THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

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

CONSTITUTIONAL APPEAL NO 02 OF 2018

BETWEEN

MALE H. MABIRIZI KIWANUKA :: APPELLANT

AND

THE ATTORNEY GENERAL ::RESPONDENT

CONSOLIDATED WITH

CONSTITUTIONAL APPEAL NO. 03 OF 2018

BETWEEN

1. KARUHANGA KAFUREEKA GERALD
2. ODUR JONATHAN
3. MUNYAGWA S. MUBARAK
4. SSEWANYANA ALLAN
5. SSEMUJJU IBRAHIM
6. WINFRED KIIZA ::: APPELLANTS

AND

ATTORNEY GENERAL:: RESPONDENT

AND

CONSTITUTIONAL APPEAL NO. 04 OF 2018

BETWEEN

UGANDA LAW SOCIETY:: APPELLANT

AND

THE ATTORNEY GENERAL:: RESPONDENT

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

JUDGMENT OF MWANGUSYA, JSC

These three appeals were filed separately in this Court. During pre-hearing, they were consolidated with the consent of the parties since they arose from the same Judgment of the Constitutional Court in consolidated Constitutional Petitions Nos. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018.

In the above Constitutional Petitions, the appellants had challenged the constitutionality of the provisions of the Constitution (Amendment) Act, No. 1 of 2018 (hereinafter referred to as the impugned Act) and the process of its enactment into law. The appellants argued that because

the process of enacting the impugned Act and the provisions therein were unconstitutional, the impugned Act should be nullified.

The Constitutional Court found that some of the provisions of the impugned Act were indeed unconstitutional, as I shall highlight later, and accordingly struck them out. The Constitutional Court however found that some of the provisions of the impugned Act were constitutional. Applying the principle of severance, the Constitutional Court retained those provisions it found constitutional and on that basis declined to grant the main relief sought by the appellants which was to nullify the whole impugned Act. The Constitutional Court also found although that there were some procedural irregularities in the course of passing the impugned Act, the irregularities were not substantive enough to nullify the entire Act.

Before considering the submissions and merits of this appeal, it is necessary to provide a brief background to this appeal. The appellants lodged various petitions in the Constitutional Court challenging the constitutionality of the impugned Act. The major contention of each appellant in their respective Petition was that the impugned Act was unconstitutional both in regard to the process of enacting it and to the provisions themselves.

The Attorney General duly filed responses to the Petitions. His response was to the effect that the impugned Act was enacted by Parliament in accordance with the provisions of the Constitution that provide for its amendment and the provisions of the impugned Act were constitutional.

The parties agreed upon fourteen issues for determination by the Constitutional Court. These where:

1. ***Whether Sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from five to seven years is inconsistent with and/or in contravention of Articles 1, 8A,***

61(2)(3), 77(3)(4), 79(1), 96, 105(1), 260(1), 233(b) and 289 of the Constitution.

2. And if so, whether applying the said Act retroactively is inconsistent with and/or in contravention of Articles 1, 8A, 77(3)(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 five to seven 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 the 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 was inconsistent with and/or in contravention of Article 93 of the Constitution.

(c) Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members of Parliament in the Parliamentary Chambers, 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.

(d) Whether the consultations carried out were marred with restrictions and violence which was 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 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 Section 2,5,6,8 and 10 of the Act was inconsistent with and in contravention of Articles 1,91(1), 259(2), 260 and 263(2) (b) of the Constitution.

(g) Whether the Act was against the spirit and structure of the 1995 Constitution.

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

i) Whether the actions of parliamentary staff preventing some members of the public from accessing the parliamentary chambers during the presentation of the Constitutional amendment Bill No. 2 of 2017 was inconsistent with and/or in contravention of the provisions of Articles 1, 8A, 79, 208(2), 209, 211(3), and 212 of the Constitution.

ii) 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.

iii) Whether the alleged actions of the Speaker of Parliament in permitting the 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.

iv) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some committee members who had become Members of the Committee after the public hearings on Constitutional Amendment Bill No. 2 of 2017 had been held and completed, to sign the Report of the said Committee, was in contravention of Articles 44(c), 90(1) and 90(2) of the Constitution.

v) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee on 18th December, 2017 to submit to Parliament the said Committee's Report 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.

vi) 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.

vii) Whether the action of Parliament in:

(a) Waiving the requirement of a minimum of three sittings before the tabling of the report which was also not seconded;

(b) Of closing the debate on the Constitutional Amendment Bill No. 2 of 2017 before every willing Member of Parliament had been afforded an opportunity to debate the said Bill;

(c) Failing to close all the doors leading to the Parliamentary Chamber where Members of Parliament carried on the debate of the Bill, are in contravention of Articles 1, 8A, 44(c), 79, 94 and 263 of the Constitution.

8. Whether the passage of the Bill into an Act without Parliament first having observed 14 days of Parliament sitting 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 absence of a certificate of compliance from the Speaker and a 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 re-introduces term limits and entrenches them as being subject to a 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 harmonise the seven year term of Parliament with the 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 of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution.

14. What remedies are available to the parties?

On 26th July 2018, the Constitutional Court partially allowed the consolidated Petitions and declared as follows:

1. By unanimous decision, 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.

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

3. By majority decision 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 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. 20,000,000/= (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.

Dissatisfied with part of the decision of the Constitutional Court, the appellants appealed to this Court. The appellant in Constitutional Appeal No. 02 of 2018 lodged a Memorandum of Appeal in this Court containing 84 grounds of appeal categorized under different parts. These grounds were:

PART A: GROUNDS RELATING TO DEROGATION OF THE RIGHT TO FAIR AND SPEEDY HEARING BEFORE AN IMPARTIAL COURT

1. *All the learned Justices of the Constitutional Court erred in law and fact when they failed to hear and determine the Constitutional petition expeditiously.*

2. *All the learned Justices of the Constitutional Court erred in law and fact when they evicted the petitioner from court seats occupied by representatives of other petitioners, putting him in the dock throughout the hearing and decision of the petition.*

3. *All the learned Justices of the Constitutional Court erred in law and fact when they caused a miscarriage of justice by not giving the petitioner ample time to present his case and extremely and unnecessarily interfered with his submissions.*

4. *All the learned Justices of the Constitutional Court erred in law and fact when they derogated the petitioner's right to fair hearing by preventing*

the petitioner from substantially responding to the respondent's submissions by way of rejoinder.

PART B: GROUNDS RELATING TO OMISSIONS AND FAILING IN THE COURT'S DUTY IN DETERMINATION OF THE DISPUTE.

5. *All the learned Justices of the Constitutional Court erred in law and fact when they did not give reasons for their decision not to summon the speaker of Parliament.*

6. *All the learned Justices of the Constitutional Court erred in law and fact when they did not at any one point mention the existence of or even rely on the petitioner's two supplementary affidavits in support of the petition, rejoinder to the answer to the petition and the supporting affidavit thereto as well as affidavits in rejoinder to affidavits of Jane Kibirige, Keith Muhakanizi and Gen. David Muhoozi, which were on court record.*

7. *The majority Justices of the Constitutional Court erred in law and fact when they did not determine the legality of the substantial contents in the affidavit of Gen. David Muhoozi, the chief of Defence forces, which were put in issue as hearsay.*

8. *The majority Justices of the Constitutional Court erred in law and fact when they did not determine the legality of the substantial contents in the affidavit of Keith Muhakanizi, the Secretary to the Treasury, which were put in issue as hearsay.*

9. *All the learned Justices of the Constitutional Court erred in law and fact when they did not make a clear and specific determination of Issue 6(a) and all submissions made in that regard relating to restrictions on private members' bills imposed by Article 93 of the Constitution.*

10. *All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on the principle of Constitutional Replacement as ably submitted before them by the Petitioner.*

11. *All the learned Justices of the Constitutional Court erred in law and fact when they did not determine the point that the Speaker was*

stopped from presiding over actions and presenting them as lawful which she had earlier found and ruled to be unlawful.

12. *All the learned Justices of the Constitutional Court erred in law and fact when they did not declare unconstitutional Section 1(b) of the impugned Act allowing the Electoral Commission to hold a presidential election on a day different from that of a parliamentary election.*

13. *All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on the constitutionality of the presence of armed forces outside parliament and in the entire country.*

14. *All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on constitutionality of detaining and arresting of Members of parliament from parliamentary chambers.*

15. *All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on constitutionality and legality of the action of ejection/ eviction of Members of parliament purportedly on orders of the Speaker when the Speaker was out of her chair.*

16. *All the learned Justices of the Constitutional Court erred in law and fact when they did not make a finding on the validity of the Certificate of compliance by the Speaker of parliament which was in issue.*

17. *All the learned Justices of the Constitutional Court erred in law and fact when they resolved most of the issues without referring to the evidence and submissions of the petitioner.*

18. *All the learned Justices of the Constitutional Court erred in law and fact when they did not consider the variety of authorities from within and outside the jurisdiction which were referred to them, supplied and summarized to them by the petitioner.*

19. *The learned majority Justices of the Constitutional Court erred in law and fact when they failed to properly evaluate the pleadings, evidence and submissions hence reaching wrong conclusions.*

PART C: GROUNDS RELATING TO CONTRADICTIONS AND MIS-APPLICATION OF LEGAL PRINCIPLES AND FACTS.

20. *The majority Justices of the Constitutional Court erred in law and fact when they highly contradicted themselves on legal principles and facts of the case and hence reached wrong conclusions not connected to the stated principles and facts on record.*

21. *The majority Justices of the Constitutional Court erred in law and fact when they applied statutory substantial effect/quantitative principles applicable to election petitions which do not apply to principles of determination of validity of a Constitution Amendment Act of parliament.*

22. *The majority Justices of the Constitutional Court erred in law and fact when they held that the location of an entrenchment provision in the constitution does not matter.*

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

24. *The majority Justices of the Constitutional Court erred in law and fact when they upheld part of the Act in total departure from Constitutional Court decision(s) to the effect that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it.*

PART D: GROUNDS RELATING TO VIOLATION AND MISAPPLICATION OF EVIDENCE AND ITS PRINCIPLES.

25. *All the learned Justices of the Constitutional Court erred in law and fact when they suggested answers to Gen. David Muhoozi, The Chief of Defence Forces, a witness who was under cross-examination on oath, prevented him from answering questions and with threats, ordered the petitioner not to ask any further questions.*

26. *All the learned Justices of the Constitutional Court erred in law and fact when they over-protected Mr. Keith Muhakanizi, The Secretary to The Treasury, a witness under cross-examination and prevented him*

from answering questions put to him as wells as preventing the petitioner from asking pertinent questions.

27. *The majority Justices of the Constitutional Court erred in fact when they held there was no other evidence to prove that the petitioner was denied access to parliament's gallery.*

28. *The majority Justices of the Constitutional Court erred in law when they held that there was need for corroboration of the petitioner's evidence of being denied access to the gallery of parliament.*

29. *The majority Justices of the Constitutional Court erred in fact in holding that there was no evidence that the speaker allowed members to cross from one side of the floor to another, in absence of a video.*

30. *The majority Justices of the Constitutional Court erred in fact in holding that the motion by Hon. Mwesigwa Rukutana, to suspend the rules of Procedure requiring skipping of at least 3 sitting days after tabling of the Committee Report was at Parliament committee stage and not in a normal plenary sitting.*

31. *The majority Justices of the Constitutional Court erred in fact in holding that members of parliament obtained a report of the Committee three days prior to 18th December 2017.*

32. *The majority Justices of the Constitutional Court erred in fact in holding that enough members and all those who wanted to debate had debated the Bill before voting on the second reading.*

PART E: GROUNDS RELATING TO THE CONCEPTUALIZATION AND PROCESSING OF THE ACT BY WAY OF A PRIVATE MEMBER'S BILL.

33. *Without prejudice to the above, all the learned Justices of the Constitutional Court erred in law and fact in holding that the Motion to introduce the private members Bill, the bill itself and the entire process did not contravene Article 93 of The Constitution.*

34. *The majority Justices of the Constitutional Court erred in law and fact in holding that the initial motion and Bill by Hon. Rapheal Magyezi did*

not make provision for and/or had effect of a charge on the consolidated fund.

35. *The majority Justices of the Constitutional Court erred in law and fact in holding that there was a requirement for a Certificate of Financial implications instead of government presenting the impugned Bill itself.*

36. *The majority Justices of the Constitutional Court erred in law in relying on the provisions of Section 76 of The Public Finance Management Act, 2015, to deviate from the clear provisions of Article 93 of the Constitution.*

PART F: GROUNDS RELATING TO FAILURE OF PUBLIC PARTICIPATION IN PROCESSING OF THE ACT.

37. *The majority Justices of the Constitutional Court erred in law and fact in upholding prevention of the petitioner from attending parliamentary gallery during the proceedings to amend the Constitution.*

38. *The majority Justices of the Constitutional Court erred in law and fact in holding that preventing members of parliament from debating on the Bill was not fatal in the constitutional amendment process.*

39. *The majority Justices of the Constitutional Court erred in law and fact in making a finding that in absence of regulations for public participation, parliament was not bound to carry out public participation and/or that what it did was sufficient.*

40. *The majority Justices of the Constitutional Court erred in law and fact when they, after finding that the constitution prohibits governing people against their will, did not nullify the entire Act to which people were not consulted and which was processed in a tense, chaotic and military manner.*

PART G: GROUNDS RELATING TO PARTICIPATION OF ARMED FORCES, VIOLENCE AND RESTRICTIONS ON FUNDAMENTAL HUMAN RIGHTS IN PROCESSING THE ACT.

41. *All the learned Justices of the Constitutional Court erred in law and fact when they condoned violation of non derogable rights against*

torture, inhuman and degrading treatment and validated the resultant outcome which was tainted.

42. *All the learned Justices of the Constitutional Court erred in law and fact in holding that since the members of parliament called violence for themselves, the torture, inhuman degrading treatment against them cannot be held to be unconstitutional and that the resultant Act cannot be invalidated on ground of violence.*

43. *The majority Justices of the Constitutional Court erred in law and fact in failing to invalidate the entire impugned Act on the basis of its being processed amidst violence inside and outside of parliament.*

44. *The majority Justices of the Constitutional Court erred in law and fact in refusing to invalidate the entire law on the basis of a police circular addressed to and complied with by Uganda Police Force commanders in Uganda.*

45. *The majority Justices of the Constitutional Court erred in law and fact when they failed to declare the entire impugned Act unconstitutional after making a finding that the restrictions on fundamental rights during the process were not demonstrably justifiable in a free and democratic society.*

46. *The majority Justices of the Constitutional Court erred in law and fact when they failed to nullify the entire Act after making a finding that the presence of Uganda Peoples Defence Forces in parliament was not called for.*

47. *The majority Justices of the Constitutional Court erred in law and fact in failing to nullify the entire Act after making a finding that the police circular which curtailed public participation was unconstitutional.*

48. *The majority Justices of the Constitutional Court erred in law and fact when they held that the police circular, which was enforced countrywide, had no effect on the amendment of the Constitution.*

49. *The majority Justices of the Constitutional Court erred in law and fact in holding that the actions of the Uganda Peoples Defence Forces were demonstrably justifiable in a free and democratic society.*

50. *The majority Justices of the Constitutional Court erred in law and fact when they held that the violence in parliament, which they found to be uncalled for and unconstitutional, did not vitiate the entire law.*

PART H: GROUNDS RELATING TO NON-COMPLIANCE WITH THE RULES OF PROCEDURE OF PARLIAMENT AND/OR ALIGNING THEM WITH CONSTITUTIONAL PROVISIONS.

51. *All the learned Justices of the Constitutional Court erred in law and fact when they held that the Speaker has sweeping powers to prevent the petitioner from accessing parliament without a resolution of parliament or any rules gazetted for that purpose.*

52. *The majority Justices of the Constitutional Court erred in law and fact when they held that the Speaker, solely, has powers to determine the business of parliament and order paper.*

53. *All the learned Justices of the Constitutional Court erred in law and fact when they justified and upheld suspension and eviction of members of parliament on the same day of reading out there names.*

54. *The majority Justices of the Constitutional Court erred in law and fact in holding that non-secondment of the motion to suspend the Rules of Parliament requiring separation of at least three sittings after presentation of the Committee Report was not fatal to the Constitutional Amendment process.*

55. *The majority Justices of the Constitutional Court erred in law and fact in holding that the Speaker was justified in entertaining Hon. Raphael Magyezi's motion to present a private members' Bill earlier than the earlier motion of Hon. Nsamba for a resolution for establishment of a constitutional review commission.*

56. *The majority Justices of the Constitutional Court erred in law and fact when they upheld the committee report which was signed by members of parliament who did not participate in the hearing of the public and other committee processes.*

57. *The majority Justices of the Constitutional Court erred in law in justifying and upholding the Speaker's refusal to close the doors of*

parliament chambers during the roll call voting on the 2nd and 3rd reading of the Bill.

58. *The majority Justices of the Constitutional Court erred in law when they held that the Speaker of parliament has unfettered powers in parliament.*

59. *The majority Justices of the Constitutional Court erred in law and fact in upholding the suspension of rules of parliament during the constitutional amendment process.*

60. *The majority Justices of the Constitutional Court erred in law and fact when they failed to apply estoppels against the Speaker in respect of an un-seconded motion and crossing and sitting of members of parliament to the opposite side.*

PART I: GROUNDS RELATING TO MULTI-PARTY DEMOCRACY.

61. *All the learned Justices of the Constitutional Court erred in law and fact when they held that in a multi-party dispensation, absence of opposition members of parliament does not render parliament not fully constituted.*

62. *All the learned Justices of the Constitutional Court erred in law and fact when they validated the Speaker's arbitrary decision to allow ruling party members of parliament to cross and sit on the opposition side.*

63. *The majority Justices of the Constitutional Court erred in law and fact when they, after finding that under normal circumstances, opposition members of parliament had to be in attendance, went ahead to validate part of the Constitutional amendment Act.*

PART J: GROUNDS RELATING TO REMOVAL OF AGE LIMIT QUALIFICATIONS FOR PRESIDENT OF THE REPUBLIC.

64. *The majority Justices of the Constitutional Court erred in law and fact when they did not find that amendment of Article 102(b) of the Constitution amounted to colourable legislation/ amendment of Articles 1, 2 and 3(2) of the Constitution in a manner prohibited by the Constitution.*

65. *All the learned Justices of the Constitutional Court erred in law and fact in not finding that amendment of qualifications and disqualifications of a president under our 1995 constitution amounted to a constitutional replacement which parliament had no power to do.*

66. *The majority Justices of the Constitutional Court erred in law and fact when they held that qualifications and disqualifications of a president under our 1995 constitution is not one of the core structures embedded in the Constitution.*

67. *The majority Justices of the Constitutional Court erred in law and fact in upholding lifting of the age limit on ground that even members of parliament have no age limit.*

68. *The majority Justices of the Constitutional Court erred in law and fact when they failed to make a finding that the justifications for the removal of age-limits were flimsy, selfish, irrational and not demonstrably justifiable in a free and democratic society and not allowed by the constitution rendering the amendment null and void.*

PART K: GROUNDS RELATING TO GENERAL MISAPPLICATION OF PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

69. *The majority Justices of the Constitutional Court erred in law and fact in not invalidating the Act after making a finding that the process was marred with tension and chaos.*

70. *The majority Justices of the Constitutional Court erred in law in holding that members of parliaments' right to represent the people is not absolute.*

71. *The majority Justices of the Constitutional Court erred in law when they applied the substantial/quantitative effect test in determining the validity of the Constitutional Amendment Act.*

PART L: GROUNDS RELATING TO SEPARATION OF 14 SITTING DAYS BETWEEN THE 2ND AND 3RD READING AND PRESIDENTIAL ASSENT TO THE IMPUGNED BILL.

72. *The majority Justices of the Constitutional Court erred in law and fact in holding that separation of 14 sitting days of parliament was not mandatory for the entire Bill to pass.*

73. *The majority Justices of the Constitutional Court erred in law and fact when they held that the Certificate of electoral commission that a referendum was held in respect of the entire Bill was not required in respect of the entire Bill.*

74. *The majority Justices of the Constitutional Court erred in law and fact in failing to declare the false and legally insufficient Certificate of compliance invalid.*

75. *The majority Justices of the Constitutional Court erred in law and fact in failing to declare the entire Act invalid after making a finding that the pre-conditions of a presidential assent were not followed.*

PART M: GROUNDS RELATING TO CONTINUANCE IN OFFICE OF A PRESIDENT ELECTED IN 2016 ON ATTAINING 75YEARS.

76. *The majority Justices of the Constitutional Court erred in law when they held that a president elected in 2016 is not liable to vacate office on attaining the age of 75years.*

77. *The majority Justices of the Constitutional Court erred in law and fact when they held that the qualifications of a president should not be maintained through his/her stay in office.*

PART N: GROUNDS RELATING TO PRAYERS & PLEADINGS.

78. *The majority Justices of the Constitutional Court erred in law and fact when they held that the petitioner did not contest particular provisions relating to age-limit, extension of time for Supreme Court to determine a presidential election petition.*

79. *The learned majority Justices of the Constitutional Court erred in law and fact when they proposed and granted a remedy of severance which was not pleaded by the respondent both in his answer to the petition and all affidavits in support thereto.*

PART O: GROUNDS RELATING TO REMEDIES.

80. *The majority Justices of the Constitutional Court erred in law in applying the principle of severance of some sections in a single Act in*

a situation where the constitutional amendment procedure was fatally unconstitutional and defective.

81. All the learned Justices of the Constitutional Court erred in law when they denied the petitioner general damages on ground that he did not prove them.

PART P: GROUNDS RELATING TO UN-JUDICIOUS EXERCISE OF DISCRETION.

82. All the learned Justices of the Constitutional Court erred in law and fact when they unjudiciously exercised their discretion in contravention of basic legal principles by not summoning the speaker of parliament for questioning on her role in the process leading to the impugned Act.

83. All the learned Justices of the Constitutional Court erred in law and fact when they in exercise of their discretion unjudiciously without any sound reason held that the petitioner is not entitled to professional indemnification.

84. All the learned Justices of the Constitutional Court erred in law and fact when they unjudiciously, without any reasoning held that each petition should receive professional fees of Ugx. 20,000,000(Uganda Shillings Twenty Million only.)

On these grounds, the appellant prayed for orders that:

a. The Appeal be allowed.

b. All the proceedings of the Constitutional court be declared were null and void for derogating the right to fair hearing.

c. The Constitutional Petition be remitted back to the Constitutional Court for expeditious hearing, in compliance with fair hearing principles, before a different panel.

d. The appellant be granted general damages for inconveniences.

e. The costs of this appeal and in the court below be paid by the respondent to the appellant.

f. An interest of 25% per annum be paid by the respondent on the above damages and costs.

In the alternative but without prejudice to the above reliefs sought, the appellant prayed for orders that:

a. The Private Members Bill, Constitution (Amendment) Bill No. 2 of 2017 was barred by Article 93 of the Constitution.

b. Failure to comply with mandatory constitutional provisions and the Rules of Parliament, the violence, failure of public participation among other lapses rendered the entire process leading to enactment and assent to the Constitution (Amendment) Act, 2018, null and void and of no effect.

c. The appellant be granted general damages for inconveniences.

d. The costs of this appeal and in the court below be paid by the respondent to the appellant.

e. An interest of 25% per annum be paid by the respondent on the above damages and costs.

The appellants in Constitutional Appeal No. 03 of 2018 on the other hand lodged a Memorandum of Appeal containing 24 grounds of appeal. These grounds were framed as follows:

1. The learned majority Justices of the Constitutional Court erred in law and fact in holding that sections 1, 3, 4 and 7of the constitutional (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson Local Council V to contest for election to the respective offices were passed in full compliance with the Constitution of the Republic of Uganda.

2. The learned majority Justices of the Constitutional Court erred in law and fact in holding that sections 1, 3, 4 and 7of the constitutional (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson Local Council V to contest for election to the respective offices did not abrogate, emasculate or destroy the basic structure of the 1995 Constitution of Uganda.

3. *The learned majority Justices of the Constitutional Court misdirected themselves on the construction and application of the basic structure doctrine thereby coming to a wrong decision.*

4. *The learned majority Justices of the Constitutional Court erred in law and fact in failing to pronounce themselves on the implied amendment of Article 21 of the Constitution by the impugned Act.*

5. *The learned majority 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.*

6. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the President of Uganda validly and lawfully assented to the Constitutional (Amendment) Act, 2018 in the circumstances.*

7. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the deployment and/or intervention of Uganda Police and UPDF in the chambers and within the precincts of the parliament by causing eviction of some members of Parliament was justified to enable Parliament to proceed with its Constitutional mandate.*

8. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the violence that ensued following the invasion of Parliament by Police and members of the UPDF and other security agencies did not vitiate the process leading to the enactment of the Constitutional (Amendment) Act.*

9. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the impugned Bill and the process leading to the enactment of the Constitutional (Amendment) Act did not contravene the provisions of Article 93 of the Constitution.*

10. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Ug. Shs. 29,000,000/= (Twenty Million*

Shillings) doled out to each Honourable Member of Parliament created no additional charge on the consolidated fund.

11. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that there was no evidence to demonstrate that the unconstitutional Directive issued by the Assistant Inspector General of Police, a one Asuman Mugenyi to District Police Commanders on 16th October 2017, curtailing public participation was never implemented and that it had adversely affected the entire consultative process and the passing of the impugned Act.*

12. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the public consultation by Honourable Members of Parliament took place fairly well and that the instances of interruption of public consultation and participation of the people in the enactment process of the impugned Act by Police throughout the country did not render the entire Act a nullity.*

13. *The learned majority Justices of the Constitutional Court erred in law and fact in finding that the Speaker of Parliament did not violate the rules of Procedure.*

14. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Speaker did not breach the Rules of procedure allowing Hon. Raphael Magyezi's motion for leave to introduce a private Member's Bill onto the Order Paper of 26th September 2017.*

15. *The learned majority Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent upon which the Speaker and Parliament failed to comply with and/or violated the rules of procedure of parliament.*

16. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the extent upon which the Speaker and Parliament failed to comply with and/or violated the rules of procedure of parliament did not adversely affect the whole process of enacting the impugned Act as to render it null and void in toto.*

17. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Speaker validly and lawfully exercised her discretion by suspending Members of Parliament from participating in the proceedings in the House.*

18. *The learned Justices of the Constitutional Court misdirected themselves in ordering counsel for both parties to proceed with submissions before cross examination of their respective witnesses.*

19. *The learned Justices of the Constitutional Court erred in law in denying the Petitioners a right to rejoin after closure of the Respondent's case.*

20. *The learned Justices of the Constitutional Court in their conduct throughout the proceedings in the consolidated Petitions and all applications arising therefrom acted with material procedural irregularities.*

21. *The learned Justices of the Constitutional Court erred in law in failing to exercise their discretion to call for the evidence of the Speaker of Parliament, Deputy Speaker, Minister of Justice and Constitutional Affairs, the Chairperson and the Vice Chairperson of the Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi.*

22. *The learned majority Justices of the Constitutional Court misdirected themselves in law and fact by failing to take into consideration the Respondent's failure to adduce evidence of the Speaker of Parliament, Deputy Speaker, Minister of Justice and Constitutional Affairs, Minister of Finance, Attorney General, the Chairperson and Vice Chairperson of the Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi.*

23. *The learned majority Justices of the Constitutional Court erred in law by failing to pronounce themselves on a number of the Appellants' prayers and misapplying the doctrine of severance in determining the validity of the Constitutional (amendment) Act, No. 1 of 2018.*

24. *The learned majority Justices of the Constitutional Court erred in law and fact in awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees for each petition including Constitutional Petition No.*

05 of 2018 and two-thirds of the taxed disbursements to all the Petitioners.

On these grounds, the appellant asked for the following orders:

1. *That this appeal be allowed.*
2. *That the majority judgment and orders entered for the Respondent against the Appellants by the learned Justices of the Constitutional Court in the Constitutional Court of Uganda at Mbale be set aside and be substituted with the following:*

    I. *That the Constitution (Amendment) Act, 2018 be annulled.*

    II. *In the alternative, but without prejudice to paragraph (I), the following sections of the Constitution (Amendment) Act, 2018 hereunder listed be annulled;*

        a) *That section 3 of the Constitution (Amendment) Act, 2018 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as President of Uganda.*

        b) *That section 7 of the Constitution (Amendment) Act, 2018 in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as District Chairperson.*

    III. *That the invasion and/or heavy deployment at the Parliament by the combined armed forces of the Uganda People's Defence Forces and the Uganda Police and other militia in using violence, arresting, beating up, torturing and subjecting the Appellants and other Members of Parliament to inhuman and degrading treatment on the day the impugned Bill was tabled before the parliament amounted to amending the Constitution using violent and unlawful means, undermined Parliamentary independence and democracy and as such was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3) and 259 of the Constitution.*

IV. *That the arbitrary actions of the armed forces of the Uganda People's Forces, Uganda Police Force and other militia in frustrating, restraining, preventing and stopping some members of Parliament from attending and/or participating in the debate and/or proceedings of the House on the Constitutional (Amendment) Bill was inconsistent with and in contravention of Articles 1, 8A, 20, 24, 28(1), 79, 208(2), 211(3) and 259 of the Constitution of Uganda.*

V. *That the actions of the armed forces of the Uganda People's Defence Forces, Uganda Police and other militia to invade the Parliament while in plenary thereby inflicting violence, beating, torturing several Members of Parliament at the time when the motion seeking leave of Parliament to introduce the Private Members' Bill, Constitution (Amendment) Bill No. 2 of 2017 was being tabled was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3), and 259 of the Constitution.*

VI. *The actions of the armed forces of the Uganda Police force in beating, torturing, arresting, and subjecting several Members of Parliament while in their various constituencies to consult the people on the Constitution (Amendment) Bill, 2017 was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3), 259 and260 of the Constitution.*

VII. *That the arbitrary decision of the Inspector General of the Uganda Police Force of restricting several Members of Parliament to their respective constituencies in their bid to consult their electorates on the constitution (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Articles 1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3) and 259 of the Constitution.*

VIII. *That the process leading to the enactment of the Constitution (Amendment) Act, 2018 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National Objectives and Directive Principles of*

state policy and other constitutional provisions and as a result was inconsistent with and in contravention of Articles 1, 2, 3, 8A, 79, 91 and 259 of the Constitution of Uganda.

IX. *That the actions of Parliament to prevent members of the public, with proper identification documents to access the Parliament's gallery during the seeking of leave and presentation of the Constitutional (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Articles 1, 8A, and 79 of the Constitution of Uganda.*

X. *That the procedure and manner of passing the Constitution (Amendment) Act, 2018 was flawed with illegality, procedural impropriety and the same was a violation of the Rules of Procedure of Parliament and therefore inconsistent with and in contravention of Articles 79, 91, 94, and 259 of the Constitution of Uganda.*

XI. *That the actions of the Speaker in entertaining and presiding over the debate on the impugned Bill when the matter on the same was before Court was a violation of Rule 72 of the Rule of Procedure of Parliament of Uganda therefore inconsistent with and in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.*

XII. *That the arbitrary actions of the Speaker of Parliament to suspend the 1st, 2nd,3rd,4th and 5th Appellants who were in attendance in the Parliamentary Proceedings on the 18th day of December, 2017, a sitting of Parliament where the two reports on the Constitution (Amendment) (No. 2) Bill, 2017 were to be debated was a violation of Rules 87 and 88 of the Rules of Procedure of Parliament of Uganda therefore in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution of Uganda.*

XIII. *That the actions of the Speaker of Parliament to close the debate on the Constitution (Amendment) Bill No. 2 of 2017 before each and every Member of Parliament could debate and present the views of their constituents concerning the Constitutional*

(Amendment) Bill was a violation of Rule 133(3) (a) of the Rules of Procedure of Parliament therefore in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

XIV. That the actions of Parliament in waiving Rule 201(2) requiring a minimum of three sittings from the tabling of the Committee Report on the Constitution (Amendment) Bill No. 2 of 2017 was in contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

XV. That the purported decision of the Government of Uganda to make an illegal charge on the consolidated fund to facilitate the Constitution (Amendment) Bill No. 2 of 2017 which was tabled as, a private member's Bill was inconsistent with and in contravention of Article 93 and 94 of the Constitution of Uganda.

XVI. That the purported decision of the Government of Uganda to issue a certificate of compliance in regard to the Constitution (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Article 93 and 94 of the Constitution of Uganda.

XVII. That the actions of the President of Uganda to assent to the Constitution (Amendment) Act, 2018 was inconsistent with and in contravention of Articles 1, 2, 8A, 44(c), 79, 91, 94 and 259 of the Constitution.

The appellants also prayed for costs of this Appeal and in the Court below.

Lastly, the appellant in Constitutional Appeal No. 04 of 2018 lodged a Memorandum of Appeal in this Court containing four grounds of appeal. These were:

1. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that passing of the Constitution (Amendment) (No.2) Bill 2017 into law without Parliament first observing 14 days of Parliament sitting between the 2nd and 3rd reading is not inconsistent with the 1995 Constitution of the Republic of Uganda.*

2. *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 the Constitution (Amendment) Act 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda.*

3. *The learned majority Justices of Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act 2018 is not invalid for the reasons that some of the sections therein are inconsistent with provisions of the 1995 Constitution of the Republic of Uganda.*

4. *The learned majority Justices of Constitutional Court erred in law when they found that there were breaches of the Constitution and failed to make orders on the Appellant's prayers.*

On these grounds, the appellant prayed for the following orders:

1. *That the appeal be allowed*

2. *That the majority judgment and orders entered for the Respondent against the Appellants by the learned Justices of the Constitutional Court in the Constitutional Court of Uganda at Mbale be set aside and be substituted with the following:*

   i. *That the Constitution (Amendment) Act, 2018 be annulled and declared unconstitutional;*

   ii. *In the alternative but without prejudice to paragraph (i) section 3 of the Constitution (Amendment) Act, 2018 be annulled and declared unconstitutional in as far as it purports to lift the minimum and maximum age qualification of a person seeking to be elected as president of Uganda undermines the sovereignty and civic participation of the people of Uganda and is inconsistent with Articles 1, 8A, 38, 105(1) and 260(1);*

   iii. *that the actions of the security forces in entering Parliament, assaulting and detaining members of Parliament is inconsistent with*

or in contravention of Articles 23,24 and 29 of the 1995 Constitution of the republic of Uganda;

iv. That the entire process of conceptualizing, tabling, consultation, debating and passing of the Constitution (Amendment) Act, 2018 was inconsistent and in contravention of Articles 1, 8A,29,38,69(1),72(1),73 and 79 of the 1995 Constitution of the Republic of Uganda;

v. That the passing of the Constitution (Amendment) (No.2) Bill 2017 at the second and third reading without the separation of at least fourteen sitting days is unconstitutional and inconsistent with Articles 1,105(1), 260(2)(b) & (f) and 263(1) of the Constitution;

vi. That the actions of Parliament waiving rule 201 (2) requiring a minimum of three sittings from the tabling of the committee report on the Constitution (Amendment) (No.2) Bill 2017 was in contravention of Articles 79,91,94 and 259 of the 1995 Constitution of the Republic of Uganda.

3. That the Appellant prays for costs of this Appeal and in the Court below.

Representation

The appellant in Constitutional Appeal No. 02 of 2018 represented himself. M/S Lukwago & Co. Advocates together with M/S Rwakafuzi & Co. Advocates appeared on behalf of the appellants in Constitutional Appeal No. 03 of 2018. Counsel Wandera Ogalo represented the appellant in Constitutional Appeal No. 04 of 2018. The Attorney General Byaruhanga William led a team consisting of the Deputy Attorney General Mwesigwa Rukutana, Mr. Francis Atoke the Solicitor General, Ms. Christine Kahwa the Ag. Director Civil Litigation, Mr. Philip Mwaka Principal State Attorney, Mr. George Karemera Principal 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 Amusugat State Attorney, Mr. Sam Tusubira State Attorney and Mr. Allan Mukama State Attorney.

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

Before I proceed to the merits of this appeal, I wish to dispose two issues raised by the Attorney General regarding the competence of Constitutional Appeal No. 02 of 2018**.**

The Attorney General contends that the Memorandum of Appeal contravenes the Rules of this Court and secondly that the appellant filed his petition from which his appeal arose way before the impugned Act had been enacted.

Attorney General's Submission

The Attorney General contended that all the 84 grounds of Appeal in Constitutional Appeal No. 02 of 2018 offended Rule 82 of the Rules of this Court. In his view, the grounds were speculative, argumentative, narrative, insolent and an abuse of Court process.

According to the Attorney General the grounds in the Memorandum of Appeal offended Rule 82 in that they did not specify the points that are alleged to have been wrongly decided by the Constitutional Court, the nature of order they wanted this Court to make and were not concise, but were rather narrative, argumentative and speculative.

In the Attorney General's view, this was an abuse of Court process. He relied on **Hwan Sung Ltd v. M&D Timber Merchants & Transporters Ltd, Civil Appeal No. 02 of 2018** to argue that a ground of appeal which does not state in what way the Court of Appeal erred offended Rule 82.

In light of his contentions above, the Attorney General prayed that the Memorandum of Appeal in Constitutional Appeal No. 02 of 2018 be struck out.

The Attorney General submitted that the appellant's appeal should fail since the Petition did not conform to Article 137 of the Constitution. He

argued that the Petition was filed in December 2017 before the Bill from which the impugned Act arose had been passed into an Act. He further argued that the appellant did not amend the Petition after the impugned Act had been enacted.

Relying on the authorities of **Miria Matembe & 2 Ors v. Attorney General, Constitutional Petition No. 02 of 2005** and **Makula International v. His Eminence Cardinal Nsubuga & Anor, Court of Appeal Civil Appeal No. 21 of 2001**, the Attorney General argued that this rendered the Petition null and void. On this basis, the Attorney General prayed that this appeal be struck out.

Appellant's Reply

The appellant who represented himself, objected to the manner raising this preliminary objection. He contended that Rule 98 (b) of the Rules of this Court the objection to memorandum of appeal should have been by Notice of Motion.

Without prejudice to his submissions above, the appellant contended that the Attorney General misinterpreted the provisions of Rule 82 by arguing that every ground of appeal must contain in it the nature of the order which it is proposed to ask the Court to make. In his view, grounds of appeal drafted in such a way would lead to an absurdity. The appellant further argued that what Rule 82 requires is that at the end of stating the grounds of appeal, the appellant must state the nature of the order which it is proposed to ask the Court to make. In the appellant's view, he did exactly that as is evident at pages 19-21 of the Record of Appeal.

On the issue of the grounds of appeal being speculative, argumentative, narrative, insolent and an abuse of court process, it was the appellant's contention that Rule 82(1) only prohibits 'argument' or 'narrative' and not 'speculation', 'insolence', and 'abuse of court process' as contended by the Attorney General.

The appellant argued that the purpose of Rule 82(1) was to ensure that the Court adjudicates on specific issues complained of in the appeal. In the appellant's view as long as a ground of appeal points to a specific complaint so as to be able to contemplate what will be argued, such ground is compliant with the Rule. The appellant then proceeded to highlight why his grounds of his appeal were competent. The summation of these highlights was that:

(a) The grounds of objection do not need to be wrongly decided, they can be omissions and errors which may render the decision to be null and void [for instance failure to give a fair hearing in the course of hearing]

(b) Conciseness of a ground depends on the nature of the complaint and the fact that a ground of appeal contains several words does not mean that it is not concise

(c) The grounds of appeal did not need to have prayers in themselves.

The appellant prayed that since he had demonstrated that the memorandum of appeal complied with Rule 82(1) and that the objection was irregularly raised, the Attorney General's objection should be rejected.

In the alternative, the appellant prayed that in the unlikely event that this Court found any merit in Attorney General's submissions, then the Court should find that the Attorney General has suffered no prejudice since he was able to understand the complaints in the appeal and adequately responded to them.

The appellant submitted that the claim that the petition did not conform to Article 137 was unfounded and that the objection was neither raised nor argued in the Constitutional Court and thus cannot be raised at this level.

The appellant further contended that even if the Attorney General's objection was not incompetent, there was a clear failure by the Attorney

General in comprehending Article 137 of the Constitution. The appellant argued that the Attorney General's contention that the petition was incompetent because it was filed before the Bill had become an Act does not make it incompetent in light of Article 137(3) of the Constitution.

Relying on Article 137(3), the appellant argued that his locus arose the moment Parliament prevented him from accessing Parliament and all the subsequent actions up to the purported voting were inconsistent with or in contravention of the Constitution. The appellant, citing some excerpts of his petition submitted that in his petition he clearly challenged the actions of the persons stated in the petition which in his view passed the test under Article 137(3) of the Constitution.

In conclusion, the appellant submitted that the Attorney General's objection lacks merit and should be rejected.

Court's Determination of the Preliminary Objection

I agree with the Attorney General that for the reasons he so ably expounds the appellant's Memorandum of Appeal does not meet the standards set out under Rule 82 of the Rules of this Court. However, as rightly pointed out by the appellant the preliminary point should have been raised at the earliest opportunity which was at the Pre hearing Conference when apart from Consolidating the appeals issues arising from all the memoranda of appeal were framed. After framing the issues court allowed parties to file written submissions which the parties including the appellant complied with. Having allowed the appellant to proceed with the appeal this court cannot strike it out at this stage of the hearing and as rightly pointed out by the appellant the Attorney General would not suffer any prejudice.

The Attorney General also contended that the appellant's petition at the Constitutional Court did not disclose a cause of action since the impugned Act that is being challenged had not yet been enacted.

On the other hand appellant contends that Article 137(3) of the constitution gives a right to any person to lodge a petition to the Constitutional Court as under:-

"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

(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."

In **Ismail Serugo v. Kampala City Council, Constitutional Appeal No. 02 of 1998, Mulenga, JSC** (as he then was) held that a petition brought under Article 137 (3) of the Constitution:

"**Sufficiently discloses a cause of action if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and pray for a declaration to that effect.**"

In **Baku Raphael Obudra & anor v. Attorney General, Constitutional Appeal No. 02 of 1998**, Odoki, CJ (as he then was) while relying on the above ratio held as follows:

*"***In my opinion, where a petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of action if it specifies the Act or its provision complained of and identifies the provision of the Constitution with which the Act or its provision is inconsistent or in contravention, and seeks a declaration to that effect. A liberal and broader interpretation should in my view be given to a Constitutional petition than a plaint when determining whether a cause of action has been established."**

A review of the appellant's petition shows that he was aggrieved and dissatisfied with numerous acts and omissions of various persons and/or authorities which acts and/omissions, in his view contravened or were

inconsistent with various provisions of the Constitution. Some of these acts and omissions were even done before the impugned Act had been assented to by the President. He proceeded to ask for various declarations the climax of which was that the Act which was a product of such a process be declared unconstitutional.

Thus in line with the provisions of Article 137 of the constitution and the ratio in **Ismael Serugo** (supra), it is my finding that the appellant's Petition disclosed a cause of action warranting its consideration by the Constitutional Court. It therefore follows that the appellant's petition was properly before the Constitutional Court and so is his appeal before this Court.

Principles of constitutional interpretation relevant in this Appeal.

In interpreting the Constitution, one of the principles to be followed is that where the words of the Constitution are clear and unambiguous, then they are given their primary, plain, ordinary and natural meaning. However where the language of the Constitution is imprecise, unclear and ambiguous, then the same is given a liberal, broad, generous and purposive interpretation so as to give effect to the spirit of the Constitution as a continuing instrument whereby governance is upon principles that are acceptable and demonstrably justifiable in a free and democratic society.

Interpreting the Constitution, requires Court to look at the Constitution as a whole. All the provisions of the Constitution touching on the issue have to be considered together. The Court must give 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 leads to an apparent conflict within the Constitution. Where a Constitutional provision is in conflict or

inconsistent with another Constitutional provision, the Constitutional Court has jurisdiction to resolve the inconsistency so that the Constitution remains whole. See: **Ssemogerere & Another v AG: Constitutional Appeal No. 1 of 2002 (SCU).** See also: **Mtikila V AG: High Court Tanzania Civil Case No. 5 of 1993.**

The Constitution must be interpreted in such a way that it does not whittle down any of the rights and freedoms contained in it, unless there are clear and unambiguous words to that effect within the Constitution itself. See **Dow –v- AG (1992) LRC (Const) 623** at 668. The interpretation must be directed at ascertaining the foundation values inherent to the Constitution and not merely the literal meaning of its provisions. See: **Matison & Others –v- The Commanding Officer Port Elizabeth Prison & Others [1994] 3 BCLR 80 at 87.** Interpreting the Constitution should take account of the context, scene and setting under which it is operating, not necessarily when it was enacted, so as to take account of the growth and the changing circumstances of the society it is regulating. See: **Archbishop Okogie V AG (1981) 2 NCLR 337 at 348 (Nigeria COA).**

Where Constitutional history is relevant in interpreting the Constitution, particularly so as to point out past mistakes so that they are not repeated or revived, then such a history should be resorted to. Indeed this is very well brought out by the preamble to the 1995 Constitution that:

"We the People of Uganda:

Recalling our history which has been characterised by political and Constitutional instability";

That ***"Recalling of our history"*** cannot be left out when interpreting the Constitution. See: **Karuhanga vs AG: Constitutional Court Petition No. 39 of 2013.**

The principles that govern interpretation of ordinary Statutes also apply to interpretation of a Constitution. However, because of the very important objectives of a Constitution that evolve upon the development and aspirations of the people and being the framework for the legitimate exercise of government power as well as the protection of basic individual rights and liberties, the Court interpreting the Constitution must go further than the one interpreting an ordinary Statute, by reading the words of the Constitution and attaching to them great purposes that were intended to be achieved by the Constitution as a continuing instrument of government. It is only this way that the people can have full protection of their fundamental rights and freedoms as well as that of the whole Constitution: See: **Attorney General V Whiteman [1991] 2 WLR 1200 at 1204 and Attorney General of Gambia V Momadu Jube (1984) AC 689 (Privy Council).**

Under the purpose and effect rule of Constitutional interpretation, the purpose and effect of an impugned Act go to determine the Constitutionality of that Act. If the purpose or its effect infringes a Constitutionary guaranteed right, then the Act is declared unconstitutional. See: **Abuki & Another V AG**: **Constitution Petition No. 2 of 1997.**

Related to the above, is the rule of interpretation that the Constitution must be interpreted to give logical and practical meaning and effect to its provisions. Hence the right to life guaranteed under the Constitution has

been interpreted to include the right to livelihood: See **Abuki & Another V AG (Supra)** where the Uganda Constitutional Court relied in the Indian Supreme Court decision of **Tellis & Others V Bombay Municipal Council (1987) LRC (Const) 351**.

In interpreting the Constitution resort is also made, where necessary and relevant, to international and regional treaties and instruments. This is because, in the case of Uganda, paragraph 28 of the National objectives and Directive Principles of State Policy, provides that Uganda is to respect international law and treaty obligations and actively participate in international and regional organizations that stand for peace, well-being and progress of humanity. The Uganda Human Rights Commission under Article 52(i) (h) monitors the Government's compliance with the international treaty and convention obligations on human rights. It follows therefore that under the Constitution the role of the international and regional treaties and Instruments is a recognized one. It is therefore right of the Constitutional Court to hold that in matters of interpreting the Constitution:

" **..... we may have to use aids in construction that reflect an objective search for the correct construction. These may include international instruments to which this country has acceded and thus elected to be judged in the community of nations."** Per Egonda-Ntende AG JA, in **Tinyefuza –v- AG (Supra).**"

At pre-hearing conference, 8 issues were agreed upon by the parties and the Court, these are;

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

2. Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of 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?

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

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

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

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

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

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

8. What remedies are available to the parties?

I shall now proceed to determine these issues starting with issue No.7 because if resolved in the affirmative it may not be necessary to delve into

the merits of the appeal which would have been disposed by way of annulment of the entire trial.

Issue 7: PROCEDURAL IREEGULARITIES

This issue was framed as follows:

"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?"

Appellants' Submissions

MPs submissions on Issue No.7

Counsel submitted that the right to a fair hearing a non derogable right under Article 44 of the Constitution was compromised in a number of ways by the Constitutional Court.

Counsel submitted that one of the salient features of what constitutes fair trial is that it must be before **"an independent and impartial Court or tribunal established by law."**

In counsel's view, allegations of denial of the right of fair hearing or trial are very serious and should not be made lightly or merely in passing. That they impact on the very core of our trial system.

Counsel submitted on the principle in determining the question of judicial discretion which was succinctly explained in the case of **Uganda Development Bank- versus – National Insurance Corporation SCCA No. 28/1995** where court observed that;

"**The principles which this court applies when deciding whether to interfere with the exercise of discretion by a Trial Judge are well known and are set out in such decisions as MbogoVs. Shah (1968)**

E.A. 93 where, Newbold, P. at page 96, stated the principles to be that—

"...a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis justice."

Counsel submitted that Judicial discretion must be exercised on fixed principles: **Jetha Vs. Sigh (1931) 13L.R.K.1**. 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**.

That a mere difference of opinion between the appellate court and the lower court as to the proper order to make is no sufficient ground for interfering with a discretion which has been exercised in the Court below. There must be shown to be an unjudicious exercise of the discretion or an exercise of discretion at which no Judge could reasonably arrive whereby injustice has been done to the Party complaining

Counsel submitted that though there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if such discretion has been rightly exercised.

According to counsel the learned justices of the Constitutional court misdirected themselves when they unjudiciously exercised their discretion by declining 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.

That under Rule 12 (3) of the Constitutional Court (Petitions and References) Rules, SI. 91 of 2005;

"**The 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 while considering the nature and scope of inquiry and investigations which ought to be done by the Constitutional Court, noted that;

"**In my view, facts pertaining to constitutional questions ought to be proved with certainty rather than being left to the fate of "hide and seek" between litigants, which the rules on the onus of proof evoke.....I would go as far as to say that if the parties failed to do so, it was open to the court,.....to call direct evidence from the appropriate officer of Parliament without appearing 'to unduly descend into the arena'. The desirability to decide constitutional issues on ascertained facts cannot be over emphasized."**

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. 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. Magyezi 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 leaned Justices of the Constitutional Court erroneously directed the Appellants' counsel to make submissions before the cross examining the relevant witnesses.

b) The leaned 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.

That all these procedural irregularities occasioned a miscarriage of justice.

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

Counsel submitted that the above irregularities limited the Constitutional court's scope of investigation thereby failing on its noble duty vested under Article 137 (1) of the Constitution thereby coming to a wrong decision. He relied on the case of **Semwogerere (supra**) where Kanyeihamba JSC observed that;

"In Uganda, courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution."

The Appellants also contended that the Learned Justices of the Constitutional Court erred in law and fact and injudiciously 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.

<u>Submissions of Mabirizi</u>

Mr. Mabirizi submitted that the court was duty bound to determine the petition expeditiously whose failure derogated the right to fair hearing. He cited **Article 137(7) of The Constitution and Rules 10 & 11 of The Constitutional Court Rules** which place a duty on the Constitutional Court to determine a Constitutional Petition expeditiously. That the petition was filed in December 2017 and court heard it in April 2018 and

interrupted by unnecessary lengthy adjournments. 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. He cited **Rule 33(2) of the Court of Appeal Rules** and the **Uganda Judicial Code of Ethics, Paragraph 6.2** which 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."**

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

He cited the case of **Chief Ifezue V. Mbadugha-Nigeria** Nigeria Supreme Court Case No. 68 of 1982, where the Justices declared that the Judgment delivered out of the three months allowed by the law was null & void.

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 he submitted there was a derogation of his right to a fair hearing & rules of natural justice

Mr. Mabirizi complained that the court turned into 'defence counsel' through excessive interruptions hence derogating the right to fair hearing.

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 incessant 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.

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.

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

That his right to reply after submissions by the respondent is absolute and not at the whims of court as the court made it to the extent that he had to plead for it. That the DCJ introduced two terms; '**Closing Remarks'** and '**New Matter'**. Which are not known under any law.

Mr. Mabirizi submitted that court was bound to be patient to enable presentation of the 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 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.

He cited the case of **Charles Onyango Obbo and Anor v Attorney General (Constitutional Appeal No.2 of 2002)** 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."**

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. He relied on Section 33 of the Judicature Act and referred to the case of **Ebenezer & Ors V.Onuma & Anor, Nigeria Supreme Court Case No.213/88,** where ESO,JSC, he 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.

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, that instead, the DCJ dealt with issue No. 6 but did not resolve issue 6(a).

Mr. Mabirizi argued that court failed to make a decision on arresting & detaining members of parliament from the house yet it was in issue 6(c).

That the court was bound to make a decision on his application to strike out the affidavits of Mr. Keith Muhakanizi & Gen David Muhoozi. That except, Justice Musoke, who declined to expunge the paragraphs for reason that Mr. Keith Muhakanizi disclosed the sources of information, the DCJ, Kasule, Kakuru & Barishaki JJCS said nothing about this affidavit and no decision was therefore reached.

Mr. Mabirizi submitted that it was irregular for court to propose answers to witnesses & to prevent the appellant from cross examining witnesses. He referred to Section137 (2)of the Evidence Act provides that "…**the cross-examination need not be confined to the facts to which the witness testified on his or her examination-in-chief.".**

He complained that 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 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.

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.

It was his contention that the two affidavits of Gen. Muhoozi and Keith Muhakanizi were 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, SCCAPl. 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 Ochailap 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.

Mr. Mabirizi submitted that his desire to have the speaker summoned was well pleaded & the application in court was so contentious that its decision could not go without reasons, but none was given in the Judgment, which amounted to a whimsical exercise of discretion. That

failure by court to give reasons for dismissing the application for summoning the speaker was an abuse of discretion.

That at hearing, the effects of not summoning the speaker caught up with the Justices and Attorney General 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 & against her without testing the basis and credence of these actions.

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

Mr. Mabirizi submitted that the failure to accord him a fair hearing and the procedural irregularities highlighted rendered all the proceedings and judgment null & void.

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

The Attorney General's submissions

The Attorney General submitted that the 2nd Appellant's submissions are presumptuous and without any basis whatsoever. That at the outset, he points out that the 2nd Appellant did not apply to the Court to examine the Rt. Hon. Speaker of Parliament - or any of the other witnesses that had not sworn Affidavits in respect of the Petition, including those cited herein. The record shows that it was only the 1st Appellant that requested Court to examine the Rt. Hon. Speaker and the Respondent has already dealt with the same ground/issue its submissions in reply to the 1st Appellant and therefore incorporates its arguments in Constitutional Petition No. 2/2018 by way of reference.

The Attorney General cited the case of **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.**

The Attorney General submitted that beyond making general submissions that the cross-examination was guided by the ground rules established by the Hon. Justices, the Appellants have not demonstrated how they were prejudiced or otherwise denied a fair hearing in the circumstances.

The Attorney General submitted 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 proceedings demonstrates that the 2ndAppellants – and all the parties in the Consolidated Petitions - fully participated in the proceedings and had ample time to present their case.

On the rejoinder, The Attorney General submitted it was only on new matters raised during the course of the Respondents submissions. The Respondent contended that no prejudice was occasioned by the Court permitting cross examination after submissions had commenced and the Appellants had the opportunity to extensively submit on the matter raised during the cross examination. Additionally, the Appellants did not object to the mode adopted by the Honorable Court and this is therefore an afterthought.

The Attorney General relied on the case of **American Express International Banking Ltd Vs. Atul [1990-1994] EA 10 (SCU);** in which the Supreme Court of Uganda elaborated the circumstances/tests for interference with discretion, including: -

"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 - see: **The Abidin Daver [1984] All ER 470**.

Referring to the case of **Mbogo Vs. Shah (1968) EA 10** (Supreme Court of Uganda);

The Attorney General contended that under **Article 137(7) of the Constitution** requires that upon presentation of a Petition, the Constitutional Court; -"... **shall proceed to hear and determine the Petition as soon as possible ..."** Rule **10(1) of the Constitution Court (Petition and References) Rules SI No. 91/2005** similarly provides; - **"... the Court shall, in accordance with Article 137(7) of the Constitution, hear and determine the Petition as soon as possible ..."**

Accordingly, that the standard established by the Constitution for the Constitutional Court to hear and determine Constitutional Petitions is "**as soon as possible".** The Attorney General submitted that he 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.

The Attorney General submitted 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 Attorney General invited 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.

On the eviction of 1st Appellant from Court seats occupied by representatives of other Petitioners and being put in the dock, the Attorney General referred this court to the authoritative and conclusive guidance of the Hon. Deputy Chief Justice which I intend to rely on in this judgment.

The Attorney General prayed 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.

On the excessive interruption, the Attorney General submitted that 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 Attorney General submitted that there was no derogation of the 1st Appellant's right to a fair hearing arising from the procedure adopted by the Hon. Justices of the Constitutional Court and the allegations that the Court acted contrary to International Conventions do not arise whatsoever.

The Attorney General cited the case of 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."**

On the failure by the Constitutional Court to consider evidence, submissions and authorities, he submitted that each and every Hon. Justice of the Constitutional Court acknowledged the pleadings, submissions and authorities in their respective Judgments.

On the determination all matters in controversy between the parties as required by Section 33 of the Judicature Act, Cap. 13. The Attorney General submitted 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.

He cited the case of **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 Attorney General contended 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.

On the proposing answers to witnesses, The Attorney General submitted 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.

On the failure by the Constitutional court to give reasons for the decision not to summon the Rt. Hon. Speaker of Parliament the Attorney General submitted that a review of the record demonstrates that the 1st Appellant was the only one that sought cross examination of the Rt. Hon. Speaker and the reason for not summoning her was given.

The Attorney General submitted that on not calling the Rt. Hon. Speaker for examination are overtaken by events and any decision of the Court in

that regard would therefore be moot. That the verbatim record of Parliamentary proceedings produced in the Hansard is already on Court record together with the Certificate of Compliance. 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.

The Attorney General further submitted that neither the 1st Appellant, nor the 2nd Appellant, sought to examine the Rt. Hon. Deputy Speaker 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 submissions on the same was an afterthought and prayed that the Honorable Court finds the Appeal entirely without merit.

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

The Attorney General submitted that the Appellants participated at each and every stage of the proceedings in the Constitutional Court and duly were accorded a fair hearing in accordance with the **Article 28 of the Constitution.** The Respondent further contended 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. In conclusion, he submitted that the Appellants had not proved any of their respective Grounds of the Appeal, prayed that the Consolidated Appeals are dismissed with costs.

Court's Determination of Issue No. 7

Failure to summon the Speaker.

As already stated in this judgement the petition was brought under Article 137 of the constitution. The allegations were that under Clause 3(a) an Act of parliament and under 3(b) a number of acts and omissions were inconsistent with or in contravention of the constitution and the petitioners prayed for annulment of the Act. The petitioners filed affidavits to prove the acts and omissions that would warrant annulment of the Act and the Attorney General filed a number of affidavits in defence of the enactment of the Act. The Attorney General did not find it necessary to include the Speaker or Deputy Speaker among the witnesses to swear affidavits. As a party defending the petition, a decision as who would testify in the case was his prerogative because he knew better the witness that would support the case he wished to present. The acts and omissions in the proceedings in the parliament were well documented by the evidence of the Clerk to Parliament, the Parliamentary Hansard and evidence of some of the petitioners who were in Parliament. So the factual aspect of the case was well covered and there was not so much controversy about what happened in parliament during the enactment of the impugned Act. What was in the controversy was the constitutionality of the acts, omissions and the Act itself.

During the trial at the Constitutional Court, the Petitioners sought the indulgence of the court to summon the speaker for cross examination on a number of matters. The petitioners sought to rely on **Rule 12(3) of the Constitutional Court (Petition and References) Rules S.I.91 of 2005** which provides that;-

"The 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."

The appellants argue that apart from the Speaker and Deputy Speaker who should have been called to testify on their lead role in the enactment of the impugned Act others who should have been called included the minister for finance who would testify about contradictory certificate of financial implications, Hon. Raphael Magyezi who moved the impugned Act, the President who assented to the Bill which was not accompanied by a valid Certificate of compliance and the Chairperson and the deputy Chairperson of the legal and parliamentary affairs committee of parliament.

On their own motion the court did not find it necessary to call any witness outside those that had filed affidavits. Some of those that had filed affidavits like Mr. John Mitala, Head of the Civil Service, Mr.Keith Muhakanizi, Mr. Frank Mwesigwa, Mr. Asuman Mugenyi, General David Muhoozi and Hon. Nambooze Bakireke were cross examined from the loads of evidence that was filed by both the petitioners and the respondent. With that cross examination of the witnesses the court was equipped with more than sufficient material to make the necessary interpretation as required under Article 137 (3) (a) and (b) of the constitution.

As to the failure by the Constitutional Court to give detailed reasons as to why they found no reason to call the Speaker, the reasons advanced in this court cure the omission because as a first appellate court we are required to do a re-evaluation and come to our own conclusion.

Cross Examination after submissions

I agree with the submissions of counsel that it was irregular of the court to take final submissions of the case before cross examination. The submissions are supposed to be a final act in a trial before judgement. The evidence elucidated during cross examination would be part of the comments during final submissions. In my own view the cross examination after final submissions was not fatal to the trial since the evidence was at the disposal of the justices and it would be taken into account during their own analysis of the case.

Interjections

Interjections by the court should be within limits. Court may wish to clarify a point or even give direction of the trial without appearing to be descending in the arena. The appellants who complain of the interjections were able to present their cases which was not any different from that presented in this court. In fact Mr. Mabirizi submitted before this court that he was able to present his case with a number of authorities which constitutional court did not acknowledge.

Submissions of Authorities

Mr. Mabirizi complained that he presented his case with a number of authorities which court did not acknowledge. But all the justices supported their findings with a number of good authorities from a number of jurisdictions. This might have been as a result of their own research in addition to the authorities presented by the parties. They might not have mentioned who of the parties was the source of the authorities but they were assisted by the authorities submitted by all parties including Mr. Mabirizi.

Delay of the trial and delivery of the judgement.

According to Mr. Mabirizi the commencement of the trial and the trial itself were delayed. This court is not in position to comment at why the trial did not start immediately after the filing of the petition as required under Article 137of the Constitution. In relation to the adjournments of the case during the trial, an adjournment of the case does not necessary mean that because there no hearing in the court room there is no work going on. The hearing of case entails a lot of work during the hearing in court and outside court where there is a lot of reading and research being done.

I have studied Mr. Mabirizi's argument about the consequences of the delayed judgement. He cited the Nigerian case of **Chief Ifezue V. Mbadugha, Nigeria (supra)** where a judgment was annulled for failure to deliver it within 90 days prescribed by the Constitution. In our case it is a Regulation in the Judicial Code of Conduct which Courts should endeavor to adhere to. However, I would not go as a far as saying that failure to deliver a judgement within sixty days renders it null and void. A judgement of a court cannot be invalidated by reason of delay. In the instant case the Constitutional court made pronouncement on the constitutionality of the impugned Act and unless it is reversed it remains on the record as the judgement of the court.

Mr. Mabirizi complained that he was made to sit in a dock during the trial of the case. There was an argument as to whether a litigant can sit at the Bar with counsel and court found that Mr. Mabirizi who was representing himself could not sit at the table reserved for counsel. The DCJ Dollo went to a great length to the position and he stated that:-

"… **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."

I agree with the guidance of the court on this point. From wherever he was he was able to present his petition and I do not see how his right to a fair hearing was compromised by being denied a seat at the Bar.

The Appellants submitted that they were restricted on what to ask in cross examination of the witnesses which limited them to the scope to the averments in the affidavits. I am aware of the provisions of Section 137(2) of the Evidence Act which makes the scope of cross examination wide. But where a witness has been summoned with leave of court the court may limit the cross examination to the facts deponed to the affidavit.

The court, in my view inadvertently denied the appellants' counsel and appellant right to a rejoinder after the Attorney General had made his submissions in reply. But no prejudice was suffered by the appellants.

On the affidavits of affidavits of Mr. Keith Muhakanizi and General David Muhoozi being hearsay, my view is that affidavit evidence like any other evidence is subject to evaluation. Upon evaluation court is entitled to

accept or reject the evidence if it is worthless it may not be necessary to strike out the affidavits.

I don't find any basis for an award of professional compensation or damages to Mr. Mabirizi.

On whether the Court determined all issues in controversy, I agree with the submissions of the Attorney General that from the consolidated Petitions issues were framed and the Constitutional Court resolved them and if not this court is duty bound to re-evaluate the case and come to its own conclusions.

In conclusion on this issue, I wish to observe that some of the issues raised are valid as I have tried to explain. However, none of the irregularities was fatal to the whole trial as would warrant annulment as prayed by the appellants. The issue is answered in the negative

IssueNo.1.

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

Appellants' Submissions (MPS)

Counsel submitted that the basic structure doctrine attempts to identify the philosophy upon which a constitution is based as opposed to a textual exegesis of the same. He submitted that the doctrine has been instrumental in shaping the constitutional jurisprudence of different countries across the world since 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

case was followed in **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.

Counsel cited cases in other jurisdiction where the doctrine was followed like in Taiwan, where 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."**

In Bangladesh the Supreme Court in the case of **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, 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 alteration 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)**

In applying this doctrine to the instant petition, counsel strongly submitted that the learned justices of the Constitutional Court misconstrued the application of the basic structure doctrine in their finding 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 S. 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 faults the learned Justices in according 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. To this submission, he relied on the case of ***Kesavananda (supra)*** where court held that;

"To say that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies only in the procedure provided for amendment is an over-simplification. In certain Constitutions there can be procedural and or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the satisfaction of which no amendment can validly result. The form and manner may take different forms such as a higher majority either in the houses of the concerned legislature sitting jointly or separately or by way of a convention, referendum etc. Besides these limitations, there can be limitations in the content and scope of the power. The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the preamble of sovereignty in the people there is firstly no question of the law-making body being a sovereign body for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people."

Counsel for 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. Every Constitution is a product of historical events that brought about its existence. He relied on the **dissent judgment of Kasule, JA in Saleh Kamba & others Vs.**

Attorney General & others; Constitutional Petition No. 16 of 2013 in support of his submission.

In that case the learned Justice held that in interpreting a constitution, court ought to take into account the history of a given country. He further considered the issue of the basic structure of the Constitution and stated as follows:

"Therefore from the historical perspective, the Constitution is to be interpreted in such a way that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party state and/ or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association..."

He argued that what constitutes the basic structure of the 1995 Constitution was aptly highlighted by **Kakuru JCC** in his dissent, where he came up with what he believed were features of the Constitution that should not be tampered with lest the fabric of the constitution is destroyed

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."

That it is on that premise that Kakuru JCC makes a finding that;

"Parliament, in my view, has no power to amend, alter or in any way abridge or remove any of the above pillars or structures of the Constitution, as doing so would amount to its abrogation as stipulated under Article 3 (4). This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

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."

Counsel therefore invited this Honourable court to consider the finding of Kakuru, JA as a locus classicus on the basic features of the 1995 Constitution and also further relied on the case of **Yaakov vs chairman of the Central Elections committee for the sixth Knesset EA 1/65** where the Supreme Court held that:

"The invalidity of a constitutional provision cannot be rejected merely because the provision itself is part of the Constitution. There are fundamental constitutional principles that are of so elementary a nature, and so much the expression of law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms, which do not occupy this rank and contradict these rules can be void because they conflict with them."

Counsel contended that the aforesaid key pillars of the 1995 Constitution are reflected and embodied in the preamble to the constitution yet the Majority Justices of the Constitutional Court overlooked the significance and importance of the preamble. Counsel again cited several authorities such as the **British Caribbean Bank v The Attorney of Belize Claim No. 597/2011, Kesavananda case(supra)** and **Minerva case(supra)** followed in of **Anwar case(supra)** that applied the basic structure in emphasising the essence of the preamble in support of his submission.

In **British Caribbean Bank v The Attorney of Belize Claim No. 597/2011, the Supreme Court of Belize** invoked the basic structure doctrine to strike down a particular constitutional amendment which was at variance with the preamble to the constitution of Belize. The court emphasized that;

"The basic structure doctrine holds that the fundamental principles of the preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of the existence... There is though a limitation on the power of amendment by implication by the words of the preamble and therefore every provision of the constitution is open to amendment, provided the foundation or basic structure of the constitution is not removed, damaged or destroyed. ...The preamble is the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions...."

In the case of **Minerva case (supra**) while emphasizing the essence of the preamble, the Supreme Court of India explained that;

"The preamble assures to the people of India a polity whose basic structure is described therein as a sovereign democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is

not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself."

The Supreme Court of Bangladesh in the case of **Anwar case (supra)** cited with approval the Indian case of **Minerva case (supra)** and held that;

"We the people declared the fundamental principles of the constitution and the fundamental aims of the state" this preamble is not only part of the constitution but stands as an entrenched provision that cannot be amended by parliament alone. It has not been spun out of gossamer matters nor is it a little star twinkling in the sky above. If any provision can be called the pole star of the constitution then it is the preamble."

Finally, in the **Kesavananda case (supra)** court observed that the preamble constitutes a landmark in a country and sets out as a matter of historical fact what the people resolved to do for moulding their future destiny.

Counsel therefore invited this Honourable court to take cognizance of the fact that the framers of the 1995 constitution deemed it absolutely necessary to enshrine within the text of the constitution such provision as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy; these included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. All these lofty provisions were designed and intended to guarantee orderly succession to power and political stability which to date remains a mirage for our motherland.

He argued that by amending Article 102 (b) to remove the presidential age limit, after scrapping term limits, parliament not only emasculated

the preamble to the constitution but also destroyed the basic features of the 1995 Constitution thereby rendering it hollow and a mere paper tiger.

Therefore, It is the Appellants' contention that the basic features of the constitution herein mentioned to wit; supremacy of the constitution as an embodiment of the sovereign will of the people; political order through adherence to a popular and durable Constitution; political and constitutional stability as well as constitutionalism and rule of law in general were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 constitution. On that account alone the Constitutional Court ought to have invoked the basic structure doctrine to strike down the entire Constitution (Amendment) Act, No.1 of 2018.

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

Attorney General's Submissions.

Attorney General submitted that the learned Justices of the Constitutional Court correctly applied the basic structure doctrine when they found that sections 3 and 7 of the impugned Act do not derogate from the Basic Structure of the 1995 Constitution.

He contended 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:

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;

He pointed out that it is important to note that any amendments have to be done without destroying the spirit and the basic structure and the foundation upon which Uganda was built as a nation.

He therefore contended that the Constitutional Court unanimously found that the framers of the 1995 Constitution clearly identified provisions of the Constitution which are fundamental and form part of the Basic Structure of the 1995 Constitution. He argued 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 the Attorney General, the Safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament, and a referendum, in fulfillment of the provisions of Articles 260 and 261 of the Constitution.

It follows therefore 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**. Only the people can amend these Articles pursuant to the provision of **Article 1(4) of the Constitution.**

The Attorney General submitted that the Constituent Assembly that took a considerable 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 peace, order, development and good governance in Uganda.

Accordingly, **Article 259 of the Constitution** offers the procedure to the amendment of the Constitution by giving Parliament powers to enact an Act of Parliament, the sole purpose of which is to amend the Constitution by way of addition, variation, or repeal of any provision in accordance with the procedure laid down in Chapter Eighteen.

Therefore, it was 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 contravene the basic structure of the Constitution and neither was it inconsistent with or in contravention of the constitution

The Attorney General fortified his submissions by the unanimous decision of the learned Justices of the Constitutional Court where it was found as follows:-

As to whether sections 3 and 7 of the impugned Act derogated from the Basic structure of the 1995 Constitution, Justice Owiny Dollo held as thus;

"...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 noted on Page 77 paragraph 2051- page 78 paragraph 2070, Volume 4 of the Record of Appeal 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."

The Attorney General submitted that the people's power to elect the President or District Chairperson of their choice is not taken away by lifting their respective age limits. If anything, citizens would be encouraged to aspire to elect leaders of their choice and to actively participate in politics and elections as they will now be presented with a wider choice of people to choose from.

He referred to the judgment of Justice Elizabeth Musoke in support of this submission where she held on pages 794 Vol. 4 as follows:

"....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.

He referred further to Justice Cheborion Barishaki judgment where he makes reference to the German jurist, Professor Dietrich Conrad, who introduced the basic Structure doctrine to Indian scholars and subsequently Indian jurisprudence in a series of public lectures he delivered in that country, notably his 1965 Public Lecture; Prof. Dietrich Conrad, **"Implied Limitations of the Amending Power**." He also refers to the landmark decision in **Kesavanand Bharati vs State of Kerala (A.I.R 1973 SC 1461)** wherein it was subsequently held that principles of democracy and democratic government are part of the basic structure of the Indian Constitution and incapable of amendment.

The Attorney General agreed with Justice Cheborion JCC on the applicability of the basic structure doctrine to the 1995 Constitution that sections 1, 3 and 7 of the impugned Act were enacted within the reach of

the amending power of Parliament and do not derogate from the Basic structure of the 1995 Constitution.

In conclusion, He affirmed his submission that the learned Justices of the Constitutional Court took time to review the basic structure Doctrine and construed it rightly in as far as it's applicable to the 1995 Constitution.

Court's Determination of Issue No. 1

This issue as framed at the Constitutional court for determination as:-

6(g) Whether the Act was against the spirit and structure of the 1995 Constitution.

The Basic Structure doctrine as judicial principle was well defined by all the parties in the Consolidated Constitutional Petition at the constitutional Court as well as in this court.

Both the appellants and the Attorney General seem to agree on the doctrine and in fact the Attorney General agreed with Mr. Lukwago that the basic structure as defined by Justice Kakuru constitutes the basic structure of the 1995 Constitution which should be adopted by this court.

Before we go any further it should be observed that much as there are proponents of the doctrine there are also its opponents.

In the judgement of **Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461** there were six dissenters out of the 13 judges that presided over the case. One of the six dissenting judges**, Hon. Justice A.N.Ray** had this to say:

"***Fundamental or basic principles can be changed. There can be radical change in the Constitution like introducing a Presidential system of government for a cabinet system or a unitary system for a federal system. But such amendment would in its wake bring all consequential changes for the smooth working of the new system.(see paragragh 960)...***

The problems of the times and the solutions of those problems are considered at the time of framing the Constitution. But those who frame the Constitution also know that new and unforeseen problems may emerge, that problems once considered important may lose their importance, because priorities have changed; that solutions to problems once considered right and inevitable are shown to be wrong or to require considerable modification; that judicial interpretation may rob certain provisions of their intended effect; that public opinion may shift from one philosophy of government to another... The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and wellbeing of the people. Changes in the Constitution serve these great ends and carry out the real purposes of the Constitution. (See para 987).

In quoting the above passage from judgment of Hon. Justice A.N.Ray, Justices Tsekooko in the case of **Paul k. Ssemogerere and Ors v Attorney General Constitutional Appeal No.1 of 2002** stated that:-

"This passage indicates that written constitutions are not static and are liable to be amended. There is an obvious implication in this passage that courts have to interpret constitutional provisions to bring the constitution in line with current trends. Implicit in this is the real possibility that one part of the constitution can be harmonised with another part of the same constitution."

In the case of Rev**. Christopher Mtikila v Attorney General Misc. Civil Cause No. 10 of 2005,** the Tanzanian Court of Appeal found:-

"**we are definite that the courts are not the custodian of the will of the people, that is the property of elected members of parliament", so if there are two or more articles or portions of articles which cannot be harmonised then it is parliament which will deal with the matter and not the court unless power is expressly given by the constitution.**

On the doctrine of 'basic structure' of the Constitution, the Court held in that case that:

We agree with Prof. Kabudi that that doctrine is nebulous, (meaning it is misty, it is cloudy, it is hazy according to the dictionary) as there is no agreed yardstick of what constitutes basic structure of a constitution."

There were attempts by both the Indian court and the Constitutional court to define what the basic structure of our respective constitutions are.

In the case of **Kesavananda Bharati v. State of Kerala AIR 1973 SC 1461** from which the doctrine has its genesis, never came up with a single structure that would be said to be a useful guide as to determining as to which part/Articles of our constitution is amendable because it is not part of the basic structure and which part/Articles cannot be amended because to do so would lead to the destruction of the Basic structure leading to total collapse of the constitution.

In the same case **Chief Justice Sarv Mittra Sikri**, writing for the majority, indicated that the basic structure consists of the following:

1. **The supremacy of the constitution.**
2. **A republican and democratic form of government.**
3. **The secular character of the Constitution.**
4. **Maintenance of the separation of powers.**
5. **The federal character of the Constitution.**

Justices Shelat and Grover in their opinion added three features to the Chief Justice's list:

1. **The mandate to build a welfare state contained in the Directive Principles of State Policy.**
2. **Maintenance of the unity and integrity of India.**
3. **The sovereignty of the country.**

Justices Hegde and Mukherjea, in their opinion, provided a separate and shorter list:

1. **The sovereignty of India.**
2. **The democratic character of the polity.**
3. **The unity of the country.**

4. Essential features of individual freedoms.
5. The mandate to build a welfare state.

Justice Jaganmohan Reddy preferred to look at the preamble, stating that the basic features of the constitution were laid out by that part of the document, and thus could be represented by:

1. A sovereign democratic republic.
2. The provision of social, economic and political justice.
3. Liberty of thought, expression, belief, faith and worship.
4. Equality of status and opportunity

It can be easily discovered from above that each of the above justices had his own understanding of what formed the Basic structure of the Indian constitution at that time. There was no unanimity as to what constituted the basic structure of the Indian Constitution.

The same can be seen by Ugandan Constitutional Court justices whose attempt to define what the basic structure of the Ugandan constitution suffered the same fate as that of the Indian court.

The Hon. Justice Alfonse C. Owiny – Dollo; DCJ/PCC in his judgement considered what formed the Basic structure and stated that;

"**The principal character of the 1995 Constitution, which constitute its structural pillars, includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, a unitary state, separation of powers between the Executive, Parliament, and the Judiciary, Bill of Rights ensuring respect for and observance of fundamental rights, and judicial independence.**

In the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution, which it considers are fundamental features of the Constitution. They carefully entrenched these provisions by various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the

Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fetter Parliament's powers to do so and thereby deny it the freedom to treat the Constitution with reckless abandon. Article 259 of the Constitution offers the provision signifying the safeguards to the Constitution; by providing as follows:

'(1) Subject to the provisions of this Constitution, Parliament may amend by way of addition, variation, or repeal, any provision of this Constitution in accordance with the procedure laid down in this Chapter.

(2) This Constitution shall not be amended except by an Act of Parliament–

(a) The sole purpose of which is to amend this Constitution; and

(b) The Act has been passed in accordance with this Chapter.'

Article 75 of the Constitution prohibits Parliament from enacting a law establishing a One Party State; meaning, in essence, that it is only the people who can do so pursuant to the provision of Article 1(4) of the Constitution. Article 260 of the Constitution lists provisions in the Constitution, the amendment of which Parliament can only recommend; but can only become law upon the approval of the people in a referendum. Similarly, Articles 69 and 74(1) of the Constitution provides for the requirement of a referendum to determine whether there should be a change in the political system to be applicable in Uganda at a given time. Other provisions, such as Articles 260, and 262, require special majority; to wit, two –thirds majority of the entire membership of Parliament in the second and third readings of the Bill for the amendment of provisions referred to under Articles 260 and 261 of the Constitution.

It is only such provision of the Constitution as is referred to under Article 262, which Parliament may amend under the general powers conferred on it to make laws as is envisaged under the provision of Articles 79 and 259 of the Constitution. Otherwise, for amendment

of the provisions of the Constitution covered under Articles 260 and 261 of the Constitution, as exceptions to the general rule, there is, respectively, the mandatory requirement of approval by the people in a referendum, and ratification by the specified proportion of District Councils. In addition, Article 263 provides that the votes required in the second and third readings referred to in Articles 260 and 261 of the Constitution must be separated by at least fourteen sitting days of Parliament.

Article 77 (4) for its part, as I will discuss at length below, restricts the extension of the tenure or life of a serving Parliament to six months at a time; which can only be necessitated by either a situation of war, or emergency, rendering holding an election impossible. Furthermore, in addition to the requirement for satisfying the threshold of the stated special majority, and fourteen sitting days space between the second and third readings of the Bill, Article 260 provides that the provisions entrenched therein can only be amended after the people have positively pronounced themselves thereon in a referendum. These provisions, for the people to exercise their original constituent power in the amendment of the Constitution, are clear manifestation of the safeguards inbuilt within the Constitution to secure the provision of Article 1 of the Constitution; which recognises that ultimate power vests in the people.

Then there is the special provision of Article 44 of the Constitution; which prohibits any form of derogation whatever from the human rights and freedoms specified therein; as follows:

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms–

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) Freedom from slavery or servitude;

(c) The right to fair hearing;

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

It is these non–derogable provisions, protecting fundamental human rights, with respect to which the phrase 'tojikwatako' (do not touch it) – which gained notoriety during the Constitution amendment process, urging members of Parliament not to touch the Constitution – would have been most relevant."

In the judgment of Hon. Justice Remmy Kasule correspondingly attempted to define the doctrine he stated that;

"Therefore, the doctrine of basic structure is embedded in the 1995 Constitution. As the Njoya vs Ag & Others (Supra) case shows, Kenya has also embraced the said doctrine. Tanzania seems not to have embraced it fully, given the Tanzania Court of Appeal decision of AG vs Mtikila: Civil Appeal No. 45 of 2009. But our history of tyranny, violence and Constitutional instability is different from that of Tanzania that has had Constitutional stability since her becoming an Independent State, and it is fitting that Uganda adopted the doctrine of basic structure.

Accordingly by application of the doctrine of basic structure, the Parliament of Uganda can only amend the Constitution to do away or to reduce those basic structures such as sovereignty of the people (Article 1), the supremacy of the Constitution (Article 2) defence of the Constitution (Article 3), non-derogation of particular basic rights and freedoms (Article 44), democracy including the right to vote (Article 59), participating and changing leadership periodically (Article 61), non-establishment of a one-party State (Article 75), separation of powers amongst the legislature (Article 77): The Executive (Article 98): The Judiciary (Article 126) and Independence of the Judiciary (Article 128), with the approval of the people through a referendum as provided for under Article 260 of the Constitution."

In his judgment Justice Kenneth Kakuru, JA/ JCC outlined what in his opinion formed the Basic structure of the 1995 Constitution. The structure which is already outlined in counsel Lukwago's submissions

was supported by the Attorney General in his submissions. After outlining the structure he concluded as follows:-

"Parliament, in my view, has no power to amend alter or in any way abridge or remove any of the above pillars or structures of the Constitution, as doing so would amount to its abrogation as stipulated under Article 3 (4). This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

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."

This was in spite of his acknowledgement that the doctrine had not yet attained universal acceptance as he explained:-

"Needless to say, the doctrine of basic structure has not yet attained universal acceptance. It was rejected in Tanzania, when the Court of Appeal reversed the Judgment of the High Court that had upheld it in Attorney General vs Christopher Mtikila (Civil Appeal No. 45 of 2009).

It has not been fully accepted in Pakistan or even in South Africa where it has been alluded to but not adopted.

The Supreme Court of Sri Lanka, also rejected it because the language in its Constitution permitted expressly any amendment or repeal of any Constitutional provision. The doctrine has also been rejected in Malaysia, where the Court granted Parliament an unlimited power to amend the Constitution..."

In the judgment of Hon. Lady Justice Elizabeth Musoke, JCC. She took the stance of **Justice Jaganmohan Reddy** (supra) that in the definition of the doctrine, we must not lose sight of the preamble of the constitution and she proceeded to state that;

"**I find that in Uganda the Preamble to the Constitution captures the spirit behind the Constitution. The Constitution was made to**

address a history characterized by political and constitutional instability…The new Constitution is for ourselves and our posterity, and the Preamble is meant to emphasize the popularity and durability of the Constitution. Further still, a critical aspect of the basic structure of our Constitution is the empowerment and encouragement of active participation of all citizens at all levels of governance. This is the hallmark of the Democratic Principle No. II (i) of the National Objectives and Directive Principles of State Policy. All the people of Uganda are assured of access to leadership positions at all levels. [See Directive Principle II (i)].The goal of ensuring stability is echoed in Directive Principle No. III. And pursuant to Article 8A, the Objective Principles are now justiciable.

Another of the basic pillars of our Constitution is Article 1(1), which guarantees the sovereignty of the people by providing that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution.

The Bill of Rights to be found in Chapter Four of the Constitution contains fundamental human rights which are inherent and not granted by the State. The ones in Article 44 are non-derogable and are part of the basic structure which if removed or amended would be replacing the Constitution altogether."

In the judgment of Hon. Justice Cheborion Barishaki, JCC, he stated that the doctrine had been rejected by the Court of Appeal of Tanzania. He made a comparison between the Tanzanian constitution and ours, which I think was not necessary.He stated as follows:-

"By contrast, the Court of Appeal of Tanzania, in Attorney General vs Rev. Christopher Mtikila, Civil Appeal No.45 of 2009 in 2010 (EA) 13 rejected application of the doctrine and overruled the High Court of the said country which had held that the doctrine applies to Tanzania as well. The Justices of the Court of Appeal took the view that the Tanzanian Constitution does not contain any provisions that cannot be amended.

In particular, they seem to have been persuaded by the fact that the doctrine must be expressly legislated since Constitutions of countries such as Algeria, Malawi, Namibia, South Africa, Italy, France and Turkey specifically contain provisions providing that certain clauses of the Constitution are not subject to amendment under any circumstances. A similar provision does not exist in the Tanzanian Constitution.

The Tanzanian Constitution is unique on that account and the unanimous decision of its final appellate Court must be viewed in that regard. The Ugandan Constitution does not contain any clause prohibiting amendment of any provision but it, in my view, differs in major respects from the Tanzanian Constitution. I will enumerate a few unique features which clearly militate against reaching a similar conclusion like the Tanzanian Court of Appeal on applicability of the basic structure doctrine.

Firstly, our Constitution contains elaborate National Objectives and Directive Principles of State Policy that emphasize democratic government, public participation in governance, promotion of unity and stability, respect for fundamental rights and freedoms inter alia. Article 8A of the Constitution requires Uganda to be governed based on the principles of national interest and common good.

Secondly, Article 20(1) of the Constitution, touching upon fundamental rights and freedoms provides that;

"Fundamental rights and freedoms of the individual are inherent and not granted by the State."

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

must also take into account our shared values as a country which are alluded to in the Directive Principles of State Policy.

I am not convinced that Parliament, in exercise of its powers under Article 79(1) is free to effect amendments that would in effect replace the Constitution resulting from the consensus of the Constituent Assembly with a new one. Consequently, I hold that the Ugandan Constitution is designed to recognise, to a certain extent, the basic structure doctrine in its preamble, national objectives and Directive Principles of State Policy read together with Article 8(A).

In my view, in the Ugandan context the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution.

Amendments to the Constitution should not be introduced or passed in a manner that defeats our country's national objectives and Directive Principles of State Policy without the input of the people in a referendum. Amendments that directly impact on the people's sovereignty enshrined in Article 1 of the Constitution, if passed without a referendum, are deemed to have offended our Constitution's basic structure.

I am persuaded to follow the Kenyan, South African and Indian authorities on this point and respectfully decline to follow the approach of the Court of Appeal of Tanzania. I will therefore determine the extent, if at all, to which the impugned amendments violate the basic structure of our Constitution.

Throughout the trial at the Constitutional court and the appeal before this court there was no suggestion that the Indian Constitution is the same Model as our constitution because our constitution was structured according to our history.

In our constitution there is the whole chapter eighteen with the heading "**Amendment of the Constitution"**, under which there are various Articles including: - Article 259 Amendment of the Constitution, Article 260 Amendments requiring a referendum, Article 261 Amendments

requiring approval by district councils and Article 262 Amendments by Parliament which provides:-

A bill for an Act of Parliament to amend any provision of the Constitution, other than those referred to in articles 260 and 261 of this Constitution, shall not be taken as passed unless it is supported at the second and third readings by the votes of not less than two-thirds of all members of Parliament.

These Articles give a framework within which the constitution can be amended. I do not think that it is necessary to agonize as to what the basic structure of the constitution is. As I have already stated both the Indian Court and the Constitutional court attempted to define what the basic structure of the Indian and Ugandan Constitution is but it was an exercise in futility.

My understanding of the basic structure doctrine is that within this framework the constitution is amendable but it can still be protected from compromise of its own foundation and structure so that every amendment is harmonized with the rest of the constitution and the wishes of the people of Uganda.

The framework provided under Articles 259,260 and 261 of the constitution should not be seen as a licence to the Legislative arm of Government to amend the constitution the way they wish. As to whether this amendment was part of the basic structure it was adequately addressed by the Constitutional court which came to the conclusion that the removal of the age limit would not affect the basic structure of the constitution and I agree with that finding. The issue is answered in the negative.

ISSUE No. 2

This issue was framed as follows:

"Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of

Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?."

The appellants 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 Parliament. Parliament is enjoined under Article 94 of the Constitution to make rules to regulate its own procedure, including the procedure of its committees, subject to the provisions of the Constitution. That Parliament was obliged to follow the provisions of the Constitution and its own Rules of procedure. In support of this argument, they relied on the case of **Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14** which was cited with approval in the case of **Law Society of Kenya vs Attorney General & Anor [2016] eKLR** where court held that:

"***Parliament as a law making body should set standards for compliance with the constitutional provisions and with its own Rules. ... the enactment of the law is a process and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it ...***"

The appellants stated that the net effect of non-compliance of parliament with its own rules of procedure and those laid down in the Constitution rendered the impugned Bill and the resultant Constitution (Amendment) Act No. 1 of 2018 null and void. That the constitution being the supreme law of the land, the procedure for its amendment ought to be sanctified and followed to the letter. They cited the case of **Indira Nehru Gandhi**

vs Shri Raj Narain Civil Appeal No. 887 of 1975 where the Supreme Court of India held that:

"In a democratic country governed by the constitution which is supreme and sovereign, it is no doubt true that the constitution itself can be amended by Parliament but that can only be validly done by following the procedure prescribed by the constitution. That shows that even when the Parliament purports to amend the constitution, it has to comply with the relevant mandate of the constitution itself. Legislators, Minister and Judges all take oath of allegiance to the constitution, for it is by the relevant provisions of the constitution that they derive their authority and jurisdiction and it is to the provisions of the constitution that they owe allegiance."

They therefore invited this Court to answer issue two in the affirmative.

The Attorney General's Submissions in Reply

The Attorney General submitted that the 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).

The issue raises a number of acts and omissions for which the appellants sought declarations and redress under Article 137 of the Constitution. The Article which defines the jurisdiction of the Constitutional Court provides as follows:-

"137. Questions as to the interpretation of the Constitution.

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

(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(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 (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 this 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.

(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court— (a) may, if it is of the opinion that the question involves a substantial question of law; and (b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.

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

(7) 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 that purpose, suspend any other matter pending before it." (Underling for emphasis)

I deal with each act or omission as raised by the petitioners/appellants to determine the unconstitutionality of the alleged acts and omissions before determining the constitutionality of the Act.

1. **<u>Charging the Consolidated Fund contrary to Article 93 of the Constitution</u>**

Submission by MPs

In respect to whether or not the Bill had a charge on the consolidated fund contrary to the provisions of Article. 93 of the Constitution, counsel contended that although the Constitutional Court made a finding that the impugned Act violated the provisions of Article 93 of the constitution, it declined to nullify the entire Act on ground that the non-compliance with the Constitutional provision only affected Sections 2, 6, 8 and 10 of the impugned Act extending the term of Parliament and local government councils from five to seven years. That the said Sections were introduced by way of amendments that imposed a charge on the consolidated fund.

On the above premise, counsel argued that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private

member's bill or a motion including amendments thereto which has the effect of creating a charge on the consolidated fund. Parliament therefore flagrantly violated Article 93 of the Constitution when they proceeded to consider and enact into law the impugned Bill with its amendments which had the effect of imposing a charge on the consolidated charge as found by the constitutional court. It was therefore erroneous to apply the doctrine of severance in a Bill which was considered and passed as an integral legislation in the same process.

Counsel further submitted that there was a charge on the consolidated fund by paying each Member of Parliament UGX 29 million as facilitation to carry out consultations with the public regarding the Bill. 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.

3rd Appellant's submissions

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

(a) Parliament shall not…….proceed upon a bill that makes provision for…….the imposition of a charge on the Consolidated Fund or other public fund of Uganda

(b) Proceed upon a motion … the effect of which would make provision or any of the purpose specified in paragraph "a" of this Article.

In counsel's view, the words "**Parliament shall not proceed**" should be given their ordinary meaning as was held by this Court in **Theodore Sekikubo and others vs. Attorney General Constitutional Appeal No. 01 of 2015.** Those words simply prohibit Parliament from proceeding on a Bill or motion. The words in their ordinary interpretation mean **"to Stop, Do not go forward".** Parliament proceeded with the Bill and subsequently enacted the Act. The fact that 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. The provisions of the Constitution deal with a Bill. It is the Bill which was in issue and the Court with respect ought to have made a decision on the constitutionality as at the time of considering the Bill and not after the Bill became law.

The Speaker was required under Rule 113 (2012 Rules) to make a ruling. That it is the responsibility of the Speaker to decide whether a bill contravenes Article 93. In effect the speaker ruled that Article 93 was not applicable because the House was dealing with a committee report and not Bill. This was the wrong way of interpreting the provision. The House was proceeding under a motion for second reading and as such Article 93(b) was applicable.

The House then proceeded with debating the motion. The Speaker reminded members that she had earlier put the question that the bill be read for the second and called for a vote. Members voted. That was proceeding and making a decision on a motion.

Subsequently, Hon. Tusiime brought in amendments to enlarge the life and term of both Parliament and local councils which as the Court found contravened Article 93. At that stage and in line with Article 93 and the

Rules of the House 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. Tusiime. 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, 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.

The Bill itself, containing the offending provisions was put to a vote and members accepted that the Bill should pass. It passes. The final approval is given. That is proceeding on the Bill. It is that Bill which is then sent to the President for assent. Parliament has at this stage already breached the Constitution by proceeding with a bill and motions charging the Consolidated Fund and even sending it to the President who then assented to it with the clauses creating a charge on the Fund. Contrary to the Constitution the Parliament considered a bill charging the Consolidated Fund and enacted it into law.

That in the above circumstances, the Constitutional Court could not validate the unconstitutional acts by holding that after all the offending parts of the Bill have been struck down. The question that will still remain is: Did Parliament proceed on a bill creating a charge on the Consolidated Fund?

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.

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.

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 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.

A medium term expenditure framework is a primary document which contains the consensus on policies, reform measures, projects and programmes that a Government is committed to implement 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.

On the other hand, 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."

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.

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.It would mean that at the time preparing budget estimates in 2016 Parliament was aware of this bill and made provision for it. That does

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.

Mr. Mabirizi's Submissions

Mr. Mabirizi submitted that parliament's power and functions are not absolute or above the law but subject to the provisions of this Constitution as provided under **Article 97.**

He cited the cases of **Oloka-Onyango & 9 ORS V. Attorney General, CCCP No. 8/14,** where it was held that" **Parliament as a law making body should set standards for compliance with the constitutional provisions and its own rules…The enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it"**

The case of **Doctors for Life International v. The Speaker of the NATIONAL Assembly & ORS South Africa Constitutional Court Case No. CCT 12/05, i**t was noted by Ngobo, J that "…**Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid…"**

The constitutional provisions under application in the American case are couched in the same way like our Article 93 which starts with a prohibition "…**Parliament shall not** …" The article does not give any exception whatsoever. Section 76 of The Public Finance Management Act 2015, has no single word of a Private Members Bill, it was only designed to guide ministers.

Mr. Mabirizi contended that a prohibited law is null & void only waiting to be struck down. Although Article 94 of The Constitution allows members of Parliament to introduce Private members' bills, they can only legally introduce bills in line with Article 93 of The Constitution.

Mr. Mabirizi contended non-compliance with rules of procedure rendered the outcome null and void. That the justices agreed with him where they relied on **Paul Ssemwogerere** and **Ors Vs Attorney General** and **Oloka Onyango and Others vs Attorney General (supra)** to find that failure by Parliament to strictly follow laid down procedures in the Constitution and Parliamentary Rules of Procedure will invalidate subsequent legislation even if it be an Act for amending the Constitution.

Attorney General'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 by Government, that had financial implications as provided therein.

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

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

Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial 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 of 2015.

The Attorney General submitted that the evidence on record showed 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 his evidence showed that on 3rd October 2017, 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 the section 76 of the Public Finance Management Act, 2015 and the Rules of Procedure of Parliament.

The Attorney General was emphatic that 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 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.

He also referred us to the Judgment of Cheborion, JCC 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, 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.

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 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 said facilitation to Members of Parliament did not make the enactment of the impugned Act inconsistent with Article 93 of the Constitution. In support of his contention, he referred this Court to the Judgments of Kasule, Cheborion, JCC, Kakuru, JCC and Musoke, JCC.

In conclusion on this point, the Attorney General submitted that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government that 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.

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.

Determination of the Court.

Article 93 of the 1995 constitution provide as follows:-

> **93. Restriction on financial matters.**
>
> **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 for any of the following—

(i) the imposition of taxation or the alteration of taxation otherwise than by reduction;

(ii) the imposition of a charge on the Consolidated Fund orother public fund of Uganda or the alteration of any such charge otherwise than by reduction;

(iii) the payment, issue or withdrawal from the Consolidated Fund or other public fund of Uganda of any monies not charged on that fund or any increase in the amount of that payment, issue or withdrawal; or

(iv) the composition or remission of any debt due to the Government of Uganda; or

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

The essence of this Article is to enable the government plan on how such charge or others imposition on consolidated fund can be effectively implemented by it without causing unnecessary restraints on its budget. This is to prevent Parliament from proceeding with Bills and Motions that create charge on consolidated fund unless they are brought by government.

The impugned Constitution (Amendment) Act 2018, had two certificates of financial implications. The first was issued upon the request of Hon Magyezi and another issued by Ministry of Finance to Hon. Tusiime Michael for an amendment to original Magyezi bill to add a clause for extension tenure of parliament from 5 years to 7 years starting with current parliament. The issue of the second certificate having glitches was properly handled by the Constitutional court which found it to have been irregularly issued .The other amendment of Hon Nandala Mafabi had no certificate of financial implication.

The majority of Constitutional Court justices found that the impugned Act violated the provision of Article 93 of the constitution and they contended that non –compliance only affected section 2,6,8 and 10 of the impugned Act which provided for extension of the term of parliament and Local government from five to seven years which were introduced by the way of amendment that it imposed a charge on the consolidated fund and severed it and saved the original contents of the Magyezi bill as it had no imposition of a charge on the consolidated fund.

I concur with the Constitutional court that the Magyezi Bill had no charge or imposition of the same on the consolidated Fund. The amendments did. Under Article 93(a) of the Constitution debate on the Magyezi Bill should not have proceeded. It was incumbent on the speaker to resolve this issue before proceeding with the debate.

The Article forbids private members from introducing or proceeding with Bills that make a charge on consolidated fund. The language is in mandatory terms.

I therefore find that the process of debating and passing Constitutional (Amendment) Bill 2017 with its amendment that infringed on Article 93 of the Constitution was null and void and vitiated the entire enactment of the Constitutional (Amendment) Act 2018.

On the issue of 29 million.

The Parliamentary Commission spent moneys which were already appropriated. I would leave this matter for the Auditor General to establish whether or not there was misappropriation of the funds much as its source was the consolidated fund.

2. **<u>Consultation/Participation</u>**

Submissions by MPs

On the issue of Consultation/Public Participation, counsel submitted that the learned majority Justices of the Constitutional Court erred in

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

In support of his submissions above, counsel cited the persuasive Kenyan cases of:

i)**Law Society of Kenya Vs. Attorney General, Constitutional Petition No. 3 of 2016** where the Court noted that:

"...public participation in governance is an internationally recognized concept. This concept is reflected in the international human rights instruments. The Universal declaration of Human rights of 1948 proclaims in Article 21 that everyone has a right to take part in the government of his country, directly or through freely chosen representatives..."

The Kenyan Constitutional Court further pronounced that;-

*"...**To paraphrase Gakuru case (Supra), public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply "tweet" messages as it were and leave it to those who care to scavange for***

it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances to exhort the people to participate in the process of enactment of legislation by making use of as many for a as possible such as churches, mosques, public "barazas", national and vernacular radio broadcasting stations and other avenues where the public are known to converge and disseminate information with respect to the intended action..."

ii)**Robert N. Gakuru& Others –Vs- The Governor Kiambu County & Others** where the Court noted that:

*"...**the obligation to facilitate public involvement is a material part of the law making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my Judgment, this Court not only has a right but also has a duty to ensure that the law making process prescribed by the Constitution is observed. And if the conditions for law making process have not been complied with, it has the duty to say so and declare the resulting statute invalid..."***

Counsel stated that the significance of consultations is a fundamental value of our Constitution which was not appreciated by the majority Justices of the Constitutional Court. That the learned Justices of the Constitutional Court failed in their duty of evaluating the evidence on record and arrived at a wrong decision that the people were consulted on the impugned Constitution (Amendment) Bill, 2017 whereas not.

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

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

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

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

d. The Committee on Legal and Parliamentary affairs which was assigned the duty of processing the Bill did a shoddy job.

e. The opposition members of Parliament were denied the opportunity and right to engage the people over the aforesaid bill. The public gatherings for opposition members of Parliament which had been organized countrywide were blocked, ruthlessly and violently dispersed by the police and other security agencies and many Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment

In breaking up the opposition MPs' rallies, Police relied on the directive issued by Asuman Mugyenyi, the Director of operations which directive was unanimously declared unlawful, arbitrary, obnoxious, unfortunate

and unconstitutional by the Constitutional Court. Ironically, the Constitutional Court held that there was no evidence to demonstrate that the aforesaid illegal directive was ever implemented and that it had adversely affected the entire consultation process. Counsel submitted that the finding was untenable, both in law and fact as there was overwhelming evidence on record to the effect that the said directive was enforced as illustrated hereinabove. Indeed, Asuman Mugyenyi himself admitted during cross examination that his directive was enforced by all the police officers countrywide.

Despite the fact that Members of Parliament were given exgratia facilitation of UgX29m the purported consultation as argued by the Attorney General was illusory and ineffectual. He invited Court to adopt the finding of Justice Kakuru where he held that, "…**the process of public participation in my humble view is required to pass the SMART test; that is, it has to be Specific, Measurable, Attainable, Relevant and Time bound…"**

He further contended that Justice Kakuru, while applying the qualitative test, found that only 7 out of 455 members of Parliament who were on the Roll call, when the bill was passed were proved to have consulted the people in some way and that "…**The number of constituencies in which consultations were made appear to have been only 7 out of 290 constituencies representing 2.41% of the total…"**

In conclusion on this issue, Justice Kakuru observed that; "…**I find that Parliament failed to encourage, empower and facilitate active public participation of all citizens in the process of enacting the impugned Act in contravention of Articles 1, 2 and 8A of the constitution and this omission vitiated the whole impugned Act."**

Counsel therefore invited this Court to uphold the finding of Justice Kakuru that the Committee could not sufficiently consult the people of Uganda in a span of only 60 days given the fact that they needed to gather views from 15,277,198 registered voters, 290 Parliamentary /constituencies, 112 Districts, 1,403 Sub-Counties, 7,431 Parishes and 57,842 villages. The committee in its report, indicated that it managed to interact with only 53 groups and individuals, nearly almost of whom are Kampala based.

3rd Appellant's (ULS) submissions

Counsel submitted that the actions of the police during consultations deprived citizens of the freedom to assemble and associate There was evidence as found by the Constitutional Court of violent dispersing of rallies and stopping citizens from interacting with their members of parliament by the Police. Unfortunately, the Court did not pronounce itself on the infringed rights of citizens

Furthermore, counsel submitted that rights are vested in every individual. Even if only one Ugandan is deprived of a right it remains a contravention of the Constitution. Once proved as the judges clearly found, the burden shifted to the Respondent to show that the actions of violently dispersing rallies and intimidating the population is demonstrably justifiable in a free and democratic society.

Counsel argued that the Attorney General failed to discharge his burden and consequently this proved that the actions of the police contravened Articles 1, 8A, 29 and 38 of the Constitution. Counsel contended that the court erred when it failed to make declarations to that effect.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that there was no way the majority justices could find that public participation was sufficient in the face of violence during the process & restrictions to fundamental rights & freedoms. That participation of the people in legislation processes has historical roots & is a universally acceptable principle as elaborated by in the case of **Doctors for Life International v. The Speaker of the National Assembly & ORS South Africa Constitutional Court Case No. CCT 12/05.** It is an integral part of the law making process that the test for determining whether the legislature took all reasonable steps to ensure participation of the people in legislation as stated was not passed by the respondent because parliament was not reasonable in closing out people's participation and in rushing a constitutional amendment which sought to amend Articles that rotate around the sovereignty of the people. In all fairness, parliament was obliged to consult the people in the amendments and the failure indeed vitiated the entire process. There is a strong rationale for public participation in the legislation process as pointed out **in Doctors for Life (supra) by Ngobo, J & SACHS J,** The rationale is to ensure that people, who are sovereign retain that sovereignty, in presence of Parliament. Mr. Mabirizi submitted that the effect of failure of public participation renders the resultant law null & void.

Attorney General's submissions

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

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

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

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

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

In relation to the case of **Robert Gakuru and others v. Governor Kiambu County, Petition No. 532 of 2013**, the Attorney General submitted that while it was elaborate on public participation and consultation it is limited in its application to the Ugandan setting because unlike the provisions in the Constitution of Uganda, public participation is elaborately and illustratively provided for in the Constitution of Kenya and in the County Governments Act, 2012 of Kenya. Further that these requirements were clearly stipulated in a mandatory manner in Articles 10, 94, 118, 174, 196 and 201 of the Constitution of Kenya. Furthermore that the yardsticks to be used to measure compliance with the public participation and consultation requirements were also provided in section 87 of the County Governments Act, 2012 which is not the case for Uganda.

In the Attorney General's view, because of the different legal regime in these countries, it would be erroneous for the cited cases and standards set therein to be deemed 100% applicable to Uganda in the absence of a clear legal regime on public participation.

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

The Attorney General also argued that the appellants' attack on the nature of consultations in terms of quality and quantity was not factual. He argued that notices of invitation were published in the print media inviting all persons who wished to be part of the process. He argued further that fifty four groups of persons, legal and natural, heeded the invitation, including the President of Uganda and registered political parties. The Attorney General also argued that Parliament could not deny them audience. He however argued that Parliament could not force unwilling participants to come to the committee.

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

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

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

Determination of the Court.

As a brief Background I wish to quote paragraph O.22 of the Odoki report where the Constitutional Commission made the following remarks;

"The government also faced its challenge successfully. It created and maintained the atmosphere of peace, security and freedom of expression so necessary for the success of the exercise. It left in full freedom in the organization and direction of our work. At no time

did it in anyway interfere with what we were doing. The people everywhere manifested signs of tremendous growth in political maturity. They discussed issues without quarreling or fighting. We observed no hostile tensions in any of the seminars or meetings we conducted as a part of the exercise. Ugandans seems to have agreed that the constitutional making process was the critical exercise for the future peace and stability of Uganda."

The process of consultation and passing of the impugned Act was the exact opposite of the above observation.

The Magyezi bill was from the outset very controversial if what happened in parliament on 26th and 27th September, 2017 is anything to go by. Parliament was polarized. The Hon. Speaker recognized the importance of the bill and adjourned the House to allow consideration by the Parliamentary committee and consultation by members of parliament. Unfortunately the consultation by members of parliament was interfered with and interupted by directive by the Inspector General of Police issued by Assistant IGP Asuman Mugenyi which all the Justices of Constitutional court condemned.

I quote a passage in the judgement of **Cherborion Barishaki JCC** to illustrate the condemnation in very strong words;-

"I must state here that I find the obnoxious directive issued by AIGP Asumani Mugenyi appalling. It does not make any legal or logical sense. <u>The directive restricted freedom of association and movement of Members of Parliament without any justification whatsoever.</u>

<u>The directive was intended to prohibit Members of Parliament from holding joint rallies or canvassing support for certain positions outside their constituencies. This is unlawful. Firstly, in the current multiparty dispensation, most Members of Parliament belong to one party or another. They should therefore be expected to offer support for similar minded colleagues in their constituencies.</u> Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for

support for their views and positions or carry out consultations not only from their constituencies but throughout the country.

Secondly, there is absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies.

Thirdly, the directive was clearly ignorant of the fact that some Members of Parliament, such as the National Female Youth Representative, literally represent an electorate spread out all over the country. Other Members of Parliament such as representative for special interest groups also cover wide territories and regions with the possibility that they would hold joint consultative meetings with other Members of Parliament. This should have been foreseen and the directive adjusted accordingly. In my view, the directive was recklessly and wantonly issued without any regard for the law more specifically Article 29(2) which guarantees the freedom of every Ugandan to move freely in Uganda. Yet, it was issued, ironically, by a custodian of law enforcement.

During cross examination, AIP Asuman Mugenyi explained that their reason for the restriction was based on security intelligence that some MPs were planning to move people from their areas and cause chaos. He testified thus;

"My Lords, we had a reason and this was based on intelligence information pertaining at that time. If I am allowed to explain the genesis of the circular, my lords, we got intelligence information that some members of Parliament were planning to move people outside their constituencies to cause chaos and violence in other constituencies while consulting and as police we are mandated by the Constitution to detect and prevent crimes." There was no evidence adduced to prove that Members of Parliament were planning to cause chaos in the Country.

The directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi. However, the

evidence presented by the Petitioners fell woefully short of demonstrating that this directive had that chilling effect in actual fact.

In some cases the directive was rightly and roundly ignored while in other isolated cases such as parts of Lango and central region, at least based on the evidence on record, meetings and rallies were dispersed. Hon. Odur averred that on 24th October,2017, he with five other MPs were violently and unlawfully stopped from consulting their people and that police dispersed people who had gathered at Adyel Division in Lira District for consultation by firing live bullets and teargas inflicting severe fear in him (para 15(s) of his affidavit in support of the petition). Hon. Joy Atim Ongom who was part of the MPs mentioned in Hon. Odur's affidavit report that her consultation in Lira Municipality were interrupted by police with tear gas. She added that Cecilia Ogwal was beaten (see Hansard page at 5203). Though isolated, this was most unfortunate. I find that my position would have been different if there was sufficient evidence to prove that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory. I would not have hesitated to hold that there was no public consultation and participation thereby rendering the entire Bill a nullity. I do not have such evidence before me."(Underling for emphasis)

There is no doubt that this act was unconstitutional and the Attorney General conceded so. In terms of **Article 137 (3) (b)** already cited in this judgement, what the Constitutional court was required to do was to make a Declaration to that effect and give redress where appropriate. I do make the declaration the consequences of which are that the process in parliament following infringement of fundamental rights of not only the members of Parliament but also members of the public who might have been interested in participating in consultations vitiates the process.

3. 'Smuggling' of the motion to introduce the impugned Bill onto the order paper

Submissions by MPs

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.

He faulted Owiny Dollo, DCJ for holding 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.

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 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 reassured 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. Magyezi 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 pigeon hole and where possible, electronically. All these Rules were flagrantly violated.

Attorney General's Submissions

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 Article. 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. 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 requirement set by Rules 120 and 121 (1) which allow every Member to move a Private Members Bill. He pointed out that the bill was introduced by way of a Motion to which was attached the Proposed Bill noting that the other two Bills, that is the Nsamba and Lyomoki Bills had no attachments and one was a mere Resolution.

The Attorney General further contended that the Speaker had [under Rule (47 old) 55 new] been given written Notice of this Motion three days 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.

Determination by Court

The allegation of 'smuggling' of the Magyezi bill onto the Order Paper emanate from session of the 7th sitting –first meeting of parliament held on 26th September 2017.The speaker of Parliament Ms. Rebecca Kadaga during communication from the chair, she told the members of Parliament that she was amending the order paper so as to permit those members of eligible motions to amend the communication to present them. She went further and stated that they had been demanding government to present constitutional amendment to parliament but it had failed. That she had been constrained and she could no longer hold on the members who wanted to bring their motions foe constitution amendment.

The speaker went ahead outlined motions which were eligible and had passed the test under Rule 47 and these include;

1. A motion for leave of parliament to introduce a constitutional amendment by Hon. Raphael Magyezi amend the constitution to provide for time within which to hold presidential, parliamentary and local government election and amend articles 102 (b) and 183 (2) b to remove the age limit.
2. A motion for leave of parliament to introduce a constitutional amendment by Hon. Dr.Sam Lyomoki to amend the constitution under Article 98 to provide for a transitional term and arrangements for peaceful, smooth and democratic transition for first president under the 1995 constitution while providing immunities, exemption and privileges to same individual when they cease to be president.
3. A Notice of motion by Hon.Patrick Nsamba for a resolution of parliament urging Government to constitute a constitutional review commission to comprehensively review the constitution.

The speaker went ahead and outlined motions which were not competent and she excluded them from the order paper because they were not copied to the Clerk to Parliament or did not have a draft motion and draft bill and this include;

1. A motion for leave of Parliament to introduce a constitutional amendment by Hon. Mbwatekamwa to amend the constitution to remove all academic restrictions imposed in the constitution.
2. A motion for leave of Parliament to introduce a constitutional amendment by Hon.John Nambeshe to amend the constitution to require members of parliament to relinquish their parliamentary seats once appointed ministers.
3. A motion for leave of Parliament to introduce a constitutional amendment by Hon.Mbabaali Muyanja to amend the constitution to create a second chamber so that parliament constitutes two houses lower and upper chamber.
4. A motion for leave of Parliament to introduce a constitutional amendment by Hon.Muyanja Ssenyonga to amend the constitution to make provision for the issue of federal.
5. A motion for leave of Parliament to introduce a private members bill by Hon.Dr Sam Lyomoki entitles the Museveni succession transition and immunities bill 2017.

The above amendment of the order paper by the speaker was challenged by the leader of opposition (Ms. Winfred Kiiza) because the Deputy speaker who presided over the 19th and 20th sitting of a parliament had promised members of parliament that they would not be surprised and ambushed. The Leader of opposition was questioned by the speaker, if she was questioning the powers of the speaker.

From above it can be seen that each of the Members of Parliament was seeking leave by way of motion to amend the constitution. Three motions were ready and 5 motion were not.

The speaker of parliament is mandated under **25(1) and (2) of the Rules of Procedure of Parliament 2017** to determine Order of business in Parliament. It provides that:-

25. **Order of business**

(1) The speaker shall determine the order of business of the House and shall give priority to Government business.

(2) Subject to sub rule (1) the business for each sitting as arranged by the business committee in consultation with the speaker shall be set out in order paper for each sitting

It is clear from above that order paper which contains business for each sitting is prepared by Business committee with consultation of the speaker.

I find that the speaker has powers to determine the order of business and even amend the same. As to whether or not the speaker did so with consultation of the business committee of Parliament is an internal matter of the workings of parliament in which court is not going to interfere .

Denying MPs adequate time to debate and consider the impugned Bill.

Submissions by the MPs

In regard to denying MPs adequate time to debate and consider the impugned Bill, counsel submitted that there was overwhelming evidence on record to show that Members of Parliament were not accorded sufficient time to debate on the report of the Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great national importance.

He contended that immediately after the report was "tabled", a resolution was hastily passed suspending rule 201 (2) of the Rules of parliament which required a minimum of three sittings. Each Member was given only 3 minutes within which to make their submissions on the report and hard copies of the said Report were not duly tabled before the House as provided under Rule 201(1) of the Rules of Procedure.

Counsel for the Appellants further contended that the actions of the speaker of Parliament to close the debate on the impugned bill before

each and every MP could debate and present their views on the bill was in violation of Rule 133 (3) of the Rules of Procedure of Parliament.

Attorneys General's submissions

The Attorney General submitted that Rule 80 (2) of the Rules of Procedure of Parliament provides that if the question of closure is agreed to by a majority, the motion which was being discussed when the closure motion was moved shall be put forthwith without further discussion. He argued that the requirement is that the majority have to agree to the closure and that this was done in. the Attorney General further argued that there was no requirement that each and every Member of Parliament must debate before closure.

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

Determination by Court

The time given to each Member of Parliament to speak is determined by the speaker. **Rule 69 (11) of Rules of Procedure of the Parliament 2017**, provide "**The speaker may, on the commencement of the proceedings of the day or on any motion, announce the time limit he or she is allow each member contributing to debate and may direct a member to his seat or her seat who has spoken for period given"**

Under Rule 70 Close of debate provides that "**No member may speak on any question after it has been put by the speaker, that is after the voices of both Ayes and Noes have been given on it**"

It can be seen from the Hansard that the majority of the members who had an opportunity to address the House were timed out. Out of 452 Member of Parliament only 124 members of parliament contributed or debated on the constitution (Amendment) Bill No.2 of 2017 leaving out others notably the leader of opposition pleading for time to debate. The time given for debate and closure of the same is determined by the speaker in accordance with Rules 69 and 70. I can only comment that the debate was rushed leaving out members of Parliament who still wanted to express their views yet in the first place it was the speaker who had sent them to gather the views of the electorate in accordance with Article 1 of the constitution. There was also no time for debate on other aspects of the Bill relating to electoral reforms as recommended by this court but that again is prerogative of the speaker and court cannot interfere.

4. ***Suspension of MPs***

Submissions by MPs

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. Instead at the time of adjourning the house 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.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that it was unconstitutional for the speaker to suspend members of parliament for several sittings after stating that the bill was dealing with the sovereignty of the people. This in a way disenfranchised not only the members but also their voters. Contrary to court's finding the right of members of parliament to represent people is absolute and stands taller than normal rights, it did not fault the speaker for suspending the MPs. Mr. Mabirizi contended that the constitutional court's justification for suspension of members of parliament at was only based on morals & emotions as opposed to sound constitutional principles. Eviction of a member from the house is not an event as the Speaker did it. It is a process starting with naming for the suspension to begin in the next sitting excluding the one in which he has been suspended and then he is given an opportunity to write a regret. Indeed one of the purposes of prohibition of an instant exclusion is to enable member table a formal application for review.

Mr. Mabirizi submitted that evicting members from the same sitting in which they were suspended robbed them of their right to request for a reversal. In **Uganda Law Society & Anor V. AG, CCCPS NO.2 & 8/02, Kavuma JCC** held that "…**It is unacceptable that any free democratic society in the modern world, which jealously protects fundamental human rights of all, which Uganda's society is, should ever experience a situation where even one life of an individual can be terminated by a court of first instance without at least a second opinion on whether or not such a life should be terminated.".**

Submissions by Attorney General

The Attorney General contended that Rule 7 of the Rules of Procedure of Parliament provided for the general power of the Speaker. He argued that

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

The Attorney General submitted that the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and disruptive to withdraw from Parliament and the Speaker properly did so.

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

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

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

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

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

Determination by Court

There were two suspensions by the speaker, the first being on Wednesday, 27 September 2017, where by the speaker suspended twenty five members for gross misconduct which ranged from carrying a firearm into chambers of Parliament and unruly conduct which included failure to listen to the speaker in silence, standing and climbing on chairs and tables and dressing in manner not appropriate. The speaker clearly explained to the members the above reasons before suspending them under Rule (80) (2). This first suspension is what the constitutional court dwelt on and I cannot fault them for finding that the Speaker was right to act the way she did.

There was a second suspension on Monday, 18 December 2017, whereby the Speaker suspended 6 members of parliament who included Hon. Ibrahim Ssemujju, Allan Ssewanyana, Gerald Karuhanga, Jonathan Odur, Mubarak Munyagwa and Antnony Akol without assigning any reason for their suspension.

I am aware that the Rules of Procedure of Parliament clearly show the procedure to take to challenge the Speaker's ruling which is by motion. The members should have taken that course of action and this court cannot intervene where this specific remedy is available and members omitted to take it.

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

Submissions by MPs

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 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.

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 illegal.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted failure to close the doors during the roll call & tally voting was well pleaded. 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."**

Submissions by the Attorney General

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 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.

Determination by Court

By unanimously decision, the Constitutional Court found that the Speaker gave a sound reason on her failure to observe this rule and this what Hon. Kakuru Kenneth JCC, stated:-

"The Speaker explained why the rule could not be complied with. I find that voting when the doors were open offended the Rule of Parliament cited above, however this did not in any way violate the

Constitution and vitiate the enactment of the impugned Act. The Hansard of Wednesday, 20thDecember 2017 at pages 5264-5269 indicate that all Members of Parliament who were present and wanted to vote, voted and there is no evidence to the contrary. I find no merit in this ground. The issue is resolved in the negative."

I concur with the Constitutional Court that it was hard for Parliament to observe this rule due to space and enormous numbers of the members who could not fit in the chamber. There was also no suggestion that the voting was compromised in any way.

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

Submissions by the MPs

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.

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 is apparent that the speaker's certificate of compliance which accompanied the impugned Bill was but full of glaring 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 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.

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

Counsel submitted that the Constitutional Court misdirected itself on the legality of the speaker's certificate of compliance in light of the Supreme Court authority of **Ssemwogerere & Anor 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, invalid and ultra vires."

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

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

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

Submission by Mr. Mabirizi

He submitted that the presence of the purported certificate of compliance is not conclusive on its validity or compliance with the constitution

Submission by the Attorney General

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.

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

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

The Attorney General submitted that 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.

Determination by Court

Certificate of compliance and Presidential assent are mandatory requirement that must be met before any Bill can become law. See **Article 91 and 263 of the Constitution.**

Article 263(2) (a) provides that:-

(2) **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; and**

Parliament passed the Constitution (Amendment) (No. 2) Bill, 2017 which in fact amended Articles 61, 102, 104,183, 77, 105, 181, 289, 289A, and 291 of the Constitution. The speaker of Parliament prepared certificate of compliance in which she included Articles 61, 102, 104 and 183 of the Constitution as the only ones amended and excluded Articles 77, 105, 181, 289, 289A, and 291 of the Constitution

The speaker was supposed to send the entire bill with all Articles amended and passed by parliament to the President. The majority of constitutional court justices found her action to be irregular and Hon. Justice Cheborion, JCC stated that;

"**There is no doubt in my mind that 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 is fatal. It is a mandatory requirement under Article 263 that must be met in respect of each amended Article of the Constitution and cannot be waived in any circumstance."**

In Paul Semwogerere & Others vs Attorney General (supra), Justice Oder held that "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. Mandatory Constitutional

requirements cannot simply be waived by Parliament under its own procedural rules".

This omission per se invalidates Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 on grounds that the Speaker of Parliament did not certify that Articles 77, 105, 181, 289 and 291 had been amended in strict compliance with the provisions of the Constitution. As already determined above, the purported amendments in respect of these Articles were fundamentally flawed and invalid for other reasons already highlighted.

However, I will hasten to add that the Speaker's Certificate is not invalid as asserted by the Petitioners. The only logical result of the omission of certain clauses in the certificate is that the omitted Articles were not validly amended."

The learned justice properly explained the importance of certificate of compliance and clearly stated it is mandatory requirement under Article 263 of the Constitution. This position was stated by this court in case of **Paul Semwogerere & Others vs Attorney General (supra).** With due respect to the majority of the Constitutional Court justices, once it was found that the certificate of compliance was fatal it is contradiction to conclude that it was valid. I therefore find there was no valid certificate of compliance prepared by the speaker.

8. . Illegal assent to the Bill by the President

Submissions by the MPs

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.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that presidential assent is an integral part of a law making process & any defect therein renders the law a nullity. S.9 (1) of The Acts of Parliament Act, provides that "**The President shall, subject to article 91 or 262(263) of the Constitution, assent to the bill presented to him.."**

That any disparity between a certificate & any other related document, invalidates it as it was in **Wakayima & Anor V. Kasule, CA EPA NO. 50/16.** In light of the disparity between the Hansard, the final bill and the Certificate, the president would have done more before he could assent.That the president was not "guided by considerations of reasonableness, good faith, honesty and diligence" in assenting to the bill since the purported speaker's certificate was not a certificate at all.

That the certificate from the electoral commission is a mandatory requirement whose absence invalidated the act as held in **SSEMWOGERERE & ANOR V. AG,** by Mulenga, JSC, even if the president assented, the assent does not validate the act which flouted.

That passing of a constitutional amendment act is not only about the majority numbers, it is also about the constitutional due process & integrity. That the amendment process was a sham & an imitation short of any validity.

Submissions by the Attorney General

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

Determination by the court

Having held that there was no valid certificate of compliance it follows that there was nothing valid to assent to. I find that there was no valid assent to the Bill by the president.

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

Submissions by ULS

Counsel faults 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 that this was not a correct approach. 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

In the ordinary meaning of the words "a bill shall not be taken as passed, means that the Bill will not make it to 3rd reading where the House does not comply with the 14 days.

Having amended Article 1 of the Constitution by infection, the proper course was to separate the two votes at second and third reading by 14 days. Thereafter it would be referred to referendum. It is irrelevant that one year later the court declares some of the provisions unconstitutional. Each of the two arms of government namely the Judiciary and the Legislature has its own functions and responsibilities. The one for the legislature is to ensure that there is a 14 days separation of the two votes. The legislature 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". The constitutional provisions must be complied with. It cannot be left to speculation what will happen in future.

Article 260(1) is clear that a bill [not some provisions of a bill] "shall not be taken as passed unless.....the votes on the second and third reading.....separated by at least fourteen days...."

The motions of passing it at third reading and sending it to the President for assent was all in vain. The bill remained and remains what it was- a Bill. I submit that the court gives effect to the words "shall not be taken as passed" and holds that the failure to separate the two sittings is fatal to the Act. The Act cannot be validated and given Constitutional

cover when it never passed. That means validating a constitutional illegality.

Submissions by Mr. Mabirizi

Mr. Mabirizi it was mandatory for the speaker to separate the 2nd & 3rd readings with 14 sitting days of parliament. By unanimously deciding that the Act amended Articles 1,2 & 260 of the Constitution, had the justices keenly looked at the language of the constitution which uses the word 'Act' as opposed to the word 'Section', they would have not saved any part of the law. Article 257(1)(a) provides that "Act of Parliament" means a law made by Parliament;" it does not define it as a section, subsection or part of the law made by Parliament.

Mabirizi relied on the authority **of SSEKIKUBO V. AG, CHOWDHARY V.UEB SCCA No. 27/10 and KASIRYE V. BAZIGATTIRAWO, CAEPA No.03/16,** where Court held that it was evident that the voting could not take place without separating the sittings with 14 sitting days.

Submissions by the Attorney General

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 and Owiny-Dollo, DCJ.

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 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 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.

Determination by the Court

The majority of the Justices of Constitutional Court found that sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018 required fourteen days separation between the second and third readings followed by approval in a referendum. On the other hand Sections 1,3,4,7 and 9 which did not amend any of the Articles covered by Articles 260, 261 and 263 did not require the second and third readings of the Bill to be separated by fourteen days.

The contention of the appellants is that failure to observe the constitutional requirement renders the Constitution (Amendment) Act No. 1 of 2018 nullity. While the argument of the Attorney General is that the two sets of laws were severable. I deal with the principle in this judgement but it suffices to state that the Act was passed as one and the original bill lost it originality at the Committee stage when the amendments which required 14 sitting days of Parliament between the 2nd and 3rd reading were introduced. Upon introduction of this provisions Parliament was bound to observe Article 263 of the constitution which require the fourteen sitting days between 2nd and 3rd reading of the Bill.

10. <u>Debating in absence of Opposition Leader</u>

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. 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 is prohibited in the Constitution.

Submissions by the Attorney General

The Attorney General submitted that Rule 24 of the rules of parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of parliament shall be one third of all Members of Parliament entitled to vote. In his view, it followed that the business of parliament can go on in the absence of the leader of opposition and opposition Members of Parliament as long as there is the requisite quorum in Parliament and under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

Determination by the Court

On this issue, Justice Owiny Dollo, DCJ had this to say:-

"**The evidence regarding the absence of the Leader of Opposition when certain proceedings took place is quite interesting. When the Speaker ruled that she should sit down, the Hon. Leader of Opposition took offence, and on her own volition, walked out of the Chamber of Parliament. I do not understand why anyone should blame the Speaker for the Leader of Opposition's free willed choice to evacuate herself from the Chambers of Parliament. If every time a Member walks out in protest, the Speaker must suspend proceedings, I can envisage a situation where Parliament would always be held at ransom; thus paralyzing the work of Parliament."**

The rest of the Justices of the Constitutional court were in full agreement with DCJ Owiny Dollo. The Constitutional Court rightly found that leader of Opposition on her own volition exited the House. The speaker's stance to proceed in her absence was the correct one.

11. Crossing the Floor of Parliament

Mr. Mabirizi submitted the speaker was estopped from allowing members to cross the floor yet she had punished others for doing the same. The fact of crossing the floor was not in issue and members did not cross for purposes of voting as found by Justice Musoke & Barishaki, JJCC hence Barishaki, JCC's call for a video was not required. That contrary to what Justice Kasule, JCC held the powers of the speaker do not involve violating the Administration of Parliament Act and Rules that prohibit crossing the floor.

He submitted that it applied to Parliament, the Speaker cannot exercise her general power is the face of clear provisions Rule 9 which prescribes sitting arrangements and Rule 82(1)(b) providing that "During a sitting—a Member shall not cross the floor of the House or move around unnecessarily;" That the finding that no evidence was adduced that the crossing prejudiced any members was unexpected of a constitutional court in light of the above stated constitutional provisions and Rules of Parliament which call for Members of Parliament to be accountable to the electorate. Mabirizi argued that if there is no prejudice in casual crossing of the floor, why is it prohibited and punishable?

Therefore, Justices Musoke & Barishaki, JJCC were wrong to assume that the point in issue before them was actual switching of political sides yet it was a breach of rules of procedure because if it was membership, the right court would be the high court and not the constitutional court.

Submissions by the Attorney General

On this point, the Attorney General submitted that Rule 9 (1) of the Rules of Procedure of Parliament obligated the speaker to as far as possible reserve a sit for each Member of Parliament. Further that Rule 9(4) on the other hand obligates that speaker to ensure that each Member has a comfortable sit in Parliament.

The Attorney General submitted that since the members of the opposition walked out leaving empty seats, the Speaker was justified in the circumstances to permit Members of Parliament to sit on the available sits in the chambers of Parliament. The Attorney General further argued that embers taking up available sits as had been directed by the speaker did not amount to them joining the opposition and did not contravene any rules of procedure of parliament and therefore the Justices of the Constitutional Court rightly found so.

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.

Determination by the Court

On this issue, Justice Cheborion, JCC had this to say:-

"**It has not been proved that by inviting Members of Parliament to sit on the seats left vacant by the opposition members of Parliament, who had stormed out of Parliament, the Speaker in essence allowed**

Members of the Ruling Party to Cross to the Opposition. In my view "crossing the floor" of Parliament must be with the intention of joining the Opposition or otherwise as envisaged in Article 83 of the Constitution. I am of the considered view that even if members crossed the floor that would not render the Act unconstitutional."

I concur with the unanimous decision by the Constitutional court that permitting members from Ruling party to sit on Opposition side did not any way amount to crossing the floor. Crossing is a mental and not a physical and there was no suggestion that after that particular sitting members had changed parties.

12. Signing of the Report by Non-Committee Members

Mr. Mabirizi submitted that there was ample evidence that members who did not participate in committee proceedings signed the report .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 sectoral 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.

Mr. Mabirizi submitted 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. The compliant before court was whether it was in line with the Constitution for members who never participated in the proceedings of the committee to sign a report but they veered off the rail when they started going into issues of vacancy and participation of none-members which were not in issue.

Submissions by the Attorney General

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

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

In light of his submissions above, he contended that the requirement of the law in regard to quorum and non-validation of the report were

considered and correctly adjudicated by the Constitutional Court and prayed that this Court upholds the same.

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

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

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

Without prejudice to his submission above, the Attorney General submitted that Rule 128 of the Rules of Procedure of Parliament provides that whenever a Bill is read the first time in the House, it is referred to the appropriate Committee for consideration, and the Committee shall report to the house within 45 days.

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

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

committee reported to the House on 14th December, 2017 after expiry of 45 days.

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

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Rt. Hon Speaker on the 3rd November 2017. That both letters are annexed. Further that the 45 days started running from the 3rd November 2017. In the Attorney General's view, this meant that the days would expire on 16th December 2017. Thus, the Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.

He added further that in any event none compliance with the 45 days rule does not vitiate proceedings on a Bill. He placed reliance on Rule 140 which provides that where extra time is granted, or upon expiry of the extra time granted under sub rule 2, the House shall proceed with the Bill without any further delay.

The Attorney General submitted that the report of the committee was duly presented to the whole House within the period stipulated under Rules 128 and 140 and alternatively, if it delayed, which is denied, the

delay did not vitiate or invalidate the enactment of the constitutional amendment Act No.2 of 2018.

Determination by the Court

This matter was first raised by Hon Ssekikubo shortly after the chairperson of the committee on legal and a parliamentary Affairs was presenting the majority report of the committee. He noted that two Hon members of Parliament, namely Hon Lilly Akello and Hon Akampurura Prossy who signed the report of the majority were members of committee of Defence and Internal Affairs and that they were brought as mercenaries to append their signatures. The speaker later on the evening told members that the said members had been designated to that committee by the Government chip whip on the 29th November 2017.

It is on record that the Constitution (Amendment) bill 2017 was read for the first time on 3rd October 2017 by the Hon. Raphael Magyezi and subsequently referred to committee on legal and a parliamentary affairs for scrutiny .The committee started its work without the effort and input of the said members of parliament .It was almost two months when they were sent to committee by the Government Chief whip and it was correctly argued by the Hon Ssekikubo on floor of parliament that these members were sent there to sign the report and form the majority.

The Constitutional court justices had their take on this and held that;

The Hon .Justice Owiny Dollo, DCJ stated that " **In <u>the same vein, the fact that people who were known not to be members of the Legal Committee signed the report</u> is not fatal to the process; though it was irregular. First is that, on the evidence, they did not participate at the hearings; but merely signed after the conclusion of the proceedings. Second is that even if they are removed from the list of those who signed the report, there would still be sufficient members who attended the Committee propceedings, and signed the**

report. Lastly, Article 94 of the Constitution covers this type of situation, since it provides as follows:

"(3) 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."

The Hon .Justice Kasule, JCC Stated that;

"<u>It was not clearly established at what stage these members began participating in the deliberations of the committee. Some of these members, it was asserted, signed the report of the committee.</u> This, if true, was irregular. However, 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. Accordingly the proceedings of the Legal and Parliamentary Affairs Committee cannot be invalidated because of the signing of the report by those very few members who joined the committee late."

The Hon .Justice Kenneth Kakuru, JCC held that;

"From the above excerpts, it <u>is very clear that some Members of Parliament who were not originally on the Legal and Parliamentary committee when the impugned bill was sent to it for consideration, later joined it while they were still Members of other committees</u>.

With all due respect, to the Rt. Hon. Speaker, her Ruling that the issue should be treated as simply indiscipline had no legal justification. It is clear from the excerpts above that some members who signed the Legal and Parliamentary Affairs Committee report in

respect of the impugned bill which was later enacted into law, were not legally members of that committee. This is a legal matter that has an impact on the validity of the process of enacting legislation. It is not an issue of discipline.

I am, however, unable to find that, in ordinary circumstances failure to comply with Rule 155 of the Rules of Procedure of Parliament, would vitiate the proceedings of a Parliamentary committee in view of the provisions of Article 94 (3) of the Constitution."

The Hon .Justice Musoke, JCC stated that;

"**Act of the Legal and Parliamentary Affairs Committee of Parliament allowing some Committee members to sign the Report after the public hearings on the bill.**

I am inclined to agree with the Respondent's submission that the fact that 8 members joined the Committee at a later stage, did not negatively affect their participation in the proceedings of the Committee because they were adequately briefed.

From perusal of the Report and the signatures attached, I find that with or without the additional 8 members to the Committee of Parliamentary and Legal Affairs, the original members who signed the Report constituted a third of the total number. The report was, therefore, validly signed since under subsection (2) of Rule 201, the decision of the Committee is collective.

I therefore resolve this issue in the negative."

The Hon. Justice Cheborion, JCC stated 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. Rule 187(2) of the 2017 Rules of Parliament sets the quorum of a select committee of Parliament if the committee consists of more than five members to be 1/3 of all the members. In this case, even if the members complained of were not to be considered, still the quorum would be met. I therefore answer issue 7(d) in the negative"

I have endeavored to reproduce Constitutional Court finding on this issue, in order to demonstrate that it was unanimously held that the added 8 members of a parliament were not originally members of the committee when the bill was sent to it. They were brought to sign the report without actual participation in proceedings and hearing of the said committee that drafted the final report.

All the justices found this to be irregular and relied on **Article 94(3) of the Constitution** to effect that it validates their act. I also agree with the Constitutional court that signatures of the members who had not participated in the discussion did not vitiate the report.

13. Waiving the requirement of a minimum of three sittings from the tabling of the Report and Non- Secondment of the motion

Mr. Mabirizi submitted that majority justices were dishonest in finding that the motion to suspend rule 201(2) by Hon. Rukutana was at the committee of the whole house stage yet the evidence prove that it was at plenary. The speaker was estopped from claiming that secondment is not essential yet she had earlier made it essential. The failure to second the motion by Hon. Rukutana was an illegality that rendered subsequent

proceedings invalid, in line with **Makula International Ltd V.CARDINAL Nsubuga & ANOR (1982) HCB 11.**

Mr. Mabirizi submitted that the finding by majority of the Constitutional Court justices that MPs had obtained the committee report 3/4 days prior to 18/12/17 had no evidential basis according to Section 8(2) and (4) of The Electronic Transactions Act The words of Hon. Rukutana that "…**this report has been on our ipads for the last five or more days…"** did not pass the test of the report being delivered to the ipads contrary to the finding that there was evidence that members of parliament were prevented from debating the bill and that only 28% of the house debated

Submissions by the Attorney General

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

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

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

He prayed that since, the Members of Parliament received the report of the Committee three days before the debate, this Court should uphold the finding of the Constitutional Court that no prejudice was put on the members.

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

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

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

up and speak to the motion in support. He further argued that the adoption of such practice was premised on the authority of Rule 8 of the Rules of Procedure of Parliament which allows the adoption of practices of the House, the Constitutional provisions and practices of other Commonwealth Parliaments in so far as they are applicable to Uganda's Parliament.

He then concluded that since in Parliamentary practice, secondment of a proposed motion acts only as an indication that there is at least one person besides the mover that is interested in seeing the motion considered and debated by the House and the motion by Hon. Rukutana to suspend Rule 201 (2) of the Rules of Procedure of Parliament satisfied the requirements of Rule 59 of the Rules of Procedure of Parliament

Determination by the Court

Rule 201(2) of The Rules of Procedure of parliament 2017 provides that:-

Debate on report of a committee on a bill, shall take place at least three days after it has been laid on the Table by the chairperson or the Deputy Chairperson or the member nominated by the committee or the speaker.

The purpose of the rule was well articulated by Hon. Justice Cheborion when he stated that:-

"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."

It was the argument of the speaker and the Constitutional court justices that the requirement of the said rule was met when the work of the

committee was loaded on the MPs Ipads four days before. I find this rule to be in mandatory terms **"shall",** it calls for strict adherence. This was well stated Justice Kakuru JCC that:-

"The Speaker of Parliament with all due respect failed to apply Rule 201(2) which is mandatory. I accept the submission of Counsel in this regard that "laying on the table" means physically presenting the bill on the table of Parliament and does not include sending an electronic copy to members. I note that, Parliament amended and adopted new Rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore the submissions of the Hon. The Deputy Attorney General on the floor Parliament that when the Members of Parliament were availed with Ipads Rule 201 no longer serves any useful purpose has no legal basis .I therefore, find that, Parliament while passing the impugned Act, failed to comply with Rule 201(2) of its Rules of Procedure, which is mandatory. I find that failure contravened Article 94(1) of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018."

The Hansard of Monday 18, December 2017, shows that the Chairperson of the committee on legal and parliamentary affairs stated that;-

"**Madam Speaker, I beg to lay on the table a copy of the main report before I make the presentation, which is accompanied by the minutes of the proceeding of the committee**."

At that point the Hon Karuhanga rose on point of procedure and pointed out Rule 201 (2) was being flouted by Parliament. The speaker overruled him pointing that the report was uploaded on iPads and the rule did not apply.

In addition to what Justice Kakuru stated I wish to add that if indeed the introduction of the iPads had rendered the rule inapplicable evidence should have been adduced to show that a number of motions and reports had been laid on table through that method. But if following the introduction of the iPads Parliament continued to follow the physical laying on the table there was no reason why the practice was not followed in this case.

I also need to comment on motion that was moved by The Deputy Attorney General to suspend Rule 201(2).This motion was moved after the Chairperson of committee had stated reading out part of his report to House. Parliament was not in committee stage as stated by majority of the justices of the Constitutional court. It was receiving and debating the report of the committee and therefore there was need for secondment of the motion which was not done. Failure to second the motion means that there was no substantive motion moved by Deputy Attorney General to suspend Rule 201(2) hence the violation of Rule 59(2) of the Rules of Procedure which I find that vitiates the subsequent legislative process and the enactment of the Constitutional (Amendment) Act .2018.

14. <u>On Severance</u>

Appellant's submissions

Mr. Mabirizi submitted 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 matter 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.

He submitted that the 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.

Mr. Mabirizi further that it was erroneous for the Constitutional Court 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 Court 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 no 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 Lord Denning, **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 Justice Barishaki's reliance on the decision of **South Africa National Defence Union Vs Minister Of Defence & Another Constitutional Court Case NO. 27 OF 1998** was misconceived because looking at facts as summarized by O'REGAN, J at what was under challenge was only Section 126B of the South Africa Defence Act 44 of 1957, which was stated to be in contravention of the 1994 South African Constitution. That there was no challenge on the procedures and processes adopted in enacting the Act as it is here.

MP's submissions

Counsel submitted that the Constitutional Court made a finding that the impugned Act violated the provisions of **Article 93 of the constitution** but declined to nullify the entire Act contending that noncompliance only affected Sections 2, 6, 8 and 10 of the impugned Act extending the term of Parliament and local government councils from five to seven years as from the date of the last elections since they were introduced by way of

amendments that imposed a charge on the consolidated fund. They accordingly applied the doctrine of severance to strike out the said provisions.

He submitted that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private member's bill or a motion including amendments thereto which has the effect of creating a charge on the consolidated fund. Parliament therefore flagrantly violated Article 93 of the Constitution when they proceeded to consider and enact into law the impugned Bill with its amendments which had the effect of imposing a charge on the consolidated charge as found by the constitutional court. It was therefore erroneous to apply the doctrine of severance in a Bill was considered and passed as an integral legislation in the same process.

ULS Submissions

Counsel Wandera Ogalo submitted that all the authorities the Respondent cited and relied like **Abuka Silverori vs Attorney General, Kauesa vs Minister of Home Affairs, Matiso vs. Commanding officer of Port Elizabeth, Attorney General for Alberta vs. attorney general for Canada , Kingsway investments vs. Kent County and South Africa National Defence Union vs. Minister of defence** on the principle of severance to justify the refusal to nullify the whole Act by the lower Court were foreign and non-binding authorities for the following reasons.

That those authorities interpreted the witchcraft Act, Regulations under Police Act, the Magistrate Courts Act, the Alberta Act and Defence Act respectively in their respective jurisdictions. None of those authorities were amending the Constitution. Different standards and procedures apply in enacting an ordinary law as opposed to the Constitution.

That in Uganda the produce 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.

Counsel contended that all legislations cited above were enacted by respective Parliaments using the rules of procedure of the House and not their national Constitutions. 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. The severance maintained the purpose of the Bill, it is not a valid reason 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 prayed that this court to hold that the principle of severance is not applicable in the present case.

Attorney General's Submissions

The Attorney General submitted that the Court was right in making reliance on the provisions of **Article 2 of the Constitution** while applying the principle of severance. That the Constitution of Uganda allows for the application of the Doctrine of Severance under Article 2(2). The Hon, Alfonse Owiny Dollo cited the authority of **Salvatori Abuki V Attorney General; Constitutional Case No. 2 of 1997** where the Constitutional Court considered the constitutionality of Sections 3 and 7 of the witchcraft Act Cap 108 . Justice Remmy Kasule stated that;- '**I also hold and order that sections 1,3,4,and 7 of the Constitution**

(Amendment) Act No. 1 of 2018, ...hereby retained as constituting the said Act by reason of their having been enacted in compliance and in conformity with the Constitution.'

Also that Justice Cheborion Barishaki, applied the authority in **South African National Defence Union vs Minister of Defence& Another Constitutional Court case No. 27 of 1998**, the same approach was applied as is evident from this passage,

"The offending provisions, however, can be rendered constitutionally valid by the technique of severance applied to both subsection (2) and (4) of t section 126 B....."

He also stated **that "In the circumstances, I hold that section 2, 5, 8, 9 and 10 of the Constitution (Amendment) Act 2018 are hereby struck down and expunged from the Act. Section 1, 3, 4 and 7 of the Act are upheld since they are constitutionally valid."**

That the Hon. Justice Elizabeth Musoke applied the principle of severance when she declared that section 1, 3, 4, and 7 of the Constitution (Amendment) Act No. 1 of 2018 are not inconsistent with and/or in contravention of the 1995 Constitution.

It is the Attorney General's submission that Justices of the Constitutional Court properly applied the principle of severance when they upheld sections of the Act that had been validly passed into law and invite this Court to uphold the decision of the Constitutional Court.

The Attorney General submitted that the core role of the Constitutional Court under Article 137(1) of the Constitution is to interpret its provisions while Article 137(3)(b) and 137(4) provide for the grant 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 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 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, 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.

The Attorney General submitted 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

Court's Determination on Severance

The majority of Constitutional Court Justices applying the principle of severance, severed the amendments which were introduced by Hon Tusiime Michael of the extension of tenure of parliament and that of Hon Nandala Mafabi of Term limits at Committee stage of the whole House from the original Magyezi bill.

I don't agree with Mr. Mabirizi that because the principle was not pleaded or argued by any of the parties at the trial the Constitutional Court was precluded from applying it. To me if court, through its own research finds a principle that may have been missed by the parties but is helpful in solving a case there is nothing to stop the court from relying on it. The

concern to the parties should be whether the principle is actually applicable or the court was misconceived in applying it.

The above two amendments emanated from the Legal and Parliamentary Affairs committee's general recommendations where by the committee recommended for reinstatement of the presidential Term Limits and expansion of the term of president from five to seven years**(see parliamentary Hansard of 18 December 2017 at page 32-33)**.

During the debate of the report of the committee some of the members of parliament supported the above amendment which influenced debate as shown below:-

The Hon James Waluswaka NRM Bunyole County West Butaleja stated that "…**My people told me that <u>we restore the term limits</u> not only for the president but for all elected members of parliament. There are members of parliament who have been for several years but they do not want to leave. Why don't they serve two terms and go? That is what they told me**…"

The Hon Kenneth Luboogo NRM Bulamogi County Kaliro stated that "**Madam Speaker the report talks of about reinstatement of term limits and entrenching and expanding the same<u>. I agree with the reinstatement and entrenchment of the same but disagree with expansion from five to seven years</u>…I think we should we maintain the five term and restore term limits"**

The Hon. Violet Akurut NRM woman Representatibe Katakwi stated that "**I did consult my people of Katakwi we have ten sub counties and out of ten sub counties ,seven agreed to the amendment of the constitution and other three did not.<u>as a safeguard, however they also recommended that term limits be reinstated in the constitution</u>… Thank you."**

The Hon Norah Bigirwa NRM Woman Representative ,Buliisa stated that "**<u>The people of Buliisa are saying that they look forward to seeing us, as country adhering to what is embedded in the constitution. They requested me to go ahead and restore the term limits and entrench</u>**

them within the constitution because they feel that these are some of the things that will help us to run this country…"

The Hon. Alex Byarugaba NRM Isingiro County South states that **"it was on that basis that I took my consultative meetings to the five sub-counties in my constituency with a population of about 220,000 people. I traversed all the sub counties and collected the following : yes sometime in the parliament, term limits were removed.My people instructed me to come back and share with you that we must keep this country together and that term limits must be reinstated and entrenched."**

The Hon. Eric Musana NRM Buyaga County East Kagadi stated that "**I also support the committee's recommendation of establishing the constitution review commission. We have a number of serious issues that must be incorporated and this commission will help us to bring all these warring parties and Uganda to a better consensus. I am also in support of reinstating term limits. This was paramount in my constituency…"**

The Hon.Dononzio Kahonda NRM Ruhinda county Mitooma stated that "**Madam Speaker on the issue of term limits, it was raised at Kabira Sub County by lay Canon, that it should be reinstated to address the issue of transition that all Ugandan have been yearning for."**

The Minister of State for Health (General Duties) Hon. Sarah Opendi stated that "**Madam Speaker, the people however said we should restore term limits. I am glad that this is clearly contained in report of the committee."**

The Hon. Gilbert Olanya FDC Kilak County south, Amuru stated that "**I would like to stand firm in this ground and support the position of the committee to reinstate terms limits**."

There were some members of parliament who were totally against the reinstatement of the terms limit and the following were their views

The Hon. Patrick Opolot NRM Kachumbala County,Bukedea stated that "… **if a leader is very good, the people will decide to continue**

renewing his mandate. If the people find a leader unworthy-maybe if he is a drunkard-even the leader himself can decide to abandon power. It has ever happened in 1985, a leader abandoned power here because he saw that he could not manage it. Therefore <u>I don't support the reinstatement of term limits in our constitution. I beg to submit madam speaker"</u>

The Hon .Joseph Kasozi (NRM Bukoto County Mid-west Lwengo) started that "**Madam Speaker on issue of reinstating terms limits. I remember very well 12 years ago this parliament removed terms limits. My question is what mischief was meant to be cured by the removal of term limits? Has that mischief been cured so that it requires us to reinstate term limits once again as proposed by the committee?"**

Later when it comes to second reading of the Bill, The Hon Beatrice Anywar stated that "**Madam Speaker on lifting the term limits I vote 'yes'.**" she was called back by the speaker to vote properly and she voted yes but her support for the Bill was clearly influenced by the return of term limits.

I am of the opinion that the amendments introduced were not foreign to the Magyezi bill. The members of Parliament were sent out by the speaker and she emphasized that they should properly consult the people in accordance with Article 1 of the constitution. The members during the debate clearly demonstrated that their voters had strictly demanded for reinstatement of the term limits in the constitution.

At the committee stage of the whole house, the Hon Tusiime sought permission to chairperson to introduce his amendment to original Bill. His amendments were on Articles 61, 77,181,289 291 of the constitution. His proposal of the amendments were debated by members of Parliament, some of them like Hon. Nandala Mafabi were strictly opposed to the amendment.

The chairperson put a vote on it and her words she stated "**Honorable members, I put the question that new clause be introduced as proposed**." the Hansard show shows (Question put and agreed to).

Towards the end of proceeding of the committee, the Hon.Nandala Mafabi sought leave of the chairperson to add amendments on Article 105 of the constitution and introduce the terms limits which were to be entrenched .Again the chairperson put the question to members and stated "**Honorable members, I put the question the question article 105 be amended as proposed**." the Hansard show that Question put and agreed to. Later on the Hon.Nandala requested the amendment be re-entrenched and question was put and agreed upon by members.

The Deputy Attorney General moved to block the amendment by Hon. Mafabi because it was not debated and that it was matter of referendum that would reinstate them. He was overruled by chairperson since the matter had been voted on.

After the committee stage, the chairperson put question to members the title to do stand part of the bill and Hansard shows that question was put and agreed to.

From above it is crystal clear that the two amendment were proposed and voted upon by entire members of parliament in the committee and agreed that the form part of the original Magyezi Bill. From this moment up to the conclusion of the process the amendments become an integral part of the Bill judging from the report of Raphael Magyezi indicates below:-

At report from the committee of the whole house, the Hon Raphael Magyezi stated that "**Madam Speaker, I beg to report that the committee of the whole House has considered the Bill entitled, 'The Constitution (Amendment) No.2 Bill,2017' and passed the entire Bill with amendments and also introduced and passed new clauses-amending articles 77,181,29,291,105 and 260. I beg to report.**"

At the motion for adoption the report from the committee of the whole House and the again the Hon. Magyezi sated "**Madam Speaker, I beg to move that the report of the committee of the whole House be adopted.**"

The speaker put question to members that the report of the committee of the whole house be adopted and the Hansard shows that the question was put and agreed to.

The bill went to third reading. The Hon Magyezi moved that the bill be read for third time and do pass and speaker put the question to member and voting for the third reading started.

On the third reading it is important to note that bill was voted on as a whole without separately voting on each clause. The pattern of the vote also indicates that the amendments influenced the vote as a few example will show the Hon. Deputy Attorney General who fought 'tooth and nail' to block the amendment of Hon. Nandala Mafabi voted yes to the Bill and so do did other members like Hon. Joseph Kasozi and Hon. Patrick Opolot who were categorically against the return of term limits. Interestingly the Hon. Nandala Mafabi who substantially contributed to the Bill by adding an amendment to it voted No to the Bill.

The third voting as shown from above was done on the Bill as a whole. After the voting the Clerk to Parliament tallied the votes which were 315 vote in favour of the bill and 62 voted against. The speaker declared The constitutional (Amendment)No.2 Act,2017 had been passed.

I have reproduced the above part of Hansard to show that the amendments by Hon.Tusiime and Mafabi were passed by members of Parliament and allowed to be added on Original Magyezi Bill at the committee stage. Secondly the report of the committee of the whole house which contained the amendments was adopted by Members of Parliament. Thirdly the third voting on the Bill was done as one. Fourthly the Act was passed as one by Parliament and lastly some Members of Parliament as seen from above were sent by their people (electorates) and instructed to reinstate the term limits and that must have greatly influenced their third time voting on the Bill.

The Constitutional Court Justices with due respect misconstrued the doctrine of severance because from time of the introduction the amendment, the bill become one. The speaker left out the contents of the

amendment in her Certificate of compliance which rendered the certificate invalid as already determined in this judgement.

The second point about the misapplication of the principle of severance is that well before the introduction of the amendments to the Bill, the process of enacting the Act was already tainted with acts of unconstitutionality already discussed in this judgement.

Both Justice Kasule JCC and DCJ Dollo followed the case of **Silvatori Abuki v Attorney General; Constitutional Case No. 2 of 1997,** Where the Constitutional Court considered the constitutionality of **Sections 3 and 7 of the Witchcraft Act, Cap 108**.With due respect, the case of Abuki is different from the present case because it was not concerning the enactment of Witch Craft Act as whole being null and void and it be said that Act must be have been enacted according to the law but had the two sections inconsistent with constitution which is not the case we have now where by the whole Act was not passed according to Constitution.

In conclusion having found that some of the acts and omissions vitiated the enactment Constitution (Amendment) Act 2018 the doctrine of severance was wrongly applied by the Constitutional Court. The Act was passed as one and I find the principle inapplicable. I answer issue No.2 in the positive.

ISSUE 3: VIOLENCE

This issue was framed as follows:

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

Appellants' Submissions

Submissions of MPs

Counsel submitted that the Constitutional Court rightfully established that the UPDF, the Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act.

According to counsel, use of force to amend the Constitution is not only prohibited but is also treasonable.

Counsel contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting was unconstitutional 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 averred that the bill was passed amidst violence within and outside Parliament, and also in the whole Country during public consultations thereby vitiating the entire process, and thus making it unconstitutional.

That It was as a result of the heavy deployment and unprecedented violence meted out against Members of Parliament within the precincts and chambers of the August House that prompted the Speaker of Parliament to write a letter addressed to the President of Uganda inquiring into the existence of armed personnel in the perimeters of Parliament.

That the unlawful invasion and/or heavy deployment at the Parliament by combined forces of the Uganda People's Defence forces, the Uganda police force and other militia before and on the day the impugned bill was tabled before Parliament amounted to amending the Constitution using violent means, undermined Parliamentary independence and as such was inconsistent with and contravened the Constitution.

Counsel submitted that the learned Justices of the Constitutional Court acknowledged that security forces committed acts of violence in and out of Parliament but held that those acts were not sufficient to vitiate the enactment. Their Lordships applied the qualitative test. It was erroneous for the learned justices of the Constitutional Court to apply and/or misapply the qualitative test on grounds that where the prohibited conduct amounts to an offence, like in the instant case, then the qualitative test is inapplicable. The moment Court found as proved that security forces violently restrained or stopped many people from participating in the enactment of the impugned amendment, then the offence was proved.

Counsel criticized the Constitutional Court finding that the violence was not as prevalent as to vitiate the enactment process. Submitting that the violence had a chilling effect on other members of the public that wished to participate and other members of Parliament that would have wished to oppose the amendment.

It was imperative for the learned Justices of the Constitutional Court to find that the amendment was begotten from violence inflicted on persons opposed to the amendment, and therefore contravening to Art 3 (2) of the Constitution.

Counsel contended that all the five justices of the Constitutional Court held that public participation is one of the basic structures of our constitution and cannot be wished away nor taken lightly.

Counsel cited the case of **In Doctors for Life International & Ors -Vs- The Speaker of National Assembly & Ors. Constitutional Court (of South Africa) 12/05, the South African Constitutional Court** emphasized the concept of participating democracy (as is found in Art.1 of our Constitution)

"… **therefore our democracy includes as one of its basic and fundamental principles of participatory democracy. The democratic**

government that is contemplated is partly representative and partly participatory ... and makes provision for public participation in the law making process ..."

In conclusion counsel submitted that the invasion of Parliament by the combined armed forces of the Uganda People's defence forces, the Uganda police and other militia was unwarranted and uncalled for as rightly found by the learned Justices of the Constitutional Court. It was unjustified in the circumstances which later on had an adverse effect of curtailing several persons and Ugandans at large from participating in the process leading to the enactment of the Constitution (Amendment) Act. Counsel invited court to answer this issue in the affirmative and find 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.

Submissions of Uganda Law Society

Counsel submitted that the violence inside Parliament included the arrest, assault detention of members of Parliament and their forceful exclusion from representing the Constituents. The actions complained of violated several provisions of the Constitution. That the constitutional Court erred in failing to come to definite conclusions that Article 23 24 and 29 were contravened. As a result the Court neither made any declarations nor granted redress as required by Article 137 of the Constitution for the contraventions.

There was no attempt whatsoever to bring the actions of the security forces within the defenses stipulated in Article 43 instead court embarked on rationalizing the limitations on the member's right to liberty. That there is no evidence whatsoever of misconduct being a basis for the constitutional limitations on their liberty. On the contrary it is the

Speaker's orders which should be faulted as the events of 26th and 27th September show.

Counsel submitted that the court erred when it held that the Members misbehaved and this led to loss of liberty. If Court came to correct conclusion that there was no misbehavior, it would have come to a different conclusion. It would not have held that exclusion from debate, assault and detention was necessitated by the member's bad conduct. Instead it would have found that the suspension of the member by the Speaker is what was unjustified. The invitation of the police was therefore without foundation and the eventual trespass by Special Forces uncalled for. Consequently the limitations to the fundamental rights of the members to liberty and to represent their constituents and was unjustified.

Applying the test laid down **in Onyango Obbo and another Vs Attorney General** he submit that

(a) The continuance of debate in Parliament on that particular day was not particularly important to warrant overriding the fundamental rights. Debate could have taken place on another date. The debate continued for only 46 minutes and adjourned at 5.00p.m. There was nothing important about a debate. A member was simply seeking permission of Parliament to introduce a bill. I submit there is nothing particularly important in that debate to justify the limiting of fundamental rights.

(b) The limitation of the fundamental rights cannot be rationally connected to the object. How misbehavior in the House is linked to limiting MPs fundamental rights. That is not rational. It is arbitrary and unfair. The rules of the House provide for a procedure to follow in case of misbehavior. It does not include inviting in the army and police. The limitations were therefore unjustifiable

(c) The means used to impair the right were not necessary to accomplish the object of eviction. The record is full of evidence of assault

inhuman treatment and deprivation of liberty. All those were not necessary to remove the members.

Counsel submitted that had the Justices in the lower Court addressed themselves to the pleadings and affidavits there would have held that there was contravention of Article 24 and would have made a declaration to the effect and given redress.

Counsel submit that the redress to the violations has to be related to reasons his submissions which were to start the Age Limit bill on its path without the voices of opposition. The product is as good as the process. That product is tainted with deliberate and planned constitutional violations and this Court ought not to allow it to stand. The ghosts of unconstitutionality will only go back to sleep if the Act is struck down. If it is not, those ghosts will disturb the country for a long time to come.

Submissions of Mabirizi

Mr. Mabirizi submitted that violence which was well pleaded/ deponed to in the affidavits was not rebutted by the respondent but as could be seen the justices had a pre-conceived mind that violence was justified.

He submitted that it was erroneous to approach the violence as a disciplinary measure by the speaker yet parliament had been suspended. The Chamber ceased to be the House and her directions to Sergeant-At Arms could not be implemented because no parliament was sitting, the Sergeant at arms could only act in the sitting and under supervision of the Speaker.

Mr. Mabirizi contended that violence, whether real, perceived or attempted vitiates not only legislation but also any action done pursuant to it. Violence is defined by **BLACK'S LAW Dictionary,8th Edition T**he use of physical force, usu. accompanied by fury, vehemence, or outrage; esp., physical force unlawfully exercised with the intent to harm...and veiled threats by words and acts." Violent is defined at pg 4857 as

"…**relating to, or characterized by strong physical force….2. Resulting from extreme or intense force…3. Vehemently or passionately threatening…"**

That the Amendment of the Constitution through violence was foreseen by the framers of the Constitution who made a strong prescription against violence of any kind in the constitutional amendment process and invalidated each and every thing arising out of violence and created an offence of treason. The perpetrators of violence in the Constitutional amendment process committed the treason envisaged under Article 3 of The Constitution.

All the provisions rhyme well with the language in Article 3 of the Constitution against violence because in every offence where violence is an element, the maximum punishment is either death or life imprisonment, including heavy punishments for attempts. Therefore, there was no way the justices could justify violence simply because the MPs could have originated it.

He cited the cases of THE EAST AFRICAN COURT OF JUSTICE in **KATABAZI & ORS V. THE SECRETARY GENERAL, East African Community & ANOR, Reference No.1/07], SADC REGIONAL COURT in CONGO & ANOR V. ZIMBABWE, (supra) & THE CONSTITUTIONAL COURT ITSELF in DR. BESIGYE & ORS V. AG,CCC Petition** No.7/07 have set precedents that violence & arbitrary rule invalidates the resultant or intended benefit and the constitutional court was bound by this authority.

He submitted that the court erred in applying a subjective test as opposed to an objective test approved by this court in **onyango obbo's** case at in dealing with the violence and prayed that court reverse it.

The Attorney General's Submissions

The Attorney General submitted that 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 prayed that this Honourable Court does uphold the decision of the Court on this matter.

He pointed out that it is factually incorrect for the Appellants to state that the learned Justices of the Constitutional Court found that the UPDF, Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act. It was the unanimous decision of the Court that the intervention of the Uganda Police Force was lawful and there was never any reference to militias as alleged by the Appellants should make factual references to the Judgments of the Court.

The Attorney General contended that the evidence on record clearly illustrated that the proceedings of Parliament on the 21st, 26th and 27th September 2017 was 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. However, the Hon. MPs chose not to heed the Speaker's orders to leave the House and this led to their eviction by members of the security forces under the command of the Sergeant-at-Arms.

That 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 under **Article 94(1):**

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

In line with the above Constitutional Provisions; Part XIV of the Rules of Procedure of the Parliament of Uganda was enacted that provide for Order in The House and Regulation 85. Rule 88 (6) Where a Member who has been suspended under this rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force 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.

It was the Appellants' case that there was an unlawful invasion and/or heavy deployment at the Parliament of the armed forces on the day of tabling of the impugned bill before Parliament which action amounted to amending the Constitution using violent means, undermined Parliament independence and was therefore inconsistent with the Constitution.

The Attorney General submitted that from the authorities cited above it is apparent that the Rt. Hon. Speaker is legally mandated to ensure that order and decorum is maintained in the House and she clearly had the powers as derived from the 1995 Constitution to suspend the MPs who perpetuated violence in the Parliamentary chambers.

The Attorney General prayed that this Honourable Court upholds the decision of the Learned Justices of the Constitutional Court that in the circumstances as presented by the evidence, the Rt. Hon. Speaker acted within her powers and in accordance with the Constitution to evict the names 25 Members of Parliament as a

It was the Attorney General's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with our security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces.

It was apparent from the findings of the Constitutional Court that their Lordships considered the evidence on the record and came to the appropriate conclusions on this issue of the alleged violence against the members of the public.

The Attorney General faulted the Appellants for allegation that the Constitutional Court did not address this issue and the evidence was evaluated and yet it was found that an overwhelming number of Members of Parliament carried out their meetings of consultations with the people in an uninterrupted manner and they were then able to come and vote on the Constitutional Amendment Bill No. 2 of 2017.

That the Appellants, as was the case in the Constitutional Court, have not illustrated any evidence to show that there was a group of Ugandans whose right to participate in the process leading to the enactment of the Constitutional Amendment Bill No. 2 of 2017 was curtailed by the security forces.

He invited this Honourable Court to confirm the finding of the Constitutional Court that the consultative process was not marred with violence by the security forces against the people and there is no need to invalidate the same.

The Attorney General argued that the Appellant had raised a new argument on appeal that force was used to amend the Constitution and as a result the Respondents are in breach of Article 3(2) of the constitution.

That Appellants never raised this issue at the Constitutional Court and they are therefore precluded from raising this argument at the Supreme Court. Rule 82 (1) Judicature (Supreme Court Rules) Directions S.I. 13-11.he submitted that this particular argument cannot be raised by the Appellant as it was never raised at the Constitutional Court level and there is no decision on the same to be appealed against. However, in the event that this Honourable Court accepts to consider the ground of

appeal in the manner that has been raised by the Appellant, the evidence as has been led by the Respondents clearly illustrates that the amendment was done with the full participation of the Members of Parliament and this contention should be dismissed. The Attorney General prayed that this Honourable Court finds that the Appellants severely 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 in conclusion prayed that this Honourable Court finds that the Constitutional Court correctly found that the violence inside and outside Parliament was not sufficient to warrant a finding of inconsistency with the Constitution.

The Attorney General submitted that the Appellant had misconstrued the Speaker's order to have been effected when the house was not in session and it was his contention that the order could be implemented when the House was suspended and there was no misdirection on either Law or fact by the Learned Justices of the Constitutional Court.

He referred this Honourable Court to page 165 of the record of Appeal where the Rt. Hon. Speaker clearly explains that the suspension of the MPs was for actions that had occurred the previous day the 26th September 2017 and goes ahead to direct them to leave the House which they objected and she chose to leave the House to enable them to be removed by the Sargent at Arms. Clearly, the House was still in session and regardless the Speaker did have powers to evict the errant MPs.

That his Lordship the DCJ Owiny Dollo at page 2431 paragraph 2 line 7 and Her Lordship Justice Elizabeth Musoke at Page 2563 of the record of proceedings, paragraph 5, Line 976 found that the Rt. Hon. Speaker is

empowered to maintain order, discipline and decorum in the House. We pray that this Honourable Court accepts our submission that based on the enabling Laws cited above, the Speaker was mandated to maintain order, discipline and decorum in the proceedings in Parliament and is at liberty to use *Rule 77 and 80(6) of the Rules of Parliament* in order to achieve this purpose.

He further contended that such internal mechanisms, control and disciplines in Parliament of Uganda will be able to maintain effective discipline and order during debates. The essence of debate in a multi-party dispensation in Parliament is that Peoples' representatives are allowed to engage in debates and once its concluded, vote on the matter and that would be the conclusion of the particular issues.

It was the Appellant's submission 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*.

That the Appellant had severely 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 carried out strictly in accordance with the Constitution.

He argued that the public interest was the debate on such an important issue as the 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. The orders of the Speaker to maintain decorum should have been adhered to by the offending Members of Parliament.

He contended that the test of consideration of the phrase "acceptable and demonstrably justifiable" under *Article 43(2) of the 1995 Constitution* was defined in the case of *Charles Onyango Obbo & Andrew Mujuni Mwenda Versus Attorney General* In C.P. 15/1997. See page 33: paragraph 2: that illustrates the criteria in assessment of what amounts to establishing limits in a free and democratic society.

The Attorney General prayed that this Honourable Court finds it appropriate to adopt the finding of His Lordship Justice Cheborion Barishaki at page 2727 of the record of appeal and specifically paragraph 5 line 25 when he found that the intervention of Uganda Police was to enable parliament to execute their mandate.

He further prayed that in resolving these issues, Court should employ the principle of harmony and completeness in the interpreting the Constitution as one whole singular document with no particular provision destroying the other but each sustaining the other.

Refer to *Hon. Lt. (Rtd) Kamba Saleh & Anor Vs Attorney General & Four Others Consolidated Petitions Constitutional Petition No. 16 Of 2013*

The Attorney General submitted that the MPs must not confuse their right to legislate to mean it extends to disruption of other peoples' representatives right to debate and the disruption of the conduct of Parliamentary business. The enjoyment of *Articles 1, 2, 3(2), 8A, 97, 208(2), and 211(3)* must be read together with *Article 43(2)(c)* and it is our submission that Court should confirm the findings of the Constitutional Court that the actions of the Uganda Police passed the proportionality test and did not in any way contravene the 1995 Constitution in trying to ensure that the debate went on smoothly.

The Attorney General submitted that it is important to note the nature of our political system is that it is a multi-party dispensation. The implication of this fact is that each party and every Member of Parliament must have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making. In the event that these rights are curtailed, the very notion of our constitutional democracy is abused.

However, in the exercise of the debate in a multi-party dispensation there can be no doubt that the Speaker's authority under Part XIII of the Rules of Procedure is wide enough to enable Parliament to maintain internal order and discipline in its proceedings by means which the Speaker considers appropriate for that purpose.

In the case of **Twinobusingye Severino Versus Attorney General Constitutional Petition No. 47/2011** in the Judgment of the Court at page 24, paragraph 2 the Court observed that;

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

It was the Attorney General's submission that this Honourable Court should adopt the persuasive reasoning of the Constitutional Court in finding that the Rt. Hon. Speaker was well within her powers to order the eviction of the errant 25 Members of Parliament.

It is not in dispute that the 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):

It was the Attorney General's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with our security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces.

Submissions in rejoinder for MPs

That on the record there is no explanation whatsoever that was given either by the sergeant at arms or by the police or any security officer or even the addressee the president himself never responded to that letter and it is very clear that the parliament was invaded. The speaker calls it invasion of parliament by strangers.

Court's Determination of Issue No. 3

The Constitutional court unanimously found and rightly so in my view that given the gross indiscipline of some members of Parliament who were involved not only in a shouting match in complete disregard of the decorum of parliament but also in a brawl all in full view of the speaker, the speaker was left with no alternative but to wield the stick and suspend the offending members of the House. As a court we should not be seen to interfere with the discretion of the speaker to reign on errant

members of parliament to protect the integrity of the House as the Circumstances prevailing warranted.

However, what I find disturbing and of concern to this court is that after the speaker had pronounced her punishment the execution of her orders was bungled by what she describes as strangers in her letter to His Excellency the president which I reproduce hereunder.

"Your Excellency,

RE: INVASION OF THE PARLIAMENT PRECINTS BY SECURITY AGENCIES ON THE 27TH SEPTEMBER 2017

As you may be aware there were some disruptions of parliament proceeding by some rowdy members of parliament on the 21st September, 26th and 27th September 2017.

I took action to suspend 25 members of parliament from the service of the house for three (3) sittings.

However, after I had requested the Sergeant At Arms to remove the members from the precincts unknown people entered the chamber beat up the members, including those not suspended and a fight ensued for over one hour.

I have had the opportunity to view camera footage of what transpired and noticed people in black suits and white shirts who are not part of the parliamentary police or the staff of the Sergeant At Arms beating members.

Additionally footage shows people walking in single file from the office of the president to the Parliament precincts.

I am therefore seeking an explanation as to the identity, mission and purpose of the unsolicited forces. I am also seeking an explanation about why they assaulted the Members of Parliament.

I am also seeking an explanation why the members were arrested and transported and confined at police stations.

I would also like to know the commander of operations was since the Parliamentary Commission/Speaker did not request for any support.

Yours faithfully

Rebecca A. Kadaga (MP)

SPEAKER OF PARLIAMENT OF UGANDA

cc. Rt.Hon. Prime Minister

cc. Minister of Internal Affairs

cc. Inspector General of police

cc. Commander of the Special Forces Command"

I do not need to go any further than this communication from the Hon. Speaker as to the unconstitutionality of the actions by the strangers. There is no evidence that anybody responded to her concerns which raises a question of interference of one branch of Government into the activities of another branch which is a breach of the constitution.

The second question it raises is that the Members of Parliament including those who were not on the Speaker's list were assaulted, thrown on police vehicles, detained and released without charge all of which amount to inhuman treatment which is in contravention of the Constitution. In terms of **Article 137 clause 3 (b) of the constitution** I would interpret both the acts of interference with the work of Parliament as complained about by the speaker and the mistreatment of members of Parliament as unconstitutional. The provision of the constitution does not require this court to inquire into the consequences of an unconstitutional 'act' as the constitutional court did and neither is it required to make an order for redress. The unconstitutionality the act vitiates the process. I find issue No.3 in the positive.

ISSUE 4: SUBSTANTIALITY TEST

This issue was framed as follows:

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

Appellants' submissions

Submission of MPS

Counsel submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of Procedure of Parliament as well as the invasion of Parliament. According to counsel the test is only applicable in Electoral matters.

Counsel further submitted that it is an absurdity and indeed a paradox that the Constitutional court, whose primary mandate and duty is to jealously guard and defend the sanctity of the Constitution to suggest that there can be room for certain individuals and agencies of government like Parliament to violate the constitution with impunity which is charged with the duty of protecting the constitution and promoting democratic governance in Uganda under Article 79 (3) of the Constitution. He relied on the decision of this Honourable court in ***Paul K. Ssemogerere & 2 Ors versus Attorney-General SCCA. NO. 1 OF* 2002;** where it was held that the constitutional procedural requirements are mandatory.

Submissions of Mr. Mabirizi

Mr. Mabirizi submitted that under Article 137 of the constitution, the constitutional court has no jurisdiction to apply the 'substantiality' test. He contended jurisdiction of the constitution court is to determine whether the actions complained of are inconsistent with and/or in contravention of the Constitution and if so to make declaration and give redress or refer the matter to investigation.

He cited the case of **Centre for Health, Human Rights & Development (CEHURD) V.AG, SCCA No.1/13, Kisaakye, JSC**, stated "…**the Constitutional Court…may, after hearing the parties, grant the declaration that such an act or omission is inconsistent with or contravenes the provision(s) in question" "…the Constitutional court was established and given powers under Article 137(1) and (3) to consider these allegations and determine them one way or another. Indeed, the Constitutional Court as had no problem in the past in dealing with such kinds of problems before…with striking out the Referendum and other Provisions Act, 1999 on ground that the Act had been passed by Parliament without the requisite quorum stipulated in the Constitution…the Anti-Homosexuality Act 2014 on ground that it was passed by Parliament while it lacked the requisite quorum required."**

He contended that it is only the presidential & parliamentary elections acts which provide for 'substantial test' & there is no law enabling it in constitutional petitions. The substantial test is found in two specialized laws; S. 59(6)(a) of Presidential Elections Act, 2005 and S.61(1)(a) of The Parliamentary Elections Act, 2005 and in no other law.

Submissions of ULS

Counsel for the appellant submitted that the Court misunderstood the test laid down by the Supreme Court and therefore misapplied it to the facts of the Constitutional Petition resulting in a wrong decision. He faulted the Court for the following reasons;

1. The Election Petition case of **Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001** interpreted Section 65(a) of the Presidential Election Act which lays down the principle that an election cannot be set aside unless the non-compliance with the Act affects the result in a substantial manner. Counsel contended that it relates to standard and burden of proof in election petitions and in a Constitutional Petitions where Article 137(3) and (4) as well as the usual rules of evidence which apply.

2. The allegation of facts in the Besigye case was that the number of voters on the voters roll was unknown, voters were disfranchised and not verifiable and the petitioners agents were not allowed an opportunity to scrutinize the voters roll or safeguard the interest of the petitioner at polling stations. Counsel asserted that the Court was required to interpret the Act to determine whether proved facts were widespread. The facts in the present case are infringement of constitutional rights i.e. limitations to free speech and expression, movement and participation. According to counsel, the Court is not required and there is no legal basis for it to determine the extent of proved facts.

3. The Supreme Court was called upon to determine the result of an election while in the present case the court was called upon to determine the constitutionality of particular acts. According to counsel, one considers nominations campaigns polling counting tallying and declaration of results, the other considers policemen running all over the country unleashing violence and violating the Constitution. In one the Court inquiries into a legal process while the other it inquiries into an illegal process. The test cannot be the same.

4. Substantial effect was defined as the effect must be calculated to really influence the result in significant manner" Counsel argued that, if that was applied to the present set of facts, it would mean proof that the action of the police were calculated to influence the consultation

in a significant manner. That with greatest respect shows the inapplicability of applying the test. According to counsel, the constitutional limitations were intended to impact the Members of Parliament and not the process and its results.

5. If the test is applicable, then the Court would have to determine what the result of the consultation was. Can the views on a bill be quantified the same way votes can? I submit not. How would one handle a view which says;

"I support removal of age limit provided term limit is reinstated: or I support the inclusion of the recommendations of the Supreme court but I do not support the removal of the age limit?".

According to counsel, the outcomes of the consultations cannot be equated to the number of votes obtained by candidates.

6. Lastly counsel submitted that unlike in election petitions it is impossible to prove the extent of the constitutional limits imposed by police, the degree of such limitations and the substantial effect they had on the outcome of the consultations. Counsel contended that it is impossible to measure the degree of curtailed speech or restricted movement of a member of parliament. A right cannot be quantified the same way votes can. How does the failure of a member to go to a particular constituency because of limitations be related to result of the consultations? Clearly the test cannot apply.

Counsel for the appellant submitted that the wrongful application of the test prevented the court from applying the proper test which is whether the limitations imposed by the police were justified. He argued that where a directive by any organ of the state is sent to all districts of Uganda requiring police officers all over the country to breach the Constitution and indeed there is evidence that the directive was complied with in any part of the country, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or

that it was in public interest to do so. Where the respondent fails to do so, as was in this case, the petitioner has proved breach of the Constitution. All that remains is the remedy.

Counsel submitted that it cannot be argued that violations of the Constitution have to be widespread throughout the country for the Court to invalidate the Constitutional Amendment Act (the subject of the constitutional breaches). That the test ought to be whether the violations contributed or had the effect of contributing to the enactment of the Act. If in the affirmative the Act ought not to stand. According to counsel, there is abundant evidence that the violations in and out of Parliament had that effect.

He submitted that the directive speaks for itself. It reminds all Regional Police Commanders, District Police Commanders, Directors, the IGP , the Deputy IGP that there is a proposal to amend the constitution " to remove presidential age limits" (it does not refer to the other provisions of the Bill). Only the age limit.

Counsel further submitted that the directive then requires all police officers to all over Uganda to stop any Member of Parliament moving or "intending to move" to a constituency other than his or hers. "A member consulting in any other constituency must be stopped……". According to counsel, it was in furtherance of this that the police violated the Constitution. He argued that the subsequent actions of the police cannot be separated from the age limit specifically mentioned in the directive. The author of the directive wants the recipients to know that limiting fundamental human rights they are called upon to do is linked to the passage of the Bill.

The limitations were calculated to increase the chances of removing the age limit from the Constitution. The constitutional violations cannot be delinked from section 3 of the Constitution Amendment Act. Since the constitutional limitations were intended to facilitate its passage, the

redress the court can give must be in relation to that section. According to counsel, the only remedy available is to strike that section down.

Counsel submitted that if the court had not applied the substantiality test, it would have come to this conclusion. To hold otherwise is to send a message that the Court will tolerate violations of the Constitution. That is the surest way for us to return to our dark past ably spelt out in the Preamble to the Constitution i.e. our history being characterized by political and constitutional instability. A message has to go out that it is expensive to breach the Constitution and there will be a price to pay. A slap on the wrist is to play around with the future of our children and their children. This Court ought not to countenance that. Only then will the rule of law and continued stability be guaranteed. The Constitutional Court is the Guarantor but with the greatest respect it failed to protect us and future generations. It emboldened those who will breach the Constitution.

He contended that once the Court found Constitutional violations as it did, it was required to make a declaration to that effect and grant redress.

Counsel prayed for court to substitute the order of the Constitutional Court with one striking down section 3 of the Act.

Attorney General's Submissions

The Attorney General submitted that the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion.

He relied on the finding of Odoki, C.J in **Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001**,the learned Chief Justice, where he stated the evaluation tests for the effect of non-compliance on an election. He stated,

"In order to assess the effect, court has to evaluate the whole process for the election to determine how it affected the result and then asses the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produce those numbers. Numbers are useful in making adjustment for irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial".

The Attorney General submitted that the substantiality test is used as a tool of evaluation of evidence. To fault the Court for applying the substantiality test in a constitutional petition meant that a court in interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it, that proposition would be absurd.

He contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether it is constitutional court, or an ordinary suit, it is trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

He cited the case of **Nanjibhai Prabhudas& Co. Ltd versus Standard Bank Ltd [1968] E.A 670** where it was held that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In my view the alleged non-compliance is a procedural irregularity, which is not of a most fundamental nature, as to render a law null and void.

The import from the above is that there was general compliance with the constitutional requirements and procedure for the enactment of the impugned Act.

He pointed out that it was pertinent to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. The Court's evaluation of evidence and resulting decision is not exclusively based on the quantitative test. The Court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation must were not sufficient to satisfy nullifying the entire process.

He argued that the facts of this case, the process in Parliament was not negatively affected as was observed by the majority Learned Justices of the Constitutional Court. That the Learned Hon Lady Justice Elisabeth Musoke, JA applied the Quantitative Test (verifying the impact of non-compliance or inaccuracy on the actual vote numbers and final outcome).

The Attorney General submitted 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. There was thus substantial compliance.

The two tests were expounded in **Winnie Babihunga v. Masiko Winnie Komuhangi & Others, HTC-OO-CV-EP-004-2001** where it was stated;

"The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in 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."

He therefore argued that the learned Justices of the Constitutional Court found that the few instances of irregularities did not adversely affect the process of passing the impugned Act.

The Attorney General submitted that the question that begs an answer is therefore whether the Court was wrong to use that test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

He contended that a perusal of the pleadings (petitions and affidavit) of the Appellant showed that he was seeking the Constitutional Court to determine the effect of certain events/actions/commissions that occurred during the process of enacting the impugned Act on the entire Process/Promulgation of the Constitution (Amendment) Act, No. 1 of 2018.

That the Appellant pleaded and argued in the Constitutional Court that the entire process of amending the Constitution from the tabling of the Bill, to the passing thereof, were compromised and the whole process was marred/tainted with such illegalities, irregularities and violence.

He therefore argued that the Petitioners did not adduce credible evidence to show that such violence and intimidation affected the validity of the Constitution (Amendment) Act, No. 1 of 2018.

He also pointed out that the big question that should be raised is what then is the standard of proof in dealing with Constitutional matters, most especially where the matters touch on amendment and breaches of the Constitution? Is the standard of proof different from the usual on the balance of probabilities?

The Attorney General submitted that it was not in dispute that the common law concept of burden of proof that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. In this case therefore, it is common ground that it is the Appellant who bore the burden of proving to the required standard that, there were such irregularities/violence that affected the result of the entire passing of the Bill into law and should be nullified.

He noted that the form of evidence that was presented during the hearing of the Petition was both affidavit and oral evidence. A scrutiny and evaluation of the above evidence did not support the Petitioners' assertion of such widespread/massive irregularities and violence that would have led Court to nullify the entire resultant Act.

He concluded by supporting the conclusion of the Court that the evidence did not disclose any profound irregularity in the management of the legislative process for the enactment of the impugned Act, nor did it prove that the participation of some members of Parliament was gravely affected. The parts that were so affected were rightly severed by the Court.

He submitted that in this particular case, the Constitutional court was right to inquire into the extent of the alleged massive irregularities and in so applying the qualitative and quantitative test, it considered whether the errors, and irregularities identified sufficiently challenged the entire legislative process and lead to a legal conclusion that the Bill was not passed in compliance with the requirements of the constitution.

In conclusion, Attorney invited this Court to uphold the finding of the Constitutional court that certain irregularities/errors were mere

technicalities and were not fatal to sufficiently invalidate the entire process of enactment of the Constitution (Amendment) Act, No. 1 of 2018.

Court's Determination of Issue 4

The Substantiality test as applied in Election Petitions simply means that even if court was to find that an election was not conducted in accordance with the principles laid down in those provisions, it is required to find that non-compliance affected the results of the an election in a substantial manner.

Section 62 of the **Parliamentary Elections Act (2005**) as amended

62. Grounds for setting aside election

(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—

(a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner;

(b) That a person other than the one elected won the election; or

(c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or

(d) That the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.

(2) Where an election is set aside, then, subject to section 64, a fresh election shall be held as if it were a by-election in accordance with section 4 of this Act.

(3) Any ground specified in subsection (1) of this section shall be proved on the basis of a balance of probabilities.

Section 57 of the **Presidential Elections Act as amended**

57. **Challenging a presidential election.**

(1) **Any aggrieved candidate may petition the Supreme Court for an order that a candidate declared elected as President was not validly elected.**

(2)A petition under subsection (1) shall be in a form prescribed by the Chief Justice under subsection (11) and shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

(3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its finding not later than thirty days from the date the petition is filed.

(4) Where no petition is filed within the time prescribed under subsection (2), or where a petition having been filed, is withdrawn by the person who filed it or is dismissed by the Supreme Court, the candidate declared elected shall conclusively be taken to have been duly elected as President.

(5) After due inquiry under subsection (3), the Supreme Court may—

dismiss the petition; declare which candidate was validly elected; or annul the election.

(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court—

non compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the noncompliance affected the result of the election in a substantial manner;

That the candidate was at the time of his or her election not qualified or was disqualified for election as President;

That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

Nothing in this section confers on the Supreme Court when hearing an election petition power to convict a person for a criminal offence.

Where upon hearing a petition and before coming to a decision, the court is satisfied that a recount is necessary and practical, it may order a recount of the votes cast.

Where it appears to the Supreme Court on hearing an election petition under this section that the facts before it disclose that a criminal offence may have been committed, it shall make a report on the matter to the Director of Public Prosecutions for appropriate action to be taken and shall state in the report the name of the person, the nature of the offence and any other information that the court may consider relevant and appropriate for the Director of Public Prosecutions.

(10) Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.

(11) The Chief Justice shall, in consultation with the Attorney General, make rules providing for the conduct of petitions under this Act. (Underlining provided)

It was a misdirection for the Constitutional Court to apply the substantiality test as it is applied in Electoral matters. Secondly the Parliamentary Elections Act and Presidential Elections Act make a clear distinction between an illegal practice where the substantiality test is applicable and an electoral offence where the test is not applicable.

I would put an unconstitutional act in the category of cases where it is impossible to apply the substantiality test as I illustrate below from the Attorney General's argument.

The Attorney General argued that the substantiality test is used as tool of evaluation of evidence and I agree, however the purpose for which the evaluation is required becomes relevant. If the evaluation of evidence is for determination of an election result the test is specifically provided for by the statutes cited in this judgement. If the test was for general application in evaluation of evidence it would not be necessary to specifically provide for it in election related matters. On the other hand if the evaluation of evidence is related to interpretation of the Constitution under Article 137 Clause 3 of the Constitution, the substantiality test is irrelevant because once a petitioner makes a case that an 'act' or 'Act' is inconsistent with or in contravention of a provision of the Constitution the proof of inconsistency or contravention does not require application of the substantiality test.

In my view a constitutional infringement in relation to any 'act' or 'Act' that is declared unconstitutional under Article 137 (3) (b) of the Constitution cannot be subjected to the substantiality test. An infringement on the supreme law which is the Constitution is a grave matter. Its interpretation does not go beyond the declaration unless there is need for redress under Article 137 (4) of the constitution.

Issue No. 5

This issue was framed as follows:

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

Appellants' Submissions

Submissions of MPs

The MPs argued this issue 5 together with issue 4

Submissions of ULS

Counsel for the appellant had in paragraph 1(d) of the Petition in Constitution Petition 3 of 2018 challenged the removal of the age limit and supported it with the affidavits of Professor Sempebwa, Professor Latigo and Francis Gimara. The issue was also argued in the lower Court. Counsel's complaint is that none of the evidence was evaluated nor the arguments considered. The challenged provision was not tested as against Articles 8A and 38. Counsel submitted that if the court had considered the Appellant's case, it would have come to a different conclusion.

Counsel submitted that peaceful transfer of power and orderly succession of Government is a principle of democracy which ought to be used in interpretation of the Constitution. He cited the case of **Sekikubo**

and others vs. Attorney General (supra) for application of democratic principles. According to counsel, the Court below did not consider this argument and therefore made no decision on it.

Counsel referred to the affidavit of Professor Sempebwa which refers to the Constitutional Review Commission which was specifically mandated to examine sovereignty of the people, democracy and good governance and how to ensure that the country is governed in accordance with the will of the people. However, as found in the evidence of Professor Sempebwa, Professor Latigo and Francis Gimara there was abuse of human rights, violence, harassment, humiliation, assault and illegal detentions all of which negate a conducive atmosphere to genuinely seek the views of the people.

He submitted that those reasons advanced in respect of term limits equally apply in respect of a non-limit on age.

Counsel argued that the evidence of Professor Sempebwa is also to the effect that the conflict in Uganda is instigated by unchecked executive power and unlimited incumbency to the position of president.

Counsel referred to the Odoki Commission report on the questions of orderly succession and clinging to power via disregard of constitutional provision.

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 of with orderly succession and peaceful transfer of power and therefore inconsistent with Articles 1, 8A and 38 of the Constitution. According to counsel, the Court would have nullified the Act if it has considered all these facts.

Counsel submitted that the process of consultations invalidates the Act inclusive of Section 3. He referred to the authority of Robert Gakuru

which deals with public participation. The following are the discerned principles;

(i) Invitation must be given to those participating sufficient time to prepare

(ii) In Adequate time must be given to the public to study the Bill consider their stand and formulate representatives to be made

(iii) The legislature should facilitate public involvement

(iv) Parliament should create conditions that are conducive to the effective exercise of the right to participate

(v) Parliament should designate places where consultations would be held.

Counsel submitted that there were no consultations in contravention of Articles 1, 8A and 38 of the Constitution that invalidate the Act. He argued that, since the consultations were primarily in respect of the age limit, Section 3 cannot stand.

Submissions of Mabirizi

Mr. Mabirizi submitted that removal of the age limit under article 102 was a 'constitutional replacement' which has no place in a constitutional democracy. He referred to Carlos Bernal's article, Unconstitutional constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the constitutional replacement doctrine, Published in International Journal of Constitutional Law, Volume 11, Issue 2, 1 April 2013, Pages 339–357, which demonstrated what the standard for determining Constitutional Replacement. Bernal laid down the seven-tiered test. According to Mabirizi the Constitution (Amendment) Act 2018 is nothing more than a partial constitutional Replacement which cannot stand.

Mabirizi submitted that, in the instant case, the essential element of the constitution which is at stake is the qualifications/capacity of the president/fountain of Honour which is underpinned under 63 provisions of the Constitution.

That the element of qualifications/capacity of the president/fountain of Honour is essential because of the huge powers and duties vested in the president. Those powers were balanced in such a way that the president is neither too young nor too old. Removal of such may have grave consequences on exercise of such powers in the 63 provisions. Although the element of qualifications of the president are essential, that is not to say that they are eternal, not capable of amendment but can only be amended in a compliant and careful way not to destroy the entire constitutional system & base. That the essential element of the restricted qualifications of a president has been opened-up and the unrestricted qualities of a president is in conflict with restricted qualifications.

That the powers to remove the age limit only rests in a constituent assembly not parliament since it amounts to a constitutional replacement.

Mabirizi contented that, upholding of section 3 of the Act will deharmonize 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. That it will open a flood-gate of private members' bills to amend those Articles which have age restrictions.

Attorney General's Submission in Reply

The Attorney General submitted that the appellants challenged the removal of the Age limit from the Constitution in Constitutional Petition No.5 of 2018. That the appellants contend that that section 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.

The Attorney General 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 elections of their representatives or through referenda.

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. (see Article 91(1) of the Constitution)

The Attorney General 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 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 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.

The Attorney General 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.

The Attorney General submitted that the appellant in C.A No. 2/2018 advances the theory of Constitutional replacement. That the appellant argues that the amendment of Article 102 to remove the age limit qualification for election to the office of the President amounts to Constitutional replacement. He labours to justify this assertion by citing various Constitutional provisions which he claims vest so much power in the office of the president and goes on to peddle without any proof or authority the notion that a president must not be too young or too old as a justification for the restriction on age as a qualification for election to the office of the President.

The Attorney General 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.

The Attorney General 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 the Justices of the Constitutional Court were unanimous and rightly so 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. According to counsel, it is not against the spirit of the Constitution and 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.

The Attorney General 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.

The Attorney General 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.

The Attorney General submitted that the appellants raised no grounds in reference to this particular issue. That their submissions are therefore not premised on any grounds contrary to the provisions of rule 82 of Judicature (supreme Court Rules) Directions which are mandatory.

The Attorney General prayed that the Appellants' submissions to this particular issue be disregarded by this Court. That without prejudice to the above, the appellants challenged the removal of the Age limit qualification for election to the offices of President and District Chairpersons respectively from the Constitution in Constitutional Petition No.3 of 2018. In their submissions they allege that the Constitutional Court did not consider her evidence thus reaching a wrong conclusion. They claim that if the Constitutional Court had 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.

According to the Attorney General, 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.

Submissions in reply by ULS

The 3rd appellant challenged section 3 which removed the 75 years age limit.

In Ground 2 of its memorandum of appeal the 3rd appellant objects to the finding by the lower court that the entire process of conceptualizing and enactment of the Constitution [Amendment] Act did not contravene the Constitution. In its prayer the 3rd appellant specifically prays that section 3 of the Constitution [Amendment] Act 2018 be annulled and declared unconstitutional

Counsel submitted that in the consolidated the petitions in the lower court, this particular issue was argued both under issues 6 and 12[volume 1 pages 136, 195, 257, 288, 355 and 404]

As seen from prayer 2(ii) in the memorandum of Appeal it is specifically prayed that section 3 of the Act be declared unconstitutional for inconsistence with Articles 1, 8A, 38, 105(1), and 260(1). This prayer arises from ground 2. This is also in line with the petition of the appellant.

Counsel submitted that it was framed as an issue and agreed to by the Respondent. He argued that it is rather late for the Respondent to attack an issue agreed upon as arising out of the grounds of appeal and argue it as never raised.

Counsel submitted that Rule 82 is not applicable. It amounts to raising a preliminary objection in reply to submissions. Further this offends the whole purpose of scheduling at which issues to be submitted on were agreed upon. In any case Rule 98© allows a ground set forth or implicit in the memorandum of appeal. All is required is an opportunity for the respondent to be heard which the respondent has done.

Court's Determination of Issue No.5

In my finding in issue No.1 above, I have opined that the constitution is amendable as longer as the procedure laid down in Chapter 18 of the constitution is followed.

Under **Article 79 of the Constitution**, Parliament is mandated to carry out the following functions;-

> (1) **Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.**
>
> **(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.**
>
> **(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.**

The petitioners/appellants put forward arguments against removal of age limits while the Attorney General Vehemently defends their removal. I would not go into the merits or demerits of the removal of age limits because if the people of Uganda through their representatives decide to remove them the debate goes to the legislature and not to the Constitutional Court. Evidence was adduced of what transpired during the debate in parliament and it is very clear that is where the debate belongs. The issue is answered in the negative.

Issue 6

This issue was framed as follows:

> ***"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

Submissions by Mabirizi

Mr. Mabirizi submitted that, had the learned justices harmonized article 83(1)(b) with 102(b) of the constitution, they would have found that the

president elected in 2016 ceases to hold office on attaining 75 years of age.

He adopted his submissions in the lower court on this issue and added that by calling upon court to make an interpretation that a president ceases to be qualified to hold office the moment he/she ceases to posess the qualifications which were the basis of his/her qualifications, he called upon them to perform their duty of harmonization as elaborated by Odoki CJ in the case of Ssemwogerere when he stated that: *"…**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."***

Mr.Mabirizi submitted that this is because the constitution, sets similar qualifications for the holders of all national elected offices and Local council V chairman but they do not repeat them in every article. They are pegged on that of a member of Parliament the reason why Article 102(c) for president states that **"a person qualified to be a member of Parliament" and Article 183(2)(a) for District Chairperson goes that "qualified to be elected a member of Parliament',** 108A(1) for Prime minister states that **'persons qualified to be elected members of Parliament', 113(1) for ministers reads that 'persons qualified to be elected members of Parliament'**

Therefore, with proper intentions of interpretation and harmonization of the Constitution, no one can divorce 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.

Just like how Article 80 prescribes what is expected of a person at nomination, Article 102(b) prescribes the nature of a person to appear for

nomination. This has nothing to do with what happens after nomination and possibly elections.

He prayed that this issue be answered in affirmative, in the spirit of posterity of our constitution and to ensure that all its provisions are harmonized.

Respondent's Submissions

The Attorney General submitted that this issue was only raised by Mr. Male Mabirizi . It arises from grounds 76 and 77 of the appellant's memorandum of appeal in C.A No. 2/2018. The Learned Justices of the Constitutional Court rightly directed themselves to the law when they found that Articles 102 (b) which provide for the qualifications of a person wishing to stand for election to the offices of President, purely relate to the qualifications prior to nomination for election and not during the person's term in office. 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;

The Attorney General emphasized that the Constitutional Court 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. In 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.

That from the onset, Article 102 is clear that it provides for the qualifications for a person to be elected President. In other words, one must be seized with these qualifications prior to being elected to the office of the President. The learned Justices of the Constitutional Court were

unanimous that this issue had no merit and rightly resolved that Article 102 refers to qualification prior to being elected as President. See Judgment of Justice Keneth Kakuru, Justice Remmy Kasule at and Justice Owiny A.C. Dollo.

The Attorney General concurred with the finding of the learned Justices of the Constitutional Court that a President elected in 2016 is not liable to vacate office on attaining the age of 75 years.

Court's Determination of Issue No.6

This issue was framed at Constitutional court as Issue No.13 and stated as:-

> ***"13. Whether the continuance in office of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution."***

All the Constitutional Court Justices found that the office of the President does not become vacant on the incumbent attaining the age of 75 years. One of the principles of the Constitutional interpretation already stated in this judgement and explained by the Attorney General in his submissions is that where the words of the constitution are clear and unambiguous they ought to be given their primary, ordinary and natural meaning.

I am in full agreement with the Constitutional court and my interpretation of Article 102(b) of the constitution is that the Qualifications referred to are pre- nomination qualifications and not midterm. I do not think that the framers of the Constitution intended for example that a seventy four year old person would be qualified for

elections but a year later he or she no longer qualifies and the Country goes through another election.

Article 102(b) of the constitution should be read together with Article 105 which provides that:-

105. Tenure of office of the President.

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

(2) A person may be elected under this Constitution to hold office as President for one or more terms as prescribed by this article.

(3) The office of President shall become vacant—

(a) on the expiration of the period specified in this article; or

(b) if the incumbent dies or resigns or ceases to hold office under article 107 of this Constitution.

So quite clearly the office of the president does not become vacant on attainment of seventy five years of age of the incumbent. The issue is answered in the negative.

Issue 8

This issue was framed as follows:

"What remedies are available to the parties?"

Appellants' Submission

The MPs submission.

The counsel prayed that the appeal be allowed in the terms and prayers specified in the Memorandum of Appeal and specifically that the Constitution (Amendment) Act, No. 1 of 2018 be annulled and that the Respondent pays costs of this Appeal and in the Court below.

In the alternative but without prejudice to the foregoing, they prayed that if court answers issue 7 in the affirmative a retrial should be ordered.

Submissions by ULS

Counsel relied on the authority of **Tinyefuza vrs 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"**

Oder JSC then went on to say

> "**These remarks were cited with approval in Zimbabwe Supreme Court in the case of A Juvenile vrs the State [1989] LCR [Const.] 774 at 789 by Dumbutshena CJ. I agree with the remarks of the US Supreme Court. It is the duty of this Supreme Court of Uganda to enforce the paramount commands of this Constitution. I have already said in this judgment that, following highly persuasive opinions from courts in the commonwealth, that court should apply generous and purposive construction of the provisions of the Constitution that give effect to and recognition of fundamental rights".**

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

That Article 137(4)(a) of the Constitution provide that Court may grant an order of redress in addition to the declarations sought.

That the Petition before the court shows that the violations and limitations to the fundamental rights and freedoms do not even come near any of the possible defenses in Article 43. That there is callousness and extreme disregard for humanity in the manner the violations were carried out.

He noted that the Judges lamented over the conduct of Constitutional violators. Elizabeth Musoke JCC at line 1789 page 70 stated "therefore although the said violence and restrictions in themselves are to be condemned in the strongest terms……. Cheborion Barishaki JCC at line 25 page 210 makes it clear that the treatment of members of Parliament was inhuman and degrading and their arrest and detention uncalled for. Owiny – Dollo Dy CJ castigates military intervention page 545 as does Kasule JCC.

That clearly the court appears to appreciate that the security forces crossed the red line. Indeed in many instances the Court holds that the constitutional limitations were not justifiable though no declarations are made.

It was his submission that this was not just violation of the Constitution, it was a well thought out strategy to facilitate enactment of the Act as he submitted above. That it was calculated to end 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 instill terror and fear.

In addition he also submitted that also the emboldened of the army that grievously beating up our Members of Parliament to an extent of long hospitalization is now acceptable. It is for these reasons that he submits that redress must be tied to the Act. That the country must know that there is a price to pay for contravention of the Constitution. Nullifying the Act is the only remedy. That then in future individuals in government

shall not look at violence as a means of achieving their objectives, there will always be the fear that the objective will not be achieved.

Counsel prayed that the Petition be allowed. Declarations and redress as stated herein above be granted. That Issues 2 3 4 and 5 be answered in the affirmative. That just as in the lower Court the Appellant in Appeal Number 4 of 2018 did not seek costs of the Appeal but prays for disbursements only.

Submissions by Mabirizi

He prayed that court nullifies the entire process in the Constitutional Court for reasons stated above. That however, given the nature of this dispute, in the alternative court nullifies the entire law in order to re-assert the relevancy of courts in Constitutional development of this country as was done by this court in **Ssemwogerere V. Ag**(supra), the Constitutional Court in **Oloka-Onyango & 9 Ors V. Ag**(supra) and the then Constitutional Court in **Ssempebwa V. Ag**(supra).

That the above position is supported by **Nwokoro & Ors V.Onuma & Anor-Nigeria**(supra) where ESO,JSC, held that

> "**It is a fundamental principle of legality that where an act or course of conduct fails to meet with the requirements prescribed by law, such that the non-compliance renders the act or course of conduct devoid of legal effect no legal consequences flow from such acts or course of conduct...**"

It was his submission 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.

He 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, putting in mind the Ugandan experience as expressed by Twinomujuni, JA in **Akpm Lutaaya V. Ag**(supra) that "…from Ugandans experience, he is likely to chase the proceeds of this decree for yet many years to come.."

The Attorney General's Submissions.

The Attorney General contended that the Appellants have not made out any case on appeal to justify this Court reversing and/ or varying the decision of the Constitutional Court of Uganda of 26th July 2018 in the Consolidated Constitutional Petitions.

In the premises, the Attorney General prayed that the Honourable Court finds that the appeal lacks merit and thereby dismisses the appeal accordingly with costs to the Respondent and declined to grant all prayers specified and orders sought in the Memoranda of Appeal.

The Attorney General further prayed that this Honourable Court be pleased to affirm and uphold the findings of the majority Justices of the Constitutional Court of Uganda in their Judgment of 26th July 2018 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; AmamaMbabazi 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 that the court orders a retrial, it is contended for the Attorney General that this prayer is, with all due respect, misconceived and ought to be denied as the Appellants have not adduced evidence before this Honorable Court to warrant issuance of an order for a retrial. The respondent prays that the prayer for a retrial be denied.

Regarding the prayer for general damages with interest at 25% per annum from the date of judgment that it is trite 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. That general damages are awarded to fulfil the common law remedy of restitutio in integrum meaning the innocent party is to be placed so far as money can do so in the same position as if he had not suffered loss or inconvenience arising out of a violation.

It is contended for the Attorney General that the 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. Damages are usually measured by the material loss suffered by a party. It is thus submitted for the Respondent that the Appellant's claim for general damages with interest at 25% per annum from the date of judgment until payment in full is misconceived and ought to be denied.

Court's Determination of Issue No.8

It follows from my finding that as a consequence of a number of 'acts' that infringed on the Constitution in the process of enactment of the Constitutional (Amendment) Act 2018, the Act cannot be allowed to stand and is hereby annulled.

It also follows from my findings and declarations that there were 'acts' which were inconsistent with and in contravention of the constitution the prayer for nullification of the entire Constitutional (Amendment) Act of 2018 is granted.

On costs I would order that each party meets its own cots.

Dated at Kampala this ..... day of ..... 2019.

.....

JUSTICE ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT