliament to consult and provide an input in those amendments that were ultimately enacted into sections 1,3,4 and 7 of the Constitution Amendment Act No. 1 of 2018.

Counsel submitted that, contrary to the appellants' argument in C.A No. 3/2018 that the amendment of Article 102 (b) takes way the sovereignty of the people of Uganda enshrined under Article 1, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to the office of the president. He argued that the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 as well as articles 8A and 38 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

According to counsel, the amendment did not in any way take away the people's right to choose who leads them in free and fair elections held regularly every five years. That it is on this basis that the Constitutional Court found that the enactment of sections 3 and 7 of the Constitutional Amendment Act No. 1 0f 2018 did not infringe on the basic structure of the Constitution and therefore was not inconsistent with and or in contravention of the Constitution.

He asserted that there was enough evidence on the record that led the justices of the Constitutional court to the conclusion that adequate consultation was carried prior to enactment of sections 3 and 7 of the Constitutional Amendment Act No. 1 of 2018 and hence their enactment was not inconsistent with and did not contravene articles 1, 8A and 38 of the Constitution.

The respondent contended that the principle of applying democratic principles while interpreting the Constitution as laid down in Article 8A was considered by the constitutional court.

He argued further that the amendment of Article 102(b) is in line with orderly succession of government with every President strictly observing his own term.

He laid down relevant Articles to support his argument as follows;
Article 1 (1) of the 1995 Constitution of Uganda provides that; all power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

Article 1 (4) provides; The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Article 17(1) (h) provides; It is the duty of every citizen of Uganda to register for electoral and other lawful purposes. Article 59 provides that every citizen of Uganda of eighteen years of age or above has a right to vote and that it is the duty of every citizen of Uganda of eighteen years of age or above to register as a voter for public elections and referenda.

Article 103(1) provides that the election of the president shall be by universal adult suffrage through a secret ballot. Under Article 103 (8), provides that a person elected President during the term of a President shall assume office within twenty-four hours after the

expiration of the term of the predecessor and in any other case, within twenty-four hours after being declared elected as President.

Article 105(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 that the office of President shall become vacant on the expiration of the period specified in this article; or if the incumbent dies or resigns or ceases to hold office under Article 107 of this Constitution. Under Article 105 (4), the President may, by writing signed by him or her, and addressed to the Chief Justice, resign from office as President. Article 107 lays down circumstances and procedure of removal of President.

Counsel submitted that all the above articles provide for orderly succession and peaceful transfer of power and they were never part of the Constitution Amendment Act No.1 of 2018. Counsel argued that the power to decide who governs/rules the people remained with the people who exercise it through regular free and fair elections held every five years and that this power was not taken away by lifting the age limit.

He explained that citizens shall also get an unlimited opportunity to aspire for these offices. Counsel urged court to consider the holdings of Lady Justice Elizabeth Musoke and Justice Cheborion on this issue.

Counsel submitted that the amendment of Article 102(b) did not in any way affect orderly succession and peaceful transfer of power as a principle of democracy.

Court's considerations;

The Appellant's case is that the amendment on lifting of the age limit from qualifications of eligibility of presidency and District Chairpersons is unconstitutional. The parties in their submissions reemphasize arguments that were discussed in issues 1, 2 and 3 and just a few which are being raised for the first time which I shall now proceed to resolve.

Firstly I do not agree with the appellants as I stated in issue 1 that the Article 102(b) forms part of the Basic structure or is a constitutional replacement. In the same spirit, as already discussed above.
The appellants submitted that the amendment was enacted selfishly to benefit the incumbent president which is contrary to the principles of constitutionalism.

It is trite that the Constitution should not be amended for trivial or transient considerations. Such solemn action should be taken only when a matter sufficiently broad in principle is at stake to warrant the long and complex process that the framers envisioned for alterations in the basic document.

Room for amendment of the constitution was provided to cater for the variations of the needs of society. The mischief rule is the backdrop of constitutional amendments. The necessity for amendment of the constitution is made with the view of overcoming the difficulties that may be encountered in the future. The mischief rule of interpretation was first used in the land mark English case if **Heydon (1584) 76 ER 637.** According to this rule, while interpreting

statutes, first the problem or mischief that the statute was designed to remedy should be identified and then a construction that suppresses the problem and advances the remedy should be adopted.

A derivation from the mischief rule is the purposive approach of interpreting a statute. Here, courts use various resources to obtain the purpose of the legislation. In the case of **Berty Van Zyl (PTY) Ltd & Anor vs Minister for Safety and Security and 4 ors Case CCT 77/08 [2009] ZACC 11** court quoted with approval **Thornton in his works, Legislative Drafting 4th edn** at **155** that **"the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of the law."**

In the case **of Olum & Anor vs AG [2002] EA, court observed as follows;**

: "to determine the constitutionality of a section or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation……"

Further in the case of **The Queen vs Big Drugmart Ltd 1986 LRC (Const) 332, the Supreme Court of Canada observed as follows;**

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an

unconstitutional effect can invalidate legislation. All legislations are animated by an object the legislature intends to achieve. The object realised through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of legislation's object an ultimate impact, are clearly limited but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

In the instant case, the Hansards dated 27th September, 2017 at page 4741 reflect that Hon Magyezi in moving the motion stated interalia that;

".....CONCERNED FURTHER that the eligibility requirements for a person to be elected as president or district chairperson, being part of the necessary electoral reforms, must be reviewed as well to comply with Article 1 of the Constitution which gives power to the people that they have the absolute right to determine how they should be governed, and Articles 21 and 32 which prohibit any form of discrimination on the basis of age and other factors…

The purpose of amending Article 102(b) according to the Hon Magyezi was to resolve the discrimination based on age which is embodied in Article 102(b). I am persuaded by the principle in **Olum's case** (supra) that when determining the constitutionality of a provision, if its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation……."

I have carefully considered the submission of both parties on his issue. With greatest respect to the appellants, I do not agree with their contentions on this ground. It is far from truth that 102 and 183 infected Article 1 of the Constitution. The people of Uganda still have to choose who is to be their leader. The sovereign power of the people was therefore not usurped by the said amendment.

It is also not true that the said amendment was to benefit the incumbent who is allegedly about to clock 75 years thereby granting him indefinite eligibility to be President.

With greatest respect to the petitioners the above proposition does not recognise that the sovereign right to choose leaders is in the hands of the people of Uganda. Therefore it cannot be stated that the said amendment infected Article 1, 8A and 21 of the Constitution.

With regard that the amendment amounted to constitutional replacement, as indicated in the 1st ground on basic structure, Article 102 and 183 do not form the basic structure of our Constitution. Their amendments could not amount to Constitutional replacement. In any case there was no replacement since the offices of the President and the District Chairpersons were not abolished, neither were their qualifications. The effect of the amendment was to widen the choice of candidates for the people of Uganda to choose from.

In conclusion, I agree with the unanimous decisions of the Justice of the Constitutional Court and find no merit in this ground.

Issue Six

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?

Appellants' Submissions

This issue was submitted on by only Mr. Mabirizi.

He contended that had the learned justices erred when they failed to harmonise Article 83(1)(b) with 102(b) of the constitution. He explained that had they done so, they would have found that the president elected in 2016 ceases to hold office on attaining 75 years of age.

He stated that the interpretation of Article 102(b) is that a president ceases to be qualified to hold office the moment he/she ceases to possess the qualifications which were the basis of his/her nomination.

Mr Mabirizi urged this court to harmonise the aforementioned articles which principle was laid in the case of **Semogerere vs AG (supra).**

Mabirizi submitted that the Constitution, sets similar qualifications for the holders of all national elected offices and Local council V chairman however the same are not repeated in every article. He stated that because of this, the provisions in Article 83 apply to all holders of public offices.

He submitted that given a proper interpretation, court cannot differentiate the qualifications and disqualifications of a president from those of a Member of Parliament, prime minister, minister or a

district chairperson, unless the constitution is explicit on that difference.

Mabirizi contended that the question for court to answer is "what provision of the Constitution applies to a situation where a leader ceases to hold such qualifications?" He stated that the answer to the above question can only be obtained by court looking at an article related to qualifications of a president in the Constitution. He further explained that since the president's qualifications are pegged on those of a member of Parliament, the best option is Article 83(1)(b) which 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 would cause that person to be disqualified for election as a member of Parliament under article 80 of this Constitution;"

He prayed this issue be answered in affirmative.

Respondent's Submissions

Counsel submitted that Article 102 (b) of the Constitution before the amendment provided that; A person is not qualified for election as President unless that person is not less than thirty-five years and not more than seventy-five years of age.

He stated that the Constitutional Court rightly considered the provisions of Article 102 and unanimously found that the provisions therein purely relate to the qualifications prior to nomination for election and not during the person's term in office.

Counsel contended that when interpreting the Constitution, the basic principle to be followed is that where the words of the Constitution are clear and unambiguous, then they ought to be given their primary, plain, ordinary and natural meaning.

He explained that Article 102 is clearly provides for the qualifications for a person to be elected President.
He urged this court to uphold the observations of the Constitutional justices on the matter and answer this issue in the negative.

Court's considerations;

The appellant's case is that Article 102(b) read together with Article 83 of the Constitution requires the president to retire form the position upon attainment of 75 years of age in the light that had he not been president, he could not qualify to be.

Firstly I shall lay down the observation of the constitutional court regarding this issue. Justice Owiny Dollo (DCJ) found no merit in this ground which opinion was unanimously agreed on by all the justices. He observed as follows;

"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!"

Article 102(b) has been reproduced in several parts of this judgement so I will not do it here. It is to the effect that a person to

be qualified for elections as president has to be between the age of 35 to 75 years.

The position of presidency is rather a very important one. Article 98 provides that the president is the Head of state, Head of Government, Commander –in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour. Further, all the executive authority of Uganda vests in the President. On that background, the framers of the Constitution left nothing outside the box regarding the office of the presidency. I appreciate the submissions of Mr. Mabirizi in as far as his reliance on Article 83 however I disagree with his thoughts that Article 83 (1)b was meant to cater for the vacating of office of all officers in a public office including that of the President. The provisions pertaining how the president is nominated, elected, tenure, removal and resignation are well provided for in the relevant Articles in Chapter seventeen of the Constitution.

I agree with Mr. Mabirizi's submission that this court has a duty to harmonise provisions of the constitution and read it as a whole. This was well stated in the case if **Semogerere & Anor vs AG (Supra)** as follows;

"…It is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution."

Be that as it may, the principle of harmonisation applies only when the provision in issue is unclear and needs an import of other provisions that touch the same issue to interpret it. It cannot apply in this instance because the vacating of the president from office is well provided for under Article 105.

Article 105(1) provides as follows;

"A person elected President under this Constitution shall, subject to clause (3) of this Article, hold office for a term of five years. (emphasis mine)

Clause (3) of the same provision provides that;

"the office of the 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 the Constitution. (emphasis mine)

Article 107 of the Constitution provide that;

Article 107 (1) provides that;

The president may be removed from the office in accordance with this Article on any of the following grounds;

(a) Abuse of office or wilful violation of the oath of allegiance and the presidential oath nor any provision of tis Constitution.

(b) Misconduct or misbehavior _

(i) that he / she has conducted himself or herself in a manner which brings or is likely to bring the office of the president into hatred , ridicule , contempt or disrepute; or

(ii)That he /she has dishonestly done any act or omission which is prejudicial or inimical to the economy or security of Uganda; or

(c) Physical or mental incapacity, namely that he or she is incapable of performing the functions of his or her office by reason of physical or mental incapacity.

I shall rely on the Ssemogerere case (supra) and hold that Articles 105 and 107 of the constitution that require harmonisation so as to ably interpret them to suit the framer's intentions. It is my humble view that the framers of the Constitution intended that once a person has been elected president, he shall hold the office for a period of five years and shall vacate the office when the five years lapse.

In that light, I disagree with the appellant's submission that Article 83(1) b read together with Article 102(b) provides for the vacating of the office of the president.

I therefore associate with the holdings of the Constitutional Court that Article 102(b) was meant to only provide for the age bracket for one to qualify to be a president of the republic of Uganda. I further hold that it doesn't matter whether during the five year term of service, the president clocks 75 years, he/she is still a valid president.

This issue is hereby determined in the negative.

Issue Seven

"*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?"

Appellant's case

The appellants submitted that their right to a fair hearing was compromised in a number of ways by the Constitutional Court. They argued that the right to a fair hearing was enshrined in Article 28 of the constitution and reechoed by courts in cases such as *Bakaluba Peter Mukasa versus Nambooze Bakireke Supreme Court Election Petition Appeal No. 04 of 2009.*

Counsel further stated that this right is highlighted as one of the non-derogable rights enshrined in Article 44 of the Constitution. That although the concept of fair trial or hearing is established by the Constitution, it is the Statutes and Rules or Regulations that establish the procedures that are meant to ensure fair hearings for the parties.

Counsel submitted that Judicial discretion must be exercised on fixed principles and that where there has been no improper exercise of discretion, the Judge's decision cannot normally be upset: **Devji Vs. Jinabhai(19341 1 E.A.C.A. 87** a: **Jetha Vs. Sigh (1931) 13L.R.K.1**.

The appellants argued that their right to a fair hearing was abused by the constitutional court in the following ways;

- Failure by the Constitutional court to invoke their powers under the law to summon key government officials and individuals who played a key role in the process leading to the enactment of the impugned Act to appear and testify on the same.

They submitted that under Rule 12 (3) of the Constitutional Court (Petitions and References) Rules, SI. 91 of 2005 is to the effect that Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.

Counsel relied on the observations of Justice Mulenga (RIP) in the case of **Ssemwogerere& Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002** who considered the nature and scope of inquiry and investigations which ought to be done by the Constitutional Court.

Counsel contended that it is apparent that the Constitutional Court had discretion and a daunting task of even investigating beyond the evidence adduced before it since constitutional matters are of great national importance, transcending rights of litigants before Court. That it was therefore injudicious on part of the Constitutional Court to decline to summon the Speaker of Parliament the Rt. Hon Kadaga Rebecca, without assigning any reason. That the Constitutional Court ought to have exercised its discretion to summon the following persons to testify on these matters where they played a central role;

a) The Speaker and the Deputy speaker to testify on their lead role in the enactment of the impugned Act, the discrepancies in the certificate of compliance, procedural irregularities, arbitrary suspension of the honourable Members of Parliament from Parliament, the unprecedented mayhem and violence that ensued in the precincts and chambers of Parliament, etc.

b) The Minister of finance to testify on the contradictory Certificates of Financial Implication which were issued from his Ministry in regard to the impugned Act.

c) The Hon. Magezi Raphael who was the architect, progenitor, midwife and sponsor of the impugned Act to inter alia testify on the conceptualization and mischief he intended to cure by moving Parliament to enact the said Act.

d) The President who assented to the Bill which was not accompanied with a valid certificate of compliance.

e) The Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee who processed the Bill at committee stage.

- That Justices of the Constitutional Court erred when they restricted the Appellants' and their counsel on what to be asked in cross examination of the witnesses limiting them to the scope to the averments in the affidavits for the respective witnesses. It was counsel's submission that this was in contravention of the basic principles of evidence law incorporated under Section 137 (2) of the Evidence Act which is to the effect that cross examination of a witness need not be confined to the facts to which the witness testified about

That the mode adopted for submission during the hearing of the petition was also materially defective for the following reasons;

a) The learned Justices of the Constitutional Court erroneously directed the Appellants' counsel to make submissions before the cross examining the relevant witnesses.

b) The learned Justices of the Constitutional Court erroneously denied the Appellants' counsel a right to a rejoinder after the representative of the Attorney had made their submissions in reply.

The Appellants contend further that the Learned Justices of the Constitutional Court erred in law and fact and unjudiciously exercised their discretion in 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 is manifestly meagre considering the nature and significance of the matter.

Mabirizi submitted that the court was duty bound to determine the petition expeditiously whose failure derogated the right to fair hearing. That Article 137(7) of The Constitution and Rule 10 & 11 of The Constitutional Court Rules place a duty on the Constitutional Court to determine a Constitutional Petition expeditiously. That the petition was filed in December 2017 and court only heard it in April 2018 and in a relaxed manner where it would break for weekends starting from Friday up to Tuesday, court adjourned from 12th April 2018-17th April 2018, a gap of 4 days, with no reason, which was illegal. He cited the case of **M/S Mfmy Industries Ltd-Pakistan (supra)**, where it was held that "justice delayed is justice denied". The courts must,… prevent any delays which are being caused at any level by any person whosoever…"

Mr. Mabirizi contended that failure to render judgment within 60 days from 19th April 2018 derogated the right to fair hearing, invalidating the decision. That Rule 33(2) of the Court of Appeal Rules provides that when judgment is not delivered there and then, it 'shall, in any case, be without delay." Also that the Uganda Judicial Code of Ethics, Paragraph 6.2 provides that"…Where a judgment is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so."

Mr. Mabirizi argued that the Constitutional Court was duty bound to decide within the maximum being 60 days. However, hearing was

concluded on 19th April 2018 but judgment was only rendered on 26th July 2018, 97 days after hearing, with no single reason.

That the In **Chief Ifezue V. Mbadugha-Nigeria**(supra), the Justices declared the Judgment delivered out of the three months stated by law was null & void. ESO, JSC held that '…what is the sanction against a defaulting judge in regard thereto? The sanction is there! The case is taken away from him and assigned to a judge or panel of judges that will obey the Constitution. The defaulting judge if he makes it a habit becomes one that disobeys the Constitution, contrary to his oath. The consequences might lead justifiably to his removal from the exalted seat of being a judge over others…" and the case of **M/S Mfmy Industries Ltd-Pakistan**(supra), NISAR, J. held that '….Order 20 Rule 1(2), which reads as:- "the Court shall, after the case has been heard, pronounce judgment in open court, either at once or on some future day not exceeding thirty days,.."… without a sufficient cause i.e. a cause beyond the control of the Judge, the judgment is impaired in value if not invalid and disciplinary action can be taken against a Judge…"

Mr. Mabirizi prayed that court be persuaded to find that there was no valid judgment the court could give after expiry of the 60 days from 19th April 2018.

On the evicting the appellant from court seats was a derogation of the right to fair hearing & rules of natural justice. Mr. Mabirizi contended that it was Kakuru JCC who first asked why he was sitting where he was and on responding that he was representing myself, Justice Kakuru responded that they don't think they can allow a stranger" from which Mr. Rukutana stated "Mr. Mabirizi should find his level where he belongs". That he cited to them Articles 28(1) and 44(c) of the Constitution but the DCJ's answer was "Our court is not

going to be the first court to breach those rules of procedure." That he was evicted, first to back seats and later to the dock.

That it was regrettable that the Constitutional court could stand proud that it will not be the first court to breach those rules yet Kanyeihamba,JSC in Ssemwogerere V. Ag (supra), held that …the Constitutional Court…must remain constantly vigilant in upholding the provisions of the Constitution..."

He cited the Canadian Supreme court decision of **Andrews V. Law Society Of British Columbia [1989] 1SCR 143**, it was stated by MCINTYRE J, "…discrimination…It arises where. . . adopts a rule or standard…which has a discriminatory effect upon a prohibited ground…because of some special characteristic… …no intent was required as an element of discrimination,…"..

He also cited **Soon Yeon Kim & Anor V. Ag, Const. REF. No.6/07**, where it was held that "By use of the word 'shall' in sub Article (1) above makes it mandatory that in determination of one's civil rights or obligations…that person must be given a fair, speedy and public hearing before an independent and impartial court'

It approved the Kenya case of **Juma & Ors V. Ag [2003] 2 EA 461 (HCK)**, which inter alia stated that "[8.]….The adjective 'fair' describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure…[10]…He should not be denied something the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case.. [11.]…'facilities'…means the resources, conveniences, or means which make it easier to achieve a purpose…"

That the court turned into 'defence counsel through excessive interruptions hence derogating the right to fair hearing. Mr. Mabirizi noted that the DCJ opposed his submission as he stated that "No, it doesn't say like that… if it is a private members motion then it can only be gone into when there is a certificate if it has financial implication."

Mr. Mabirizi also referred to Justice Kakuru's question as to whether or not a motion, a bill and amended motion is in compliance with article 93 could require a certificate, saying there was no financial implication.

That Before hearing the defence case and rejoinder, the learned Justices made it clear on what their interpretation will be, which was picked by the respondent and the justices held exactly as they promised in the above passage. This was unfair.

He cited the case of **Peter Michel V.The Queen [2009]UKPC 41**- the Privy Council declared the proceedings and judgment a nullity due to increased interruptions by court. It was inter alia held that the core principle, that under the adversarial system the judge remains aloof from the fray and neutral.,applies no less to civil litigation than to criminal trial…He must not be sarcastic or snide…he must not make obvious to all his own profound disbelief in the defence being advanced.…this conviction cannot stand."

Mr. Mabirizi submitted that the conduct of the Constitutional Court was far from complying with any of the above principles and as the decision was nullified above, this should follow the same line.

That failure to grant him ample time to present his case was a failure of fair hearing since ample time is one of the facilities required in fair hearing, as already pointed out in the Kenyan Juma case.

That despite his warning as to the speed, the Justices were sarcastic in their reply and never bothered.

7 That the denial of the right to a rejoinder derogated the right to fair hearing & Court of Appeal rules nullifying the entire process.

Mr. Mabirizi contended that Rule 28(1) of Court of Appeal rules provides that "The court shall, at the hearing of an application or appeal, hear first the applicant or appellant, then the respondent and then the applicant or the appellant in reply." and (4) that "After hearing the opposing party, the court may allow but shall not dismiss
14 any preliminary objection, application, appeal or cross-appeal without giving the objector, applicant, appellant or cross-appellant an opportunity to reply."

That his right to reply after submissions by the respondent is outright and absolute and not put to the whims of court as the court made it to the extent that had to plead for it. That the DCJ introduced two terms; 'CLOSING REMARKS' and 'NEW MATTER'. Which are not known
21 under any law.

He cited the case of **Hamid V. Roko Construction Ltd,** SCCA No.1/13, in nullifying the judgment stated "The Court of Appeal is the second highest court of appeal in Uganda. As prescribed under Article 28(1) of the Constitution, litigants expect the Court of Appeal to handle litigation with fairness and openness which was not the case in this appeal"

28 Mr. Mabirizi submitted that court was bound to be patient to enable them to present their case as required by Principle 6.3 of the Judicial Code of Ethics which provides that "A Judicial Officer shall …be patient and dignified in all proceedings, and shall require similar conduct of advocates, witnesses, court staff and other persons in attendance."

That to the contrary, throughout the proceedings, the learned justices seemed to be so much in a hurry which indeed led to derogation of the right to fair hearing.

Mr. Mabirizi contended that the actions of derogation of the right to fair hearing, by the justices were contrary to international conventions as reflected below:

A. Article 2 (3)(c) of the International Covenant On Civil And Political rights provides that "Each State Party to the present Covenant undertakes…to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial,.. authorities.."

B. Article 27 of the Vienna Declaration & Programme of Action provides that an independent judiciary…are essential to the full and non-discriminatory realization of human rights…democracy ."

C. Article 26 of The African Charter on Human & Peoples' Rights provides that "States Parties…shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

D. Article 6(d) of The East African Community Treaty provides that "…good governance including adherence to the principles of democracy, the rule of law,..;"

He cited the case of **Congo & Anor V. Zimbabwe, Sadct:05/08**, where it was held that "…the concept of the rule of law embraces …the right to a fair hearing before an individual is deprived of a right,…The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested…" he submitted that Plainly, the procedures adopted by the lower court was below the standards above.

Mabirizi also submitted that the Justices of the Constitutional Court did not refer to appellant's pleadings, evidence, authorities & decided cases which was contrary to the rules relating to judgments. Mr. Mabirizi argued that Order 21 Rule 4 of The Civil Procedure Rules (CPR) provides "Judgments….shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision." that his case contained the petition with its main supporting affidavit, the 1st & 2nd supplementary affidavits in support, rejoinder to the answer, 4 affidavits in rejoinder and the discovered documents, which were all not mentioned. That he lined up a total of 66 authorities but no acknowledgment of them was made.

He cited the case of **Obbo & Anor V. Ag, (supra)** where Tsekooko JSC noted that "Courts should at least as a matter of courtesy acknowledge the effort of advocates who produce relevant and useful or binding decided cases…In the Court below the majority decision did not allude to any of those cases and no reasons were given why.

Order JSC held that "..the Constitutional court, …ought to have followed those authorities having a bearing on this case to which the appellants referred to"

That in the case of **Ssemwogerere V. Ag, (Supra),** Kanyeihamba, JSC"…the majority of the learned Justices of the Constitutional Court do not appear to have taken into account counsel's submissions and relevant authorities cited…" Mr. Mabirizi submitted that Court had a duty to confirm reading of the authorities and their conclusions on them.

That the constitutional court was bound to determine all matters in controversy between the parties before it as provided by S. 33 of the Judicature Act that"…so that as far as possible all matters in

controversy between the parties may be completely and finally determined…."

Mr. Mabirizi defined ' a judgment' as per S.1(i) of The Civil Procedure Act(CPA) to be "the statement given by the judge of the grounds of a decree or order;" He also referred to Order 21 Rule 5 Civil Procedure Rules(CPR) which requires a judgment to state its finding or decision, with the reasons…upon each separate issue..." it was his submission that The Constitutional Court flouted the above.

In his further submission he referred to the case of **Ebenezer & Ors V.Onuma & Anor, Nigeria Supreme Court Case No.213/88,** where ESO,JSC, held that It is the primary obligation of every court to hear and determine issues in controversy before it, and as presented to it by litigants. The Court cannot suo motu formulate a case for the parties…" and Belgore JSC held It is within the province of the parties to indicate the issue they wish the court to resolve and the court taking upon itself the formulation of issues for the parties may unwittingly be setting a destructive trap for itself to be accused not of jumping into the fray but forcing issues down the parties throats"

Mr. Mabirizi submitted that court was duty bound to determine issue 6(a) in relation to article 93 of the constitution which was pleaded & argued , Issue 6(a) read that "Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.",

That instead, the DCJ dealt with issue No. 6 but did not resolve issue 6(a). That all the other justices concentrated on the 29million shillings and the 2nd Certificate of Compliance introduced by Hon. Tusiime. That the constitutional court abdicated its duty to determine the case of constitutional replacement which was well pleaded & argued before them. He referred to the case of **Bakaluba V. Nambooze, Scepa No.4/09**, Katureebe, JSC as he was then, held

that"…since the matter had been raised as a ground of appeal and an issue had not only been framed on it but both parties had made submissions thereon, it was imperative on the court to deal with it and make specific findings on it. Simply to ignore it was a misdirection both in law and fact."

Mr. Mabirizi submitted that it was irregular for court to propose answers to witnesses & to prevent the appellant from cross examining witnesses. That the Evidence Act under S.137(2) provides that "…the cross-examination need not be confined to the facts to which the witness testified on his or her examination-in-chief.", S.144,A witness may be cross-examined as to previous statements made by him or her in writing…"

S.145 of the Evidence Act provides that when a witness is cross-examined, he or she may,…be asked any questions which tend— to test his or her veracity;.. or to shake his or her credit, by injuring his or her character,..." That the lower court over-protected Mr. Keith Muhakanizi and made it so impossible for him to give the answers which he wanted.

That the DCJ, with threats to evict him prevented Gen. Muhoozi from answering questions to point out that his affidavit was not commissioned. That the interference by the DCJ was well intended to cover-up the truth that Gen. Muhoozi's affidavit was never sworn.

He referred to the case of **Turinawe & Anor V. Kyalimpa & 4 Ors, SCC Ref.No.1/12**, where this court declined to strike out an affidavit simply because counsel had, after ascertaining that the deponent deposed the affidavit from her lawyer's office, did not ask who was around, to ascertain whether there was a Commissioner for Oaths. That the DCJ's interference defeated his intention to strike out the affidavit hence irregular as it derogated his right to cross-examine which is part of the right to fair hearing.

He also referred to the case of **Nguza Viking (Babu Seya) & Anor V. Tanzania, African Court on Human & People's Rights, Application No. 06/15,** where the court in nullifying the proceedings, ` held that "…denial of an opportunity for the Applicants to cross-examine persons who would have been material witnesses, was a violation (of) Article 7(1)(c) of the charter by the respondent state"

Uganda is a signatory. That the omission to rule on admissibility of substantial paragraphs could have been deliberate to leave hearsay evidence on record.

S.59 of The Evidence Act requires evidence to be direct but a look at the depositions of Mr.Keith Muhakanizi vis-avis, what he stated at cross examination and the depositions of Gen. David Muhoozi vis-avis what he stated at cross-examination, it is clear that neither Mr. Keith Muhakanizi nor Gen David Muhoozi's depositions in the impugned paragraphs of their respective affidavits could pass the test under S.59 of The evidence Act.

That this court in **Mbabazi V. Museveni & 2 Ors, Pep No.1/16,** prohibited affidavits of third parties but insisted that an affidavit must be by a person who perceived the actions. This what is at Similar hearsay affidavit evidence was rejected in **Banco Arabe Espanol V. Bank Of Uganda**.

It was his contention that the two affidavits are nothing but a pile of fabricated lies intended to mislead court which had to be thrown out as was done by Kato JSC, in **Tibebaga V. Begumisa & Ors, SCCAPI. No. 18/02, BERKO, JCC**, in **Ssemwogerere V. Ag**, **CCP No.3/**and in **Mubiru V. Ag, CCP No.1/01.**

Mr. Mabirizi contended that there is no reason why Patrick Ochialap who Mr. Keith Muhakanizi says is the one who processed the certificates of Financial implications or the commander who

commanded the UPDF military operation at parliament did not make their respective affidavits. That Justice Musoke's attempts to save the affidavits on ground that the deponents disclosed their sources of information, without reasons why the sources could not swear is below the statutory standard.

That court had to strike out section 1(b) of the act after nullifying all amendments introduced by Hon. Tusiime. That whether by inadvertence or otherwise, after the majority justices nullifying all the results of the provisions introduced by Hon. Tusiime in the night of 20th December 2018, in their respective judgments, the DCJ declared the entire section as having been passed in full compliance with the Constitution.

Mr. Mabirizi submitted that Issue No. 9 was couched in terms "…in absence of a valid certificate of compliance…"

That the Black's Law Dictionary, 8th Edition at page 675 defines Certificate' as "A document in which a fact is formally attested"

'Attest' meaning "...To affirm to be true or genuine." Certify meaning "To authenticate or verify in writing. To attest as being true or as meeting certain criteria..."

His submission is that after finding that the Certificate of Compliance was not genuine, authentic, true and that it did not meet the required criteria, court could not rely on it.

Mr. Mabirizi argued that court granted the remedy of severance, which was not pleaded. That no issue was framed on whether none compliance affected the act in a substantial manner, or even whether court should sever some parts of the act from others because both parties knew that failure to comply leads to nullification. The court originated the 'pleading' & 'prayer' of 'severance it is the court that originated the discussion of un-

pleaded material relating to severance and court indeed turned into the pleader for the respondent who never pleaded any alternative prayer that severance be adopted or even that the none-compliance did not affect the amendment in a substantial manner.

He contended that court had no power to frame sub-issues of 'whether severance can be applied & whether the none-compliance affected the act in a substantial manner' which did not arise out of the pleadings.

That the power of Court to frame issues is restricted by Order 15 Rule 3 CPR which restricts it to 'allegations made on oath by the parties. Allegations made in the pleadings…and the contents of documents produced by either party." Therefore, court could not originate issues of whether the amendment affected the Act in a substantial manner or whether there would be severance. That it was contrary to fair hearing for court to apply the principles & grant un-pleaded remedy of severance. Court's making of a decision on its own invented points is contrary to fair hearing principles, rules of procedure & decided cases. That order 21 rule 4 of the CPR requires judgments to be based on "…a concise statement of the case, the points for determination..."

Mr. Mabirizi submitted that this court has in several decisions nullified decisions based on matters which were not pleaded. An illustration of which was in **Besigye V. Museveni & Anor, SCPEP NO.1/06**, where Katureebe, JSC held that "…the petitioner could not expect this court to determine on facts or alleged facts that he had not pleaded.."

That in **Fangmin V. Belex Tours & Travel, SCCA No.6/13**, Odoki, Ag. JSC, court relied on the decision of Katureebe, JSC (as he then was) then in **Julius Rwabinumi V. Hope Bahimbisibwe, SCCA No.10/09**,

that "…a Court should not base its decisions on un pleaded matters", before stating that "…a party cannot be granted relief which it has not claimed in the plaint …"

Also in **Rwabinumi V. Bahimbisibwe**,(supra), Kisaakye,JSC held that "…the learned Justices of Appeal erred in law,…when they made pronouncements…which were neither founded in law nor on the pleadings of the parties." That in **Hamid V. Roko Construction Ltd** (supra), this court noted that"…None of those eight grounds of appeal in the memorandum complained about illegalities upon which the learned justices decided the appeal on.' That in **Bitarabeho V.Kakonge**, **SCCA No.4/2000,** it was held that "Had the matter been properly pleaded the possibility of the defendant being the administrator or not of her husband's estate would have been investigated…." He also relied on **Cairo International Bank V. Sadique, SCCA No.03/10**, where it was held that "However since in the plaint the respondent had claimed for interest from date of judgment I think that any interest to be awarded had to conform to the pleadings which had not been amended…" That there is need for this court to revitalize the above principles by nullifying the decision.

The DCJ erred in holding that the location of an entrenchment provision does not matter because it encourages to colourable legislation which this court prohibited in the Ssemwogerere decision,

The framers of the Constitution were sober by making a specific Chapter 18 dealing with all amendment matters and specifying Article 260 of The Constitution to deal with amendments requiring a referendum. Any attempt by parliament to create another Article elsewhere providing for a referendum before amendment of the constitution will be colourable legislation, contrary to the Constitution.

The DCJ's holding that members of parliament can wake up & vote was not pleaded and has no constitutional basis in Uganda & his source was unreliable and quoted out of context.

That the words attributed to Gerald Kaufman were neither spoken nor written by him but by a bystander. That such rumors cannot be of jurisprudential value. The proceedings under issue in the instant case were plenary proceedings and not committee proceedings yet the conversation was on how "the committee system" and passage begins that "once a member goes into the Committee room".

He contended that the passage cannot work in Uganda where people are supreme and members of parliament are accountable to them independent of the political parties, in line with Article 1(4) of The Constitution, Paragraph 3(d) of The Code of Conduct for Members of Parliament, Appendix F to Parliament Rules of Procedure.

That it contravenes the decision in **SSEKIKUBO & ORS V. AG & ORS(Supra)** and **SSEMWOGERERE V. AG,** where Karokora JSC stated that "…It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution…Each of these organs must be transparent and accountable in their operations…"

That it was erroneous for the DCJ to rely on article 2 of the constitution & the case of **Salvatori Abuki v AG; Constitutional case No. 2 of 1997** to support severance. That the DCJ's reliance on Article 2 to support severance is questionable because if a flouted procedure leads to a law, the constitution prevails rendering the law null and void. That he relied on **Salvatori Abuki v AG; (supra)**, which was not relevant to this case because as per the issues laid out in the lead judgment of Manyindo, there was no issue of the procedural validity and constitutionality of the Witchcraft Act 1957 which was passed by the colonial regime when there was no democracy to

talk about or even rule of law. The petitioner's complaint was on the exclusion order under Section 7 of The Act and not other provisions or the enactment process.

That the decision in **Ag For Alberta V. Ag For Canada(1947)AC503 AT518** relied upon by Justice Kasule to support severance was quoted out of context because from the facts as summarized by Viscount Simond at it is clear that the only point in contest was whether the legislature could legislate on 'Banking' and not whether the procedure adopted in the legislation was contrary to that laid down by the law granting powers to the legislature. This decision would have instead helped him to find for him on Article 93.

That the decision of **Matiso V Commanding Officer, Port Elizabeth Prison** was not relevant to the facts before court. Justice Kasule relied on it but the facts as summarized by KRIEGLER J, reveal that the petitioners therein were not challenging the process of enacting legislation. They were challenging some parts of the Magistrates Courts Act, enacted prior.

That the decision of , MR, **In Kingsway Investment (Kent) Ltd V. Kent County Council (1969) 1 ALLER 601 AT 611** was misapplied by Justice Barishaki, because in the circumstances of this case, no severance could be done because the law depended on the process. Looking at the facts as stated at, the issue before court was whether the provisions of the urban authority outline planning permissions were in line with the law at the time and the effect of invalidity of a clause of a permission or license. It is also clear that severance was only used in reference to a building permission and not to a statute making process.

That at hearing, the effects of not summoning the speaker caught up with the Justices and AG since the Speaker would be the only person to answer questions relating to the invalid certificate of compliance. That without summoning the speaker, court erred in commenting and deciding in favour of and against her without testing the basis and credence of these actions.

Mr. Mabirizi submitted that denying him professional compensation contravenes Articles 21, 28(1),44(c),126(1),126(2)(c) of The Constitution at ,Rule 23(1) Court Of Appeal Rules and Or 3 r1 CPR. That Common law jurisprudence is against denying self-represented litigants costs and compensation for time and resources spent in litigation as decided in **Cabana V. Newfoundland And Labrador et al., 2016 NLCA 75 (CanLII), Mr Scott Halborg V. Emw Law Llp England & Wales Court of Appeal (Civil Division) Neutral Citation Number: [2017] EWCA Civil 793 Case No: A2/2015/, 2014 ONSC 5768 (CanLII),** which are highly persuasive in this case where there is no doubt that he did professional work in preparation and exhibited much zeal and diligence at presentation in a highly contentious matter.

The UGX 20million awarded as professional fees for each petition was without basis, inadequate and below the standard set by this court. Article 126(2)(c) commands courts to award 'adequate compensation'. That in **Ag V. Sekikubo & 4 Ors SCC Ref. No.13/16,** with the reasoning Opio-Aweri JSC, awarded instruction/professional fees of shs. 80,000,000/= for Senior Counsel and shs. 50,000,000/= for the second counsel, in **Muwanga Kivumbi V. Ag, SCC Ref. No.35/18**, he awarded Ugx. 80,000,000 in the place of 6 million. Although it is true that the above decisions dealt with scenarios at Supreme Court, it is also true that the instant case is of a greater magnitude and indeed required and we did great research. In appreciation of the great research, he proposes that each petition should be awarded

Ugx.300,000,000 to meet the considerations stated by Opio Aweri JSC, above.

Mr. Mabirizi submitted that there was no need to prove general damages because they are assessed depending on the general circumstances of the case and not evidence as it has been done in **Omunyokol V.Ags, CCA No.2/12,Stanbic Bank Ltd V. Kiyemba Mutale, SCCA No.2/10, A.K.P.M. Lutaya V.Ag, SCCA No.10/02,A.K.P.M. Lutaya V. Ag, CACA No.2/05.** That Courts have awarded general damages even where a party has not proved some pertinent aspects of the case as it was done in **Opus V. Harvest Farm Seeds Ltd SCCA No.2/12, Ushabe & Anor V M/S Anglo African Ltd & Anor SCCA No.7/99,Kakembo V. Roko Construction Ltd,CACA No.5/05 & Mk Financiers Ltd & Male H. Mabirizi K.K V. Owere Franco & Ors, High Court Execution & Bailiffs Division Misc. Application No. 2763 of 2014.**

ISSUE 7(b): If so, what is the effect on the decision of the Court?

Mr. Mabirizi submitted that the failure of fair hearing & procedural irregularities rendered all the proceedings and judgment null & void. He cited the case of **Bakaluba V. Nambooze, (Supra),** Katureebe, JSC held that "…allegations of denial of the right of fair hearing or trial are very serious indeed and should not be made lightly or merely in passing. They impact on the very core of our trial system." He also relied on **Ebenezer Nwokoro & Ors V. Titus Onuma & Anor-Nigeria** (supra) Nnamani JSC held that "…I am, however, not able to say in this case that there has been no miscarriage of justice. The right to be heard is so fundamental a principle of our adjudicatory process that it cannot be compromised on any ground"

That as to the inconveniences which may arise from nullification of the proceedings and Judgment, he relied on **Chief Ifezue V. Mbadugha, Nigeria (supra)**, where UWAIS, JSC, while nullifying the

judgment held that"…The fault which leads to the infringement of the Constitution…may entirely be the fault of the court, for example…where it fails to give judgment within the period prescribed as in the present case…any hardship arising therefrom should be regarded as one of the hazards of litigation which parties have to endure."

In the alternative, Mr. Mabirizi submitted that since this court is empowered by S. 7 of The Judicature Act, it can make directions that can remedy the irregularities and grant appropriate remedies.

Respondent's case;

The Respondent submitted that the respective Appellants do not satisfy or otherwise meet the threshold required for an Appellate Court, herein the Supreme Court hearing the instant Constitutional Appeal, to interfere with the discretion or otherwise overturn the decision of a Court of Original Jurisdiction and prayed court to find no merit in the appeal.

He submitted that in the case of **American Express International Banking Ltd Vs. Atul [1990-1994] EA 10 (SCU)**; the Supreme Court of Uganda elaborated the circumstances/tests for interference with discretion and they include;

i. Where the Judge misdirects himself with regard to the principles governing the exercise of his discretion;

ii. Where the Judge takes into account matters which he ought not to consider; or fails to take into account matters which he ought to consider;

iii. Where the exercise of his discretion is plainly wrong.

Counsel submitted that the procedure to be followed by the Constitutional Court in hearing and determining Constitutional Petitions is provided for in the Judicature Act, Cap. 13, Judicature (Constitutional Court) (Petitions and Reference) Rules SI 91/2005. The Judicature (Court of Appeal Rules) Directions SI 13-10,The Civil Procedure Act Cap. 71, Civil Procedure Rules SI 71-1 and decided cases and Authorities.

He submitted that the Constitutional Court herd and determined the Constitutional Petition expeditiously and that because court delivered past the 60 days does not render the judgment a nullity. Counsel relied on Article 137(7) of the Constitution which requires that upon presentation of a Petition, the Constitutional Court shall proceed to hear and determine the Petition as soon as possible. That Rule 10(1) of the Constitution Court (Petition and References) Rules SI No. 91/2005 similarly provides that the Court shall, in accordance with Article 137(7) of the Constitution, hear and determine the Petition as soon as possible. He submitted that the standard established by the Constitution for the Constitutional Court to hear and determine Constitutional Petitions is "as soon as possible".

The five (5) Petitions were lodged respectively in December, 2017 and January 2018.The 1st Appellant specifically lodged his petition in December 2017.On 9th April 2018 several petitions were called for hearing in Mbale and thereafter consolidated for purposes of being heard together with others due to the similarity of the issues raised by the different petitioners in the lower court. The timetable adopted by the Court was implemented as follows:-First hearing, preliminaries

and Consolidation - 9th April 2018; Commencement of hearing - 10th April 2018; Conclusion of hearing - 19th April, 2018 and Judgment was delivered on 26th day of July 2018.

The Respondent submits that the record of proceedings demonstrates that the Constitutional Court considered and determined the Five (5) Consolidated Petitions with due diligence and expedience in the circumstances considering the multiple claims and multiple litigants and Counsel participating in the Court proceedings.

The Respondent invites this Honorable Court to find that the Constitutional Court duly expeditiously heard and determined the Consolidated Petitions as required by the standard established by Article 137(7) of the Constitution and that the Appellants suffered no prejudice whatsoever or derogation of the right to a fair hearing on account of the manner in which the hearing and determination was conducted.

In Ground 2 , the 1st Appellant complains that he was evicted from Court seats occupied by representatives of other Petitioners and put in the dock throughout the hearing and decision of the Petition and in (Para 9) submits that the alleged eviction was a derogation of his right to a fair hearing and the rules of natural justice. The Respondent notes that the 1st Appellant purports to selectively quote Hon. Justice Kakuru, the Hon. Deputy Attorney General and the Hon. Deputy Chief Justice respectively while ignoring or attempting to obfuscate the entire context of the discourse.

The Respondent submits that the authoritative and conclusive determination is contained in the guidance of the Hon. Deputy Chief Justice where he states: -

"… the position is this, Mr. Mabirizi is a Petitioner and he has every right to be heard like other Petitioners, the other Petitioners chose to be heard through learned Counsel, they brokered professional services of learned Counsel and they are called members of the bar with the right to appear here in a particular way. The right to be heard does not mean you choose where to sit. The right to be heard is to be able to present your case, every institution, every profession has got its rules of conduct and rules of procedure. Our Court is not going to be the first to breach those rules of procedure. Accordingly, Mr. Mabirizi will sit with the other litigants and when the time comes for him to present his case we will bring him to sit in an appropriate place where he can present his case."

The Respondent prays that the Honorable Court finds that the 1st Appellant was courteously treated like other litigants and that the record of appeal clearly demonstrates that the 1st Appellant enjoyed and 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 by way of his accommodation in Court during the hearing and determination of the Petitions. No eviction occurred.

In Ground 3 and Ground 4 the 1st Appellant complains respectively that a miscarriage of Justice was allegedly caused by the Court not

giving him ample time to present his case and alleged extreme and unnecessary interference with his submissions and that the Court allegedly derogated his right to a fair hearing by allegedly preventing him from substantially responding to the Respondent's submissions by way of rejoinder.

In (Para 10) the 1st Appellant generally accuses Court of allegedly turning into defense Counsel through excessive interruption allegedly derogating the 1st Appellants right to a fair hearing citing remarks made by the Hon. Deputy Chief Justice and Hon. Justice Kakuru, JSC.

A proper understanding of the context and the language used therein is instructive and demonstrates that the 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. The Respondent submits that the 1st Appellant's submissions are presumptuous and without any basis whatsoever.

In (Para 11), (Para 12), (Para 13) and (Para 14) respectively; the 1st Appellant complains that he did not have ample time to present his case though he does not substantiate, alleges that he was denied the right to make submissions in rejoinder, further complains that throughout the proceedings the Hon. Justices of the Constitutional Court were in a hurry derogating his Constitutional right to a fair hearing and International Conventions.

At the outset, the Respondent points out that these grounds are in stark contradiction and undermines the 1st Appellant's Ground 1 (Para 7 and Para 8) where the 1st Appellant purports to complain that the Court did not hear and determine the Consolidated Petitions expeditiously.

Notwithstanding, the Respondent re-iterates its earlier submissions that the Hon. Justices of the Constitutional Court duly heard and determined the Consolidated Petition according all parties an equal chance to present their respective cases and the record of appeal demonstrates that all the parties in the Consolidated Petitions - fully participated in the proceedings and had ample time to present their cases.

Additionally, the record of appeal demonstrates that the Hon. Justices of the Constitutional Court were deliberate and methodical as required by and in accordance with the Rules cited above.
With regard to the right to make a rejoinder, the Respondent submits that the Appellants could only submit in rejoinder in regard to new matters raised during the course of the Respondent's submissions. Contrary to the 1st Appellant's submissions in Para 12B, his right to reply is not "outright and absolute".

That the record of proceedings is instructive specifically at page 2226 Learned Counsel Mr. Wandera Ogalo stated that;

"My Lords, we request your indulgence that you allow a rejoinder … My Lords in the course of submissions by the learned Attorney

General we are of the view this side that in those arguments new matters were raised …"

7 That accordingly, Learned Counsel Byamukama rejoined at page 2226-2227 of the record of appeal, Mr. Lukwago rejoined at pages 2229 and Mr. Mabirizi was accorded an opportunity to rejoin at pages 2230-2231. At pages 2230 Mr. Mabirizi commences his rejoinder and the record demonstrates as follows: -

14 "My Lords I have a few, first of all I want this Court to note that in the pleadings and submissions the Respondent has not refuted the fact that there was colorable legislation …"
Whereupon the Hon. Deputy Chief Justice observed stating that: -
"No that is not new."

The 1st Appellant then continued stated that: -
21 "My Lords I am moving to issue 6A and B …" and at page 2231 concludes by stating that: - "… in conclusion My Lords I reiterate my earlier prayers maybe since Counsel Ogalo is closing I need to thank you for your indulgence here, for the patience and for everything except this which I challenged but it's okay I have made my case and I am grateful my Lords for you."

28 The Respondent submits that there was no derogation of the 1st Appellants right to a fair hearing arising from the procedure adopted by the Hon. Justice of the Constitutional Court and the allegations that the Court acted contrary to International Conventions do not arise whatsoever.

In **Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo & 4 Others Vs. The Attorney General & 4 Others**, while considering the power (discretion) of the Constitutional Court to grant leave to allow cross examination of deponents of affidavits under Rule 12 of the Constitutional Court (Petitions and Reference) Rules SI No. 91/2005 at pages 18 – 19 of the decision, the Supreme Court made reference to **Mbogo & Others Vs. Shah [1968] E.A. pages 93** and stated that: -

"From the wording of Rules 12(2) above, the Court's power is purely a discretionary one. That being the case, it is well settled that this Court will not, as an Appellate Court, interfere with the exercise of discretion by a lower Court including the Constitutional Court, unless it is shown that the Court took into account an irrelevant matter which it ought not to have taken into account or failed to take into account a relevant matter which it ought to have taken into account or that the Court has plainly gone wrong in its consideration of the issues raised before it."

That while in the instant Appeal the 1st Appellant complains about the Hon. Justices making enquiry into the submissions of the respective parties, which the Respondent submits the Court is entitled and duty bound to do by seeking clarification where necessary and requiring the 1st Appellant to point out the areas for submissions in rejoinder, the Supreme Court in somewhat similar circumstances held at page 19 that: -

" …, the complaint in ground 3 of Appeal is that the learned Justices of the Constitutional Court not only refused to allow cross examination of the President, but they first directed Counsel for the

Appellants to point out the questions and areas they intended to cross-examine the President on. To us, the learned Justices were only executing their duty of first establishing the material upon which to base their decision to allow or disallow the request by the Appellant's Counsel. This is in line with the well settled principle of law that the Court must exercise discretion judicially on the basis of material placed before it by the parties, not whimsically or capriciously."

That concerning fair hearing the Court proceeded to find that: -
"It is further our finding that the procedure adopted by the learned Justices of the Constitutional Court did not in any way, defeat the right to fair hearing as alleged by the appellant's Counsel since the record clearly shows that both sides were afforded an opportunity to address Court on the issues before the Court arrived at its decision. In the premises, this Court declines the invitation to interfere with the decision of the learned Justices of the Constitutional Court"

That in Ground 17, 18, 19 and 20 respectively the 1st Appellant complains that the Hon. Justices of the Constitutional Court did not refer to his evidence and submissions ,did not consider his authorities presented in submissions; that the majority Hon. Justices failed to properly evaluate the pleadings, evidence and submissions hence reaching wrong conclusions. In (Para 15) the 1st Appellant submitted that the Hon. Justices of the Constitutional Court omitted to refer to his pleadings, evidence, authorities and decided cases contrary to Order 21 Rules 4 of the Civil Procedure Rules SI 71-1. The 1st Appellant generalizes and does not elaborate on any specific

omissions. The Respondent submits that each and every Hon. Justice of the Constitutional Court acknowledged the pleadings, submissions and authorities in their respective Judgments.

Reference is made to the respective Judgments of the Hon. Justices of the Constitutional Court. Hon. Deputy Chief Justice at pages 2338-2345 of the record of appeal; Hon. Justice Kasule at page 2456 , 2501 & 2590 of the record ; Hon. Justice Kakuru at pages 2960-2966 of the record ; Hon. Justice Elizabeth Musoke at pages 2451, 2452-2454 , page 2608, pa /e 2625, 2639; and, Hon. Justice Cheborion at pages 2738-2739;

In (Para 16) the 1st Appellant submitted that the Constitutional Court was bound to determine all matters in controversy between the parties as required by Section 33 of the Judicature Act, Cap. 13. The Respondent submits that the Hon. Justices of the Constitutional Court duly determined and resolved all the issues in controversy as presented in the pleadings, framed in the issues and submitted by the respective litigants. The Respondent further submits that the core subject matter referred to the Constitutional Court were the issues for Constitutional Interpretation regarding the Constitutional Amendment Act, No. 1/2018 under Article 137(1) of the Constitution and the respective Hon. Justices of the Constitutional Court duly and faithfully interpreted the provisions Constitutional Amendment Act, No. 1/2018 vis-à-vis the Constitution and granted redress.

That in **Supreme Court Civil Appeal No. 1/2012: British American Tobacco (U) Ltd Vs. Shadrach Mwijikubi & 4 Others** it was held that "While it is prudent for Judges to provide explanations for how and

why they reached a certain decision, I am of the opinion that this is not an indication that the evidence was not properly evaluated, and is simply, as Counsel for the Respondent asserted, 'a matter of style'. However, I have carefully perused the leading Judgment and found that he actually re-evaluated the evidence of the two principal witnesses in detail and came to his own conclusion before he agreed with the findings of the trial Judge. The learned Justice ensured that he recounted the various points in contention and had them in mind while writing the Judgment."

The Respondent re-iterates that the Hon. Justices of the Constitutional Court duly considered the matters and issues complained of by the 1st Appellant and the complaints of the 1st Appellant are in respect of style and not substance.

In Ground 6, Ground 7 and Ground 8 the 1st Appellant complains respectively that; - the Hon. Justices of the Constitutional Court did not mention or even rely on the Petitioner's two (2) supplementary affidavits, rejoinder to the Answer to the Petition and supporting affidavits as well as affidavits in rejoinder to affidavits of Mrs. Jane Kibirige, Mr. Keith Muhakanizi and General David Muhoozi; the majority Hon. Justices did not determine the legality of the substantial contents of the affidavits of General David Muhoozi, Chief of Defense Forces which were allegedly put in issue as hearsay and the majority Justices did not determine the legality of the substantial contents of the affidavit of Mr. Keith Muhakanizi, Secretary to the Treasury which were allegedly put in issues as hearsay. In (Para 23) the 1st Appellant submitted that Court was

bound to make a decision on his Application to strike out the affidavits of Mr. Keith Muhakanizi and General David Muhoozi. The record of appeal shows at pages 809-814 that the Appellants applied to cross examine witnesses.

Cross examination of General David Muhoozi was at pages 1525-1561 of the record of appeal and specifically at page 1554 he testified that as the Chief of Defense Forces he was the best person to swear the affidavit since the operation was under his command and at page 1532 he testified that he passed instructions down the chain of command. Cross examination of Mr. Keith Muhakanizi was at pages 1414-1498 with the 1st Appellant specifically cross examining him at pages 1463-1480. Re-examination was at pages 1491-1498 . Mr. Muhakanizi testified that the Certificate of Financial Implications was prepared under his authority as the Permanent Secretary/Secretary to the Treasury and duly explained the circumstances under which the certificate was prepared. Sources of information were duly disclosed. No hearsay therefore arose in either circumstance.

In Ground 25 & Ground 26 (Para 24& 25) the 1st Appellant submitted and accused the Honorable Court of proposing answers to witnesses and preventing him from cross examining witnesses ;that the court over protected Mr. Keith Muhakanizi and prevented him from answering questions put to him.

The Respondent submits that the Court has discretion to regulate cross examination and guide litigants to cross examine witnesses on pertinent matter related to the litigation and surrounding

circumstances. The Court has the authority to limit cross examination including on matter that are speculative, irrelevant and otherwise inconsistent with the Evidence Act, Cap. 6. The Court may further 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.

The Respondent submits and prays that this Honorable Court finds that the Hon. Justices of the Constitutional Court were fully justified in making their enquiry. Moreover, the record of appeal at pages 1384-1385 demonstrate that the Hon. Justices of the Constitutional Court set ground rules for cross-examination to guide all the parties and Counsel cautioning them to either keep within the rules or lose the opportunity to cross examine. At pages 1556-1557 the Hon. Deputy Chief Justice guided the 1st Appellant on his cross examination since he was deviating from the ground rules established and required the 1st Appellant to abide by the ground rules set for the cross examination.

In (Para 25) the 1st Appellant submitted that the Hon. Deputy Chief Justice's alleged interference was intended to cover up the truth that General Muhoozi's affidavit was never sworn. The Respondent objects to this ground on the basis that it is speculative and offends Rule 82 of the Judicature (Supreme Court Rules) Directions SI 13-11 and prays that the ground is struck out and the submission is similarly treated. Notwithstanding, the testimony of General Muhoozi has already been referred to under (Para 24) and in the record of

proceedings at page 1525-1561. Suffice it to say that the allegation is without merit.

In (Para. 26) the 1st Appellant submitted that the alleged omission to rule on admissibility of substantial paragraphs could have been deliberate to leave hearsay evidence on record. The Respondent objects to this submission on the basis that it is speculative and offends Rules 82 of the Judicature (Supreme Court Rules) Directions SI 13-11 and prays that the ground is struck out and the submission is similarly treated. Notwithstanding, the testimony of both General David Muhoozi and Mr. Keith Muhakanizi have already been submitted on herein-above. Suffice it to say that the allegation is without merit.

In Ground 79 and Ground 80 the 1st Appellant complains respectively that the majority Hon. Justices erred when they allegedly proposed and granted a remedy of severance which was not pleaded by the Respondent; the majority Hon. Justices erred in applying the principle of severance of some sections in a single Act allegedly in a situation where the Constitutional Amendment procedure was fatally, unconstitutionally defective. In (Para 29), (Para 30), (Para 31) and (Para 32) the 1st Appellant submitted respectively that the Court granted the remedy of severance which was not pleaded, the Court originated the pleading and prayer of severance, the Court had no power to frame sub-issues of whether severance can be applied and whether non-compliance affected the Act is a substantial manner which did not arise from the

pleadings and that the foregoing were contrary to his right to a fair hearing.

7 The Respondent submits 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 redress within the discretion of the Court based on the circumstances pertaining. Accordingly, while declarations are the primary duty the Court may grant redress including the remedy of severance either at the
14 pleading or prayer of Counsel or a Litigant or exercising its own discretion.

The Court has the discretion to require Counsel or litigants to address it even on under pleaded 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
21 the Hon. Justices of the Constitutional Court exercising their discretion to grant the remedy of severance. The Respondent addressed Court on the remedy of severance at page 2206 of the record. The 1st Appellant had every opportunity to address the Hon. Justices of the Constitutional Court on the issue of severance, did not suffer any prejudice and was duly accorded a fair hearing.

28 In (Para 33) the 1st Appellant submitted that the Courts making of a decision on its own allegedly invented points is contrary to fair hearing principles, rules of procedure and decided case. The Respondent submits that in the course of a Court conducting its enquiry the Court has wide discretion to draw on existing Constitutional and legal principles and both pleaded and not

pleaded depending on the circumstances of the case and it is the duty of the Court to apply the relevant principles for the ends of justice. The Hon. Justices of the Constitutional Court in applying the remedy of severance relied on Article 2(2) of the Constitution as well established authorities. The principles considered and applied by the Court are well established Constitutional and legal principles which the 1st Appellant had opportunity to address Court on. No prejudice was occasioned and the 1st Appellant was accorded a fair hearing.

Additionally, the 1st Appellants arguments are misconceived because authorities cited related to litigants being bound by facts and matters pleaded. They do not preclude a litigant from relying on the abundance of legal principles to advance their cases. Hon. Deputy Chief Justice's decision is at pages 2437-2440, Hon. Justice Kasule's decision is at pages 2523-2528, Hon. Justice Kakuru's decision is at page 2970, Hon. Justice Elizabeth Musoke's decision is at pages 2668-2676 and Hon. Justice Cheborion's decision is at pages 2788-2789.

In (Para 34) and (Para 35) the 1st Appellant further submitted respectively that the Court initiated and granted the un pleaded defense that once there is a quorum, absence of opposition is immaterial and that it was erroneous for the Court to raise the point of quorum which was not in issue. The Respondent re-iterates that in any adjudication, specifically Constitutional Interpretation, the Court is at liberty and has a duty to enquire into the entire factual and evidential circumstances of the case and review the entire breadth and depth of Statutes, Authorities and Literature in coming to its

determination. That specifically in the Constitutional Court, the Court is not fettered in its consideration of the case by the limitations of litigants. Notwithstanding, the respective parties had every opportunity to address Court on the issue. That the parties had equal opportunity and no prejudice was suffered and thus all parties were duly and fairly heard.

In Ground 5 and Ground 82 of his Memorandum of Appeal the 1st Appellant complains respectively that the Hon. Justices of the Constitutional Court erred when they did not give reasons for the decision not to summon the Rt. Hon. Speaker of Parliament and that the Hon. Justices erred when they allegedly "un-judiciously" exercised their discretion allegedly in contravention of basic legal principles by not summoning the Rt. Hon. Speaker of Parliament for questioning on her role in the process leading to the impugned Act.

In (Para 43), (Para 44), (Para 45) and (Para 46) the 1st Appellant respectively submitted that his desire to have the Rt. Hon. Speaker summoned was well pleaded and the Application was so contentious that its decision could not go without reasons; failure by Court to give reasons for dismissing his Application for summoning the Rt. Hon. Speaker was an abuse of discretion; at hearing the effects of not summoning the Rt. Hon. Speaker caught up with the Hon. Justices and the Attorney General and without summoning the Rt. Hon. Speaker the Court erred in commenting and deciding in favor of and against her.

The Respondent refers to pages 809-850 of the record of appeal for the submissions and prayers of Counsel in respect of summoning the

Rt. Hon. Speaker. The Respondent submits that a review of the record demonstrates that the 1st Appellant was the only one that sought cross examination of the Rt. Hon. Speaker. The decision of the Court is at page 850 and 851 (print pages 85 and 86) wherein the Court states: -

"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".

The Respondent submits that the decision of the Court cited above is a ruling on an Interlocutory matter and the Court duly considered the arguments of the respective Counsel and litigants and pronounced itself on the matter of examination of the Rt. Hon. Speaker, declining to grant the order sought. The Respondent submits that the ruling of the Court already contained the abridged reasons for declining to grant the Application and as such the Appellant had due notice of the reasons for refusal.

That notwithstanding, the 1st Appellant filed in the Supreme Court Misc. Application No. 7/2018 similarly seeking to cross examine the Rt. Hon. Speaker which was heard on the 12th December, 2018 and

dismissed on the 14th December, 2018. The Respondent submits that Issues 5 and 82 were duly rendered moot by the Applicant filing Misc. Application No. 7/2018 and as a consequence of its subsequent dismissal.

The Respondent submits that Grounds 5 and Ground 82 of the 1st Appellants Memorandum of Appeal regarding the decision not to call the Rt. Hon. Speaker for examination are overtaken by events and any decision of the Court in that regard would therefore be moot. Notwithstanding, the Respondent prays that the Hon. Justices of the Supreme Court uphold the decision of the Hon. Justices of the constitutional Court not to call the Rt. Hon. Speaker who had not sworn any affidavit for examination. The Respondent submits that the verbatim record of Parliamentary proceedings produced in the Hansard is already on Court record together with the Certificate of Compliance.

Rule 223 of the Rules of Procedure of Parliament, 2017 provides: -
"The Clerk shall keep minutes of the proceedings of the house, which shall record the attendance of Members at each sitting and all decisions taken by the House."

Rule 224 of the Rules of Procedure of Parliament, 2017 provides: -
"(1) The Clerk shall –

(a) Be responsible for making entries and records of things done and approved or passed in the House;

(b) Have custody of all records and other documents belonging or presented to the House; and

Rule 225 of the Rules of Procedure of Parliament, 2017 provides: -

"(1) The Clerk shall be responsible for ensuring that all Parliamentary proceedings are reported word for word and that an official report of the proceedings is published as soon as possible after each sitting."

Rules 229 of the Rules of Procedure of Parliament, 2017 provides: -

"All papers laid before the House shall upon production be deposited with the Clerk who shall be responsible for their safe custody."

The Respondent accordingly submits 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 the Litigants in the consolidated Petition who had the opportunity to cross examine her at length.

That the Hansard and Certificate of Compliance are recognized as public documents under Section 73 and Section 75 of the Evidence Act, Cap. 8. Section 76 of the Evidence Act, Cap. 8 provides that certified copies may be produced in proof of the contents of public documents. Therefore, the admittance in evidence of the Hansard and Certificate in evidence by the Court was sufficient to enable the parties litigate the Petitions and the Hon. Court determine the matters in issue. The notion that the 1st Appellant intended to cross examine the Rt. Hon. Speaker on the contents of the Hansard is misconceived, since the Rt. Hon. Speaker cannot add, reduce or otherwise very the contents of the Hansard and the documents

speaks for itself as a true, faithful, accurate, complete and impartial account of the deliberations and decisions of Parliament.

7

In Ground 21 and Ground 22 the 1st Appellant complained respectively that the Hon. Justices of the Constitutional Court erred in allegedly failing to exercise their discretion to call for the evidence of the Rt. Hon. Speaker of Parliament, the Rt. Hon. Deputy Speaker of Parliament, the Hon. Minister of Justice and Constitutional Affairs, the Chairperson and Deputy Chairperson of the Parliamentary
14 Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi and that the majority Hon. Justices misdirected themselves by allegedly failing to take into consideration the Respondent's failure to adduce their evidence.

The Respondent re-iterates its submissions herein-above that the Clerk to Parliament, as the custodian of Parliamentary records and
21 documents, duly submitted the requisite record and documents evidencing the entire series of events and circumstances involved in presenting and considering the Constitutional Amendment Bill, 2017 and its evolution into the Constitutional Amendment Act, No. 1/2018.

The Respondent further submits that neither the 1st Appellant, nor the 2nd Appellant, sought to examine the Rt. Hon. Deputy Speaker
28 of Parliament, the Hon. Minister of Justice and Constitutional Affairs, the Chairperson and Deputy Chairperson of the Parliamentary Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi. Their Grounds of Appeal and submissions are an afterthought.

In Ground 81, Ground 83 and Ground 84 the 1st Appellant respectively complained that the Hon. Justices of the Constitutional Court erred when they denied the Petitioner General Damages on ground that he did not prove them; that the Hon. Justices allegedly exercised their discretion "un-judiciously" and without any sound reason held that the Petitioner is not entitled to professional indemnification and that they erred when they allegedly "un-judiciously" and without any reason held that each Petition should receive professional fees of Ushs. 20,000,000/= (Twenty Million Uganda Shillings).

In (Para 47), (Para 48), (Para 49), (Para 50) and (Para 51) the 1st Appellant respectively submits that he was allegedly denied professional compensation on account of appearing in person whereas he is allegedly a professional; alleged denial of professional compensation contravenes Articles 21, 28(1),44(c),126(1) and 126(2)(c) of the Constitution; common law Jurisprudence is against denying self-represented litigants costs and compensation for time and resources spent in litigation; the Ushs. 20,000,000/= awarded as professional fees for each Petition was without basis, inadequate and below the standard set by Court and that there was no need to prove general damages. The Respondent submits that the awards by the Hon. Court were purely discretionary under Article 137(3) and Article 137(4) of the Constitution. The Respondent submits and prays that the Court finds that in the circumstances the redress ordered was appropriate.

(b) If so, what is the effect on the decision of the Court?

In (Para 52) the 1st Appellant submits that the alleged failure of the hearing and procedural irregularities rendered all the proceedings and Judgment null and void. The Respondent re-iterates that as shown and submitted above 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. The Respondent further submits that the procedures adopted by the Constitutional Court were entirely within their discretion and did not in any way prejudice the Appellant or occasion derogation of such right. The Respondent, in conclusion, submits that the Appellants have not proved any of their respective Grounds of the Appeal pray that the Consolidated Appeals are dismissed with costs.

Court's consideration;

Fair trial means a fair and public hearing, within a reasonable time, by an impartial court. The right to fair hearing in civil matters is enshrined in the Constitution of Uganda under **Article 28 (1).** It provides as follows;

"In the determination of civil rights and obligations…….. a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."

The importance of this right was emphasized in **Article 44(c)** of the Constitution which is to the effect that;

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the right to a fair hearing."

This right is internationally recognized in several international treaties and covenants which Uganda ratified. **Article 2 (3) (c)** of the

International Covenant on Civil and Political rights (ICCPR) provides that;

"Each State Party to the present Covenant undertakes…to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial authorities.."

Article 27 of the **Vienna Declaration & Program of Action** provides that an independent judiciary…are essential to the full and non-discriminatory realization of human rights…democracy. . . ."

Article 26 of **The African Charter on Human & Peoples' Rights** provides that

"States Parties to the present charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

The appellants submitted that they underwent an unfair hearing in the constitutional court in various ways which I will resolve hereunder;

Expeditious hearing.

It was the appellant's contention that they did not receive a speedy trial. Further, that the judgment was delivered after 60 days and therefore is null and void.

Article 137 (7) provides that ;

Upon a petition being made or a question being referred under this Article, the court of Appeal shall proceed to hear and determine the petition **as soon as possible** and may for the purpose, suspend any other matter pending before it.

Rule 10 of the **Constitutional (petitions and Reference) Rule , 2005** provides that;

1. **The Court shall, in accordance with article 137 (7) of the Constitution, hear and determine the petition as soon as possible and may for that purpose, suspend any other matter pending before it.**

2. **The Court shall sit from day to day and may, for the purposes of hearing and determining the petition, sit during Saturdays, Sundays and on public holidays where the Court considers it necessary for ensuring compliance with article 137 (7) of the Constitution.**

3. **In any case, the Court or the Deputy Chief Justice may order that the Registry of the Court shall stay open on Sundays and public holidays to facilitate the filing and service of documents connected with the proceedings of the petition.**

In the instant case, five (5) Petitions were lodged singly in December, 2017 and January 2018. Hearing of the petitions was held on the 9th April 2018 where it handled the preliminaries and consolidation of the appeals due to the similarities in the issues contained therein. This therefore follows that the actual hearing commenced on the 10th April 2018 and concluded on the 19th April, 2018. The hearing therefore lasted 10 days. It should be noted that the case in question is a peculiar one since it was a five in one case and therefore could not be heard in just a day or two. Further, all the petitioners presented their cases in totality without regard that some issues are repetitive. In the case of **Isadru v Aroma & Ors (CIVIL APPEAL No. 0033 OF 2014) [2018], court observed that;**

"The right to a fair trial in civil matters is guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995*. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Entailed in that right to a "speedy hearing" is the right to a trial within a reasonable time, often termed the right to be tried without undue delay or the right

to a speedy trial. For the realization of this right, all parties, including the courts, have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article. The overriding objective under article 28 (1) of *The Constitution of the Republic of Uganda, 1995* and *The Civil Procedure rules* in general is that courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party.

The case before court was not an ordinary case that requires ordinary treatment as the appellant seem to suggest. It had complex issues and matters of national importance. I am persuaded by the above authority and therefore hold that 9 days is a reasonable time for court to hear five petitions merged in one.

The appellant contended that the judgment in the constitutional court was delivered past the 60 days as prescribed any law and should therefore be nullified. In the same spirit, the complexity of the petition could not be overemphasized by this court. The hearing ended on the 19th of April 2018 and judgment was delivered on the 26th of July 2018. The court thus took around 97 days to deliver its judgment. Firstly judicial code of conduct are only guidelines for judicial officers to follow while dispensing their duties therefore cannot be interpreted in strict terms. Further the code stipulates that judgment should be in 60ndyas where possible. I reiterate that this case was a five case petition and the constitutional court had to evaluate all the evidence forwarded by all parties involved. I humbly find that 97 days was expeditious time for delivery of a judgment in a consolidated case.

Calling of witnesses;

Appellants contended that court erred when they failed to call key witnesses. These included the Speaker of parliament, the deputy speaker of parliament, the minister of Finance, Hon. Magyezi Raphael, the president and the Chairperson of the Committee of Legal and Parliamentary Affairs.

Rule 12 (3) of the **Constitutional Court (Petitions and References) Rules, SI. 91 of 2005** is to the effect that **Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the <u>evidence of the witness is likely to assist the Court to arrive at a just decision.</u>**

The provision is to the effect that court may call an examine witnesses only if it is of the opinion that their testimony will assist court arrive at a just decision. First of all, the president enjoys immunity from being part of any court proceedings as provided for by Article 98(4) of the Constitution.

The speaker, deputy speaker, Magyezi and chairperson of the committee of legal and parliamentary affairs in my opinion could not assist court more than the Hansards that were filed on court record. The Hansards reflect all the event s that took place in parliament and therefore court could ably decide on all those issues without the need of those witnesses.

Sitting Arrangement

The 1st Appellant argued that his right to fair hearing was derogated when court ordered him to vacate from sitting at the Bar. I agree with the constitutional court that the bar is meant for barristers. Fair hearing is all about a party given a chance to present their case and not really about where to sit in a court room.

Professional fees

The 1st appellant claimed that he was not awarded professional fees yet he represented himself in the case.

In the case of **Kasaija vs Iga & Anor (HCT-04-CV-MC-004-2014)[2015],** court observed that;

"The Advocates (Remuneration and Taxation of costs) Regulations are made under the Advocates Act, which specifically refers to enrolled advocates." I agree with the court in above and I humbly

opine that Mr. Mabirizi is not an advocate and therefore could not claim remuneration provided for under the Advocates (Remuneration and taxation of costs).

Interruptions, cross examination and right to rejoinder.

The appellants claimed that the court over interrupted them while making their case. Further, that they were restricted to cross examination of only facts deboned upon. Appellants also claim that they were denied their right to rejoinder.

Court is enjoined with discretionary powers to interrupt a witness, or any other person presenting before it for purposes of clarity and better understanding of the case. These powers are provided for under **Section 164 of the Evidence Act.** It reads that;

" a judicial officer may in order to discover or to obtain proper proof of relevant facts , ask any question he or she pleases , in any form , at anytime , of any witness, or of the parties about any fact relevant or irrelevant. It is my humble view that court did interrupt where necessary and indeed it had powers to do so.

The appellants received a fair hearing and this ground is answered in the negative.

Issue Eight.

What remedies are available to the parties?

<u>Appellants' Submissions</u>

Counsel started by laying down the authority of **Tinyefuza vs Attorney General Appeal 1 of 1997 Oder JSC at page 37** which cited with approval the case of **Troop vs. Dulles** where the Supreme Court of the US stated that:

"The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital. Living principles that authorize and

limit government power in our nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not the words of the Constitution become little more than good advise"

Counsel submitted that *Article 20(2)* requires all organs and agencies of government to uphold and promote rights and freedoms enshrined in the Constitution.

He further relied on *Article 137(4)(a)* of the Constitution which provides that Court may grant an order of redress in addition to the declarations sought.

Counsel submitted that the Constitutional Court unanimously appeared to appreciate that the security forces crossed the red line however no declarations were made by court.

Counsel submitted that this violation was a well thought out strategy to facilitate the enactment of the Act by sending a message to the Members of Parliament and their constituents that opposition to the Bill was a red line for government. Counsel submitted that it was intended to instil terror and fear.

He explained that the emboldened of the army grievously beating up Members of Parliament to an extent of long hospitalization is not acceptable and the only remedy is nullifying the Act. That this would send a message to all the people of Uganda that there is a price to pay for contravention of the Constitution.

Counsel submitted that this court is under duty to prevent future individuals in government from looking at violence as a means of

achieving their objectives because at the end of the day, such objective shall not be achieved.

He submitted that since it is clear that the entire process of introducing, processing and enactment of The Constitution (Amendment) Act 2018 was flawed, in addition to other factors discussed above, the entire process was vitiated rendering the Act unconstitutional, null and void.

The appellants unanimously prayed court for the following remedies;

- That court allows the appeal.
- That the Constitutional Amendment Act be annulled and the costs be paid to the appellants.
- Mr. Mabirizi prayed for general damages and full costs of the case in this court and the court below with an interest of 25% per annum from the date of judgment till payment in full.
- That in the alternative, If issue 7 is answered in the affirmative, then the court should order for a retrial.
- That just as in the lower Court the Appellant in Appeal Number 4 of 2018 does not seek costs of the Appeal but prayed for disbursements only.

Respondent's Submissions

Counsel submitted that the Constitutional Court was right in applying the principle of severance. He stated that severance is provided for in Article 2(2) of the Constitution

He relied on courts' observations in the cases of **Salvatori Abuki V Attorney General; Constitutional Case No. 2 of 1997**, **South African**

National Defence Union vs Minister of Defence& Another Constitutional Court case No. 27 of 1998.

Counsel further submitted that in order to maintain the purpose of the Act, the Court came to the right conclusion by severing sections of the Constitution (Amendment) Act, No. 1 of 2018 that had been validly passed from those sections of the Act that had not met the criteria set out in the Constitution and the Rules of Procedure of Parliament.

Pursuant to the above, counsel prayed court to find that the appeal lacks merit and thereby be dismissed with costs to the Respondent.

The respondent further prayed court to affirm and uphold the findings of the majority Justices of the Constitutional Court of Uganda that sections 1, 3, 4 and 7 of the Constitution (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson of Local council V to contest for election to the respective offices and for implementation of the recommendations of the Supreme court in **Presidential Election Petition No. 1; Amama Mbabazi vs. Yoweri Museveni** were lawfully enacted in full compliance with the Constitution and valid provisions of the Constitution (Amendment) Act, No. 1 of 2018.

In regard to the alternative prayer by the appellants, the respondent prayed court to dismiss it because it was misconceived and the appellants have not adduced evidence before this Honourable Court to warrant issuance of an order for a retrial.

Regarding the prayer for general damages with interest at 25% per annum from the date of judgment, the respondent submitted that

general damages are awarded to restore a party to a position he or she was in before he suffered injury, loss or inconvenience arising from a breach of duty or obligation. He explained that appellant has not proved or adduced evidence to show that he suffered any material inconvenience or at all a loss by the passing of the Constitution (Amendment) Act No. 1 of 2018 and therefore ought to be denied.

Rejoinder

It was counsel's submission that the authorities that the Respondent cited and relied on to support the application of the principle of severance to justify the refusal to nullify the whole Act by the lower Court are non-binding authorities for the following reasons;

- None of those laws is an Act amending the Constitution. Different standards and procedures apply in enacting an ordinary law as opposed to the Constitution.

That in Uganda the procedure of enacting legislation is to be found in rules 112 to 136 of the rules of procedure of the House. That all bills have to comply with those rules. However in respect of constitutional amending legislation, Articles 259 to 263 are applicable in addition to rules 112 to 136. An ordinary legislation does not go through the process laid down in Articles 259 to 263.

- That all the challenged legislations cited in the cases above were enacted by respective Parliaments using the rules of procedure of the House and not their National Constitutions. He further argued that authorities applying the principle of severance to legislation enacted under the ordinary rules of

procedure of Parliament are not applicable to legislation enacted under a procedure prescribed by the Constitution. Those authorities apply parliamentary regulations fundamentally different from the one in the instant case.

- That in all the cases cited above, the process followed by Parliament was never in issue. What was in issue was simply the final product as it appeared on the law books viz-a viz the Constitutions.
- That in all the cases cited, Parliament was not warned that it was about to enact unconstitutional law but nevertheless went ahead to enact the law as is in the case now before the court.
- That in the cases relied upon the challenged and severed sections were not arrived at as a result of constitutional breaches.

Counsel further re-joined that it was not true that severance maintained the purpose of the Bill because purpose of a Bill can change after it is introduced in Parliament. Rule 133(20) allows Parliament to amend the long title to reflect amendments made to the Bill. It is therefore not a sound reason to justify severance on maintaining the original purpose of a Bill.

Counsel invited court to hold that the principle of severance is not applicable in the present case.

That in the alternative, exceptions to the rule in respect of constitutional amendments ought to be made. Such exceptions are that where Parliament amends a constitution well aware that any of

the provisions is unconstitutional then the rule does not apply. That others are in bad faith and deliberate contravention of the Constitution so as to achieve the challenged law. That in such case as is in the present case the principle of severance should not apply. That if the Court is inclined to uphold the principle counsel prays that exceptions are made and the Court holds that the principle is not applicable in the present case.

Counsel re-iterated his earlier prayers and those reflected in the Memorandum of Appeal.

Court's Considerations

This issue seeks to answer the question whether the majority justices of the Constitutional Court correctly severed some sections of the impugned Act and whether the appellants are entitled to any remedy. It is therefore pertinent that in resolving these issues, I am simply going to answer the following question;

Did the Constitutional Court rightly apply the doctrine of severance?

Severance is the process by which courts strike unconstitutional portions of a given law and let the remainder stand as a valid law.

According to **Johnathan Whitefield in his works, Two Tests of severance: Procedural and Substantive Constitutional violations and the legislative process in Missouri, 79 MO.L.REV (2014),** Severance may take two forms which are statutory severance and doctrinal severance. Statutory severance is provided for by the law and doctrinal severance is judicially created. In Uganda, severance is provided for under the provisions of Article 2(2) of the Constitution. It provides as follows;

"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 <u>shall to the extent of its inconsistency be void.</u>

Severance is used by courts to cure legislations that violate the constitution. It is important to note that there are two types of unconstitutional legislations. There are legislations that violate procedural constitutional requirements and legislations that violate substantive requirements.

Controls on the procedure of the legislation process are the restrictions that regulate only the process by which a legislation is enacted. Now these are referred to as *procedural constitutional violations*. Substantive procedural violations on the other hand occur when the bill contains provisions that are found to be substantively invalid based on the constitution. The appellants in their submissions impeached the impugned Act on procedure and content.

Procedure

John Godfrey Saxe, a great poet in his works, **An impeachment Trial (MICH. U. CHIRON** said that **"….. Laws …like sausages, cease to inspire respect in proportion as we know how they are made…"**

The process through which a legislation is made is very important and it squarely affects its validity. This position was echoed in the case of **Oloka Onyango& 9 Ors vs the Attorney general (Supra)**, where court observed that;

"Parliament as a law making body should set standards for compliance with constitutional provisions and with its own Rules. The speaker ignored the law and proceeded with passing the Act. We

agree with counsel Opiyo that the enactment of the law is a process and the law that is enacted is as a result of it……failure to obey the Law (Rules) rendered the whole process a nullity. It is an illegality which this court cannot sanction.."

As already set out in my discussion on issue 2, I highlighted the procedural violations that were committed by parliament. Both parties agree that it is trite that procedural violations in enactment of a law render the result of such a process a nullity. The constitutional court unanimously agreed to certain procedural irregularities however the majority of the Justices observed that those irregularities affected just some of the provisions of the impugned Act and accordingly, they were severed from the rest. The question now is did the procedural irregularities affect the severed parts of the Act or did they affect the Act as a whole?

In the instant case, the said Bill was brought by hon. Raphael Magyezi, a private member of parliament. It sought to amend Articles 102(b), 183(b) and amendments pertaining to the recommendations by this court in the case of Amama Mbabazi vs Y.K Museveni and Ors (supra) touching the conduct of presidential election petitions. It was tabled for the first reading, and the bill was taken to the Committee of Legal and Parliamentary Affairs for deliberations. The committee did its job and produced its report before parliament. In the report were recommendations that term limits for presidency be reinstated in the constitution and the tenure of presidency, parliamentarians and other political leaders be increased from a five year term to a seven year term. Some

members of parliament at that point opposed the recommendations as they would impose a charge on the consolidated fund and would only be introduced by or on behalf of Government.

The speaker dismissed the points stating that there was no bill but rather just a report of the committee. The Bill was read a second time and was sent to the Committee of the whole House for further deliberations as required under Rules 130-134 of the Rules of Procedure of Parliament. During those deliberations as a committee of the House, amendments that effected the recommendations of the committee of Legal and Parliamentary Affairs were forwarded by two private members of Parliament. They were to the effect that the term limits for presidency be brought back since they had been ousted from the constitution by a previous Parliament. The other amendment was increasing the terms of parliamentarians and local government leaders from five years to seven years. The amendments were discussed by the Committee of the House under the guidance of the speaker as the chairperson and they agreed that the Bill by Magyezi be amended to encompass the amendments.

The committee at the third reading reported to the House that the Bill had amendments. The honourable Magyezi moved the House that the Bill be read the third time and informed the House that he had **adopted** the Bill with all the amendments (*See Hansards dated 20th December 2017*). The Bill was read the third time, debated upon and the final vote was done hence passing of the Bill. The clerk then prepared assent copies to be sent to the president which copies

were accompanied by the speaker's certificate of compliance. The president assented and it became an Act of parliament.

7 It is not in contention that amendments that were adopted by the Bill at the third reading offended Article 93 of the Constitution. The speaker when notified by a member that the amendments violated Article 93 responded that the Bill was still at committee level and therefore there was no Bill really. What is not comprehensible is that when they resurfaced again as amendments still before her as
14 chairperson of the committee, she still rejected the arguments of the persons that raised points of procedure against them. The amendments were adopted, read to the whole House and members voted.

The Article 93 is couched in mandatory terms. It forbids Parliament to proceed on a motion or amendment to a motion which creates a
21 charge on the consolidated funds.

It is my humble view that Parliament unconstitutionally proceeded on a Bill which violated the constitution and therefore the Constitutional Court was right to sever that part which offended the Constitution.

28 The doctrine of severance was discussed in the 2013 case of **Round Table for Life, Inc vs State of Missouri, 396 S.W.3d.348 (Mo.2013,** the General Assembly enacted a law which touched various subjects. The petitioners challenged the legislation based on the fact that it violated the Constitutional 'single subject rule" which was to the effect that a bill shall not embrace more than one subject and that

shall be expressed in the long title. (Section 23 Article III of the Missouri constitution.

Court declared the legislation null and void in its entirety and held that Section B could not be severed from S.B7. The Attorney General appealed to the Supreme Court and his case was that court should severe the unconstitutional part of the legislation. Court held that the sections could not be severed form the initial bill due to its inclusion in the title of the bill contrary to the Constitutional requirement. **Justice Zel Fischer (CJ)** despite his concurrence with the court wrote separately in order to express his views on procedural constitutional violations and severance. He observed as follows;

"…. <u>Judicial severance encourages the Missouri General Assembly to disregard its oath to protect the Missouri constitution and the procedural mandates expressed within it</u> and that it violates the principle of separation of powers." Emphasis mine. He further observed that **"procedural constitutional mandates exist to promote necessary and valuable legislative accountability and transparency"**

In the case of **Semogerere & Anor vs AG(supra)** court observed as follows;

"an amendment need to be passed by two thirds majority on each of the second and third readings of the bill. Thereafter, a bill must be accompanied by the certificate of the speaker to the effect that it has been passed in accordance with the provisions of chapter eighteen,…"

Martha J. Dragich, a Legal Author and Law Professor in her works, **State Constitutional Restrictions on Legislative Procedure** observed as follows;

"……the applicability of S. 1.140 (equivalent to Article 2(2)) is nonsensical when applied to procedural constitutional violations since procedural violations taint the entire affected Act, it makes more sense to restrict it (severance) to substantive constitutional violations."

In the case of **Hammer Shimidt vs Boone county, 877 S.W.2dat 102,** court observed that severance is a potential remedy for constitutional infirmities of House Bills however it is a more difficult issue when procedural mandates of the constitution are violated.

Further in the case of **Legends Bank Vs State.36, S.W.3d 383,391(M.2012)** Justice Fischer (CJ) observed that **the judicially created doctrine of severance should be abolished. That doctrinal severance provides no incentives for the legislators to follow and that it violates the state separation of powers.** He further observed that;

"…. It may subvert the legislative process by allowing legislation that might not have received enough votes to become law to survive.

I have pursued the submissions of both parties together with their authorities. With greatest respect it is trite that the courts while applying authorities should bear in mind the relevance of the same to the circumstances at hand.

In the instant case, Hon. Magyezi rightly presented his bill and it went through stages upto the committee of the whole House where debates were made clause by clause. At that stage two amendments were purportedly made which created a change on consolidated funds contrary to Article 93 of the Constitution.

Although those amendments were purportedly passed, they violated the Constitution and could not be construed as amendments in law. Therefore, the Constitutional Court was right to apply the doctrine of severance on those amendments which the law could not consider as passed.

In my view, it would be very costly and a great abuse to separation of powers to strike the whole Act because of the ill intention of introducing illegal amendments to the original Bill introduced by Hon. Magyezi. This Court as a Court of last resort is not only a Court of justice but also acts as a problem solver under Article 2 (2) and 126 of the Constitution and Rule 2(2) of its Rule of Procedure.

Having found all the issues in the negative, I find that the appeal has no merit. It is accordingly dismissed. The judgment of the Constitutional Court is upheld. Parties to bear their own costs.

Dated this …… ……. day of …… ……2019

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OPIO-AWERI
JUSTICE OF THE SUPREME COURT