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 K. 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

[Appeals from the Judgment of Justices of the Constitutional Court (Owiny-Dollo, DCJ, Kasule; Kakuru (Dissenting); 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 MUGAMBA, JSC

On 26th July 2018, the Constitutional Court rendered its decision on the contested validity of the Constitution (Amendment) Act, No. 1 of 2018. Three respective parties appealed that decision to this Court.

At the pre-hearing conference, the three appeals were, with the consent of the parties, consolidated on the reasoning that this was appropriate since the appeals arose from the same Judgment and comprised similar issues.

In their Constitutional Petitions all the appellants had challenged the constitutionality of the Constitution (Amendment) Act, No. 1 of 2018. It was their contention that the process leading to the enactment of the impugned Act was tainted with irregularities and illegalities. They sought to have the entire Act nullified.

The Constitutional Court found that a majority of the provisions of the impugned Act were indeed unconstitutional and accordingly struck them down.

The Constitutional Court however found that some of the provisions of the impugned Act were constitutional. Applying the principle of severability of Statutes, 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. It is worthwhile to note that the Constitutional Court found that there were some procedural irregularities in the course of passing the impugned Act but that it held that the irregularities were not substantive enough to nullify the entire Act.

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

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, when the Constitutional Court partially allowed the consolidated Petitions it 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 are 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 removed age limits for the President and District Chairpersons, to contest for election to the respective offices, were passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

Kenneth Kakuru JCC, did not agree with the majority decision in respect of the finding that sections 1, 3, 4 and 7 had been lawfully passed. He ruled, in his dissent, that the entire Constitution (Amendment) Act 2018 was unconstitutional as it had been passed in violation of various provisions.

The Constitutional Court awarded costs, in form of instruction fees, of 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. Issues for court's determination were framed out of the consolidated appeals and for space and convenience I shall not list the said grounds of appeal.

The appellants in Constitutional Appeal No. 03 of 2018 on their part lodged a Memorandum of Appeal containing 24 grounds of appeal. Lastly, the appellant in Constitutional Appeal No. 04 of 2018 lodged a Memorandum of Appeal in this Court containing three grounds of appeal.

At the hearing, the Respondent raised two preliminary objections to the competency of Constitutional Appeal No.2 of 2018. Let me first dispose of the preliminary objections raised by the Respondent at this point.

The first was that the grounds of appeal offended against Rule 82 of the Judicature (Supreme Court) Rules. It was contended by the respondent that the grounds are speculative, argumentative, narrative and an abuse

of court process. Indeed Rule 82 relates to the contents of a memorandum of appeal and in sub rule (1) reads as follows:

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

In support of his objection the Respondent cited two cases, **Beatrice Kobusingye vs Fiona Nyakana & Another, Civil Appeal No. 5/2004 and Hwan Sung Limited vs M&D Timber Merchants & Transporters, Civil Appeal No. 2/2018.**

Essentially in the **Beatrice Kobusingye** case this Court stated, citing Rule 65(2) of the Rules of the Court of Appeal:

> ***'Grounds or any of them may ordinarily be rejected if all or any of them offended that rule which reads:-***
>
> ***"The Memorandum of Appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the POINTS OF LAW, OR OF MIXED LAW AND ACT(SIC), which are alleged to have been wrongly decided ……"***
>
> **(underlining added).**
>
> ***Generally, therefore, objections to any ground of appeal in this Court of Appeal can be based on these provisions'.***

In the **Hwan Sung Limited** case the ground read:

'The Learned Justices of Appeal erred in Law in dismissing the appeal'.

It was held by this Court that since there was no way to tell how the Court of Appeal decision was wrong, the ground, as it appeared, offended Rule 82(1) of the Rules of this Court given that no specific error on the part of the Court appealed from was indicated.

Needless to say, the objection above was opposed by Appellant Male Mabirizi in particular. He argued that Rule 82(1) of the Rules was not applicable given that Rules 78, 98(b) and 42(1) rendered this irrelevant.

For ease of reference below are the mentioned provisions:

> ***`78. Application to strike out notice of appeal or appeal.***
> ***A person on whom a notice of appeal has been served may at a time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time'.***
>
> ***`98.Arguments at hearing***
>
> ***`At the hearing of an appeal....***
> ***(a).....***

(b)a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 78 of these Rules;

`42 Form of applications to Court

(1) Subject to sub rule (3) of this rule and to any other rule allowing informal applications, all applications to the court shall be by motion, which shall state the grounds of the application'.

According to **Black's Law Dictionary**, 8th edition an objection is a formal statement opposing something that has occurred or is about to occur, in court and seeking the judge's immediate ruling on the point. From the above definition not every objection need be by motion. Rules 42(1) and 98 (b) of the Rules of this court certainly do not provide that all objections should be that formal. Rule 78 itself is not mandatory.

On the face of it nothing should stand in the way of the Respondent raising that preliminary objection relating to Rule 82(1). Prima facie, it is true that a large number of the Appellant's grounds of appeal offend the cited rule. Nevertheless it should be borne in mind that this appeal is an aggregate of three separate appeals which were for reasons of expedience combined at a scheduling conference. At the conference, one hundred and more grounds of appeal, gathered from the three appealing parties were with the help and knowledge of the Respondent compressed into eight issues.

At the hearing of the appeal what featured were the issues rather than grounds of appeal which were the discarded raw material of the issues. Respectfully, it is misleading for the Respondent at this point in time to be making references to incompatible grounds of appeal. This objection fails.

The other objection as I understand it is that this court should not allow this appeal because the Petition in the Constitutional Court which was genesis to it was filed in December 2017 before the Bill was enacted. In this connection the Respondent referred to Article 137 of the Constitution. The Article relates to the Constitutional Court. There is no evidence that this concern on the part of the respondent was ever brought to the attention of the Constitutional Court, let alone being addressed by that court. It is trite law that a matter that was not subject to adjudication in the original court of adjudication does not qualify to be addressed by this court on appeal.

Both objections lack merit. They are rejected.

Arising out of the several grounds of appeal filed by the three Appellants in their different memoranda of appeal, 8 issues were framed and agreed upon by the parties and the Court at the pre-hearing conference as being sufficient to address the Appellants' grievances with the decision of the Constitutional Court. These issues are reproduced below;

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?

Legal 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 whereas Mr. Wandera Ogalo represented the

appellant in Constitutional Appeal No. 04 of 2018. The Attorney General appeared in person.

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

Principles of constitutional interpretation

The Constitutional Court and this Court have in numerous cases endorsed various principles of constitutional interpretation and there is no dispute, as such, on those principles. The Justices of the Constitutional Court, particularly in the judgments of Remmy Kasule, JCC and Kenneth Kakuru JCC, unanimously and elaborately restated those principles and I do not therefore find it necessary to repeat them.

Similarly, the relevant Constitutional history, ably reproduced in the preamble to the 1995 Constitution, was highlighted by the Constitutional Court especially in the lead judgment of Owiny-Dollo, DCJ. Kenneth Kakuru, JCC, in his dissenting judgment also extensively discussed our nation's constitutional history and its relevance for approaching questions of fostering the rule of law and a culture of constitutionalism. I agree with him and will take that history into consideration as well.

Ultimately, I agree with the following restatement of the law, by Kanyeihamba JSC as he then was, in **Besigye v Museveni, Presidential Election Petition No.1 of 2006** endorsed by Remmy Kasule, JCC in his judgment;

"... the overriding constitutional dogma in this country is that Constitutionalism and the 1995 Constitution of Uganda are the Alpha and Omega of everything that is orderly, legitimate, legal and decent. Anything else that pretends to be higher in this land must

be shot down at once by this Court using the most powerful legal missiles at its disposal... Judges have the responsibility to pronounce themselves on a disputed matter guided only by the Constitution and laws of Uganda."

I now turn to a discussion of the issues framed by the parties to ease determination of the numerous grounds of appeal, 109 of them to be specific, in the consolidated appeals.

In evaluating the grounds of appeal canvassed by the Appellants herein, I am also mindful of the duty of a first appellate court to re-appraise the evidence on record and subject it to a thorough scrutiny and reach my own conclusion bearing in mind that I have not had opportunity to see the witnesses testify.

Some witnesses were cross examined on their affidavit evidence in the Constitutional Court while a number of deponents were not summoned for cross examination. In respect of the latter category, the lower court did not enjoy any superior advantage over this Court in terms of re-appraising the affidavit evidence on record. I will bear that in mind as well.

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

Appellants' Submissions

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 of the constitution and as such Sections 3, 4 and 7 of the

Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

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

He relied on numerous authorities specifically **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC, Minerva Mills v. Union of India, AIR 1980 SC 1789, Interpretation No. 499 of the Council of Grand Justices of Taiwan**, **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, **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)** and **Njoya vs Attorney General and Others (2004) AHRLR 157**.

Counsel faulted the learned Justices for 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 but not to the removal of upper age limit restrictions in the constitution.

Counsel argued 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 cited also authorities such as the **British Caribbean Bank v The Attorney of Belize Claim, No. 597/2011** that applied the basic structure doctrine in emphasizing the essence of the preamble in support of the submission.

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 as 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.

In Counsel's view, these provisions were designed and intended to guarantee orderly succession to power and political stability which to date remains a mirage for our motherland and 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.

It was contended by the Appellants therefore that the basic features of the constitution were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 constitution. In their view, on that account alone, the Constitutional Court ought to have invoked the basic structure doctrine and struck down the entire Constitution (Amendment) Act, No.1 of 2018.

Respondent's Submissions

The learned 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 did not derogate from the Basic Structure of the 1995 Constitution.

Counsel argued that the proper definition of the doctrine was that found 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 of the Constitution to consist

of supremacy of the constitution, republican and democratic form of government, secular character of the state, separation of powers and the federal character.

It was argued that it was within the powers of Parliament to enact sections 3 and 7 of the Constitutional (Amendment) Act, No.1 of 2018 into law and that this did not in any way contravene the basic structure of the Constitution and that it was not inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

Resolution of issue 1

It is contended by the Appellants that the qualifications for eligibility for the offices of President and District Chairpersons are part of the basic structure of the Constitution implying that they are not subject to amendment or at the very least, their amendment would require the involvement of the people through a referendum that was never held prior to the enactment of the impugned Act.

The Justices of the Constitutional Court, including the dissenting Justice, unanimously held that the qualifications for eligibility for office are not part of the basic structure of the Constitution. They all agreed that our constitution contains a basic structure or fundamental pillars but that qualifications, in particular upper age limit restrictions, for the office of President or District Chairperson were not part of them.

In his lead judgment, Owiny-Dollo, DCJ, considered the basic structure doctrine and its applicability to the Ugandan constitution as follows;

"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."

With due respect to the Appellants, I am unable to fault the collective conclusion of the Justices of the Constitutional Court in that regard. In my view, Owiny Dollo DCJ gives a correct restatement of the basic structure of the Ugandan Constitution.

The fundamental pillars of our constitution do not surely include the minimum qualifications for the offices of President or District Chairperson. The removal of age limit restrictions do not fundamentally alter the character of the constitution. I will briefly explain my reasons for that conclusion.

From the outset I must declare that the doctrine of basic structure in a given Constitution is a derivative of Indian judicial experience and that it defies universal description. The several authorities available lend testimony to this. Curiously, what forms basic structure in one jurisdiction is not necessarily what forms basic structure in another. Suffice to say that the basic structure in a given Constitution is embedded in that particular Constitution and that it is accompanied by the intended rigidity. That rigidity is woven in the Constitution and its

assured mission is to ensure that the Constitution is not wantonly tampered with by way of amendment.

Thirteen Justices of the Supreme Court were on the bench in **Kasavananda Bharati vs State of Kerala**, AIR 1973 SC 1461.They had disparate views of what constituted the basic structure in the Constitution of India. Chief Justice Sarv Miltra Sikri read the majority opinion where he said the basic structure comprised of:

- The Supremacy of the Constitution
- A republican and derivative form of government
- The secular character of the Constitution
- Maintenance of the separation of powers
- The federal character of the Constitution

To the above majority list was added another three by Justices Shelat and Grover. The three additions were:

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

Justices Hegde and Mukherjea, in their opinion, mentioned:

- The sovereignty of India
- The democratic character of the polity
- The unity of the country
- Essential features of individual freedoms
- The mandate to build a welfare state

Justice Jaganmohan Reddy relied on the preamble and cited:

- A sovereign democratic republic
- The provision of social, economic and political justice
- Liberty of thought, expression, belief, faith and worship
- Equality of status and opportunity

The array above is striking. In the Bangaladesh Supreme Court case of **Anwar Hussein Chowdhury vs Bangladesh,** 41 DLR, 1989, App. Div 169, Justice B.H. Chowdhury stated:

> ***"Call it by any name `basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by itself –namely the Parliament..... Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution".***

(The emphasis above is added).

Similarly in **Bangladesh Italian Marble Works Ltd vs Bangladesh** (2006) 14 BLT (Special) (HCD) I the Supreme Court had this to say:

> ***"Parliament may amend the Constitution but it cannot abrogate it, suspend it, or change its basic feature or structure .....The enabling powers to amend cannot swallow the Constitutional fabrics. The fabrics of the Constitution cannot be dismantled .....even the Parliament, which is a creation of the Constitution itself. While the amendment power is wide it is not that wide to abrogate the Constitution or to transform***

its democratic republican character into one of dictatorship or monarchy".

(The emphasis above is added).

Also instructive is the South African Constitutional case, **Executive Council of Western Cape Legislature vs the President of the Republic of South Africa and others** (Case No. CCT 27/95). [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 where Justice Albie Sachs stated inter alia:

"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 derivative 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".

Of further relevance is the dicta in **S vs Acheson**, 1991 (2) SA 805, a case from Namibia, where at page 813 of the report Mohamed Ag. JA referring to a Constitution of a nation said it is:

".....not simply a structure which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the

national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion".

Without exception, all the Justices who heard the Petition in the Constitutional Court related to the Constitution as the source of the basic structure or basic features. They referred to the preamble, the National Objectives and Directive Principles of State Policy and to several Articles in the Constitution to this effect. They called to memory the **chequered** history of Uganda prior to the promulgation of the present Constitution. Mention was made also of some pertinent records in the report of the Constitutional Commission that aided the Constitution making process.

In his judgment Alfonse Owiny Dollo DCJ held that the `structural pillars in the 1995 Constitution include the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, separation of powers between the Executive, Parliament and the Judiciary, the bill of rights ensuring respect for and observance of the fundamental rights and judicial interference.

Justice Remmy Kasule JCC mentioned the following to comprise the basic structure in the Constitution

1. sovereignty of the people (Article 1)
2. the supremacy of the Constitution (Article 2)
3. defence of the Constitution (Article 3)
4. non – derogation of particular basic rights and freedoms(Article 44)

5. democracy including the right to vote (Article 59)
6. participating and changing leadership periodically (Article 61)
7. non-establishment of a one party state (Article 75)
8. separation of powers amongst the legislature (Article 77)
9. separation of powers amongst the executive (Article 98)
10. separation of powers amongst the Judiciary (Article 126)
11. Independence of the Judiciary (Article 128)

Kakuru JCC held that the basic structure of the 1995 Constitution comprises of:

1. The sovereignty of the people of Uganda and their inalienable right to determine the form of governance of the country.
2. The supremacy of the Constitution as an embodiment of the soverign 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 the 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.

The basic structure in the 1995 Constitution, according to the decision of Elizabeth Musoke JCC, includes empowerment and encouragement of active participation of all citizens at all levels of governance as well as ensuring stability.

The Learned Justice also held that Article 1(1) of the Constitution 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 is part of the basic structure. She also held that the Bill of Rights, especially the non derogable rights, form part of the basic structure and their removal or amendment would result in actual replacement of the Constitution.

In his consideration of the basic structure in the Constitution of Uganda Cheborion Barishaki JCC had this to say:

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

I have demonstrated that each Justice of the Constitutional Court exhaustively addressed the doctrine of basic structure in relation to the 1995 Constitution. It is the argument of the Appellants that any amendment to the basic structure would result in the Constitution itself being abrogated or replaced. The Respondent on the other hand contended that the process by which amendment can be effected is contained in the Constitution itself and that provided that the set process is adhered to, it is possible to effect a legitimate amendment. In the Constitutional Court, four of the Justices agreed with the submissions of the Respondent in this respect.

Kenneth Kakuru JCC however was adamant that there was no possible amendment of the basic structure because such amendment would

result in the replacement or abrogation of the Constitution. With respect, I do not agree. The position of the majority Justices is the correct approach in my view.

The finding of the majority of the Justices of the Constitutional Court, with which I agree, is in consonance with the dicta of Mahomed DP in **Premier KwaZulu – Natal vs President of the Republic of South Africa,** 1996 (1) SA 769 (CC) in a majority opinion. He observed:

> ***"There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that the purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an `amendment' at all".***

Subject to the above caveat on "amendments that may not qualify as amendments at all", an amendment that follows the constitutionally prescribed procedure is unassailable.

It is assuring that we have in our Constitution Article 1 on the sovereignty of the people, Article 2 on the supremacy of the Constitution as well as Article 3 enjoining us to defend the Constitution. Needless to say there are several other provisions in the Constitution that amplify the sovereignty of the people through the Constitution. It is exactly in that spirit that we have **Article 79** which states:

> ***"Functions of Parliament***

(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".

Clearly Parliament is enjoined to act in accordance with the Constitution. The Constitution is the embodiment of the social contract between the governors and the governed. In that respect no legitimate amendment process in Parliament can be effected except where Parliament has adhered to the provisions of the Constitution.

In my view, there is inbuilt in our Constitution adequate and robust provisions whose effect is to protect the Constitution. As such any concern is ill placed and assuredly no chaperons need be called for. Articles 1, 2, 3, Chapter Four and Chapter Eighteen are self evident. It is reassuring that to effect any amendment to the Constitution, there is need to go through an elaborate gate-keeping process laid down in the Constitution.

The stringency may vary though depending on the matter at stake. The cumbersome process was obviated by the need to sustain participation by the people in matters that concern their governance. It may be touted here that the rigidly ring fenced provisions of the Constitution comprise the basic structure. My view however is that basic structure as a term is

amorphous. What is basic structure varies from country to country and from case to case.

I am unable to wholly endorse the contention that provisions exist in the Constitution that are so sacrosanct that even if one followed provisions of the Constitution it would not be possible to amend them legitimately. Respectfully, that would be turning human progress on its head. What one generation may consider impossible and unnecessary, the exigencies of the times might lead to a different conclusion for a subsequent generation. We have no right to hold our progeny in bondage. That is why the Constitution allows for amendment so long as the delicately laid down process contained in it is adhered to.

Consequently in the matter at hand I find no basis to fault the majority Justices of the Constitutional Court in their verdicts concerning the basic structure doctrine. I answer this issue in the negative.

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

Appellants' Submissions

Counsel contended 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.

It was argued that although Parliament is enjoined under Article 94 of the Constitution to make rules to regulate its own procedure, it must do so subject to the provisions of the Constitution. In support of this argument, counsel relied on the case of **Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14** which was cited with approval in **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 …"*

Counsel thus invited this Court to find the above authority persuasive and hold that failure by Parliament to comply with its own Rules of Procedure rendered the whole process a nullity.

In respect to whether or not the Bill was 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.

Counsel argued that the entire Act ought to have been struck out because Article 93 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. He added that the sum of Shs.29,000,000 paid as facilitation to carry out consultations with the public regarding the Bill. was a charge on the consolidated fund.

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 some of the clauses of the impugned Constitution (Amendment) Bill, 2017.

In support of the submissions above, counsel cited the persuasive Kenyan cases of **Law Society of Kenya Vs. Attorney General, Constitutional Petition No. 3 of 2016** and **Robert N. Gakuru& Others –Vs- The Governor Kiambu County & Others.**

Counsel submitted that there was overwhelming and cogent evidence on record indicating that 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. Counsel relied on the affidavit evidence of the Appellants who are Members of Parliament for this view.

Counsel further argued that members of Parliament opposed to the amendments were denied the opportunity and right to engage the people over the aforesaid Bill by the police and other security agencies. The

affidavit evidence of some members of Parliament including the Appellants as well as the testimony in cross examination by AIGP Asuman Mugenyi, was relied on.

The Appellants contend that the motion to introduce the impugned Bill was smuggled onto the order paper in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure. Counsel submitted that the finding of Owiny Dollo, DCJ that the Speaker had considerable latitude in determining the content of the order paper was an erroneous conclusion at variance with the express Rules of Procedure of Parliament. He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee.

The affidavit evidence of Hon. Semujju Nganda, to the effect that on 19th September 2017 the 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, is relied upon. The Appellants contend that Rules 27 and 29 regarding prior provision of an order paper with relevant documents to members of parliament were flagrantly violated.

It is argued that Members of Parliament were denied adequate time to debate and consider the impugned Bill as well as the Report of Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great national importance. Counsel additionally contended that the Committee Report was not tabled in accordance with rule 201 (1).

It is argued that the suspension of some members of Parliament, the 1st, 2nd, 3rd, 4th and 5th Appellants, by the speaker during the

Parliamentary sitting of 18th December 2017, was in contravention of Article 1, 28(1), 42, 44 (c) and 94 of the Constitution.

Further, one of the Appellants disputes the validity of the Committee Report on the impugned Bill and faults the majority decision of the Constitutional Court for holding that the participation of the new members that were irregularly added to the Committee could not invalidate the Committee report because even if their signatures were disregarded, the majority report still had enough signatures to pass it.

It is argued by the Appellants that the Failure to close the doors to the chambers at the time of voting on the impugned bill, 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.

Counsel further submitted 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.

It is argued that the Speaker's certificate of compliance was materially defective, ineffectual and it rendered the presidential assent a nullity. Counsel added that the requirement of a valid certificate of compliance under Article 263 (2) of the Constitution and Section 16 of the Acts of Parliament Act is couched in mandatory terms.

The Appellants raised various other irregularities that, in their view, contravened the Rules of Procedure of Parliament including the non-admission of Appellant Male Mabirizi to the gallery during the debate,

Parliament proceeding without the official opposition in the house and delay by the committee to issue its report.

In conclusion, the Appellants contend that the net effect of non-compliance of Parliament with its own rules of procedure and those laid down in the Constitution was to render the impugned Bill and the resultant Constitution (Amendment) Act No. 1 of 2018 null and void.

Respondent's Submissions

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

The Attorney General was emphatic that Parliament only proceeded with the Bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the Consolidated Fund. He further argued that this position was rightly confirmed by all the five Justices of the Constitutional Court who held that the original Bill presented on the floor of Parliament by Hon.Raphael Magyezi did not contravene Article 93 of the constitution.

Regarding the contested facilitation of Ug. Shs. 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination [at pages 309 Vol. 3 of the Record], the Clerk to Parliament ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the Consolidated Fund.

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.

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 some clauses of the impugned Act.

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 submitted that the two cases on public consultation relied upon by the appellants were distinguishable. Additionally, he submitted that the above notwithstanding, at pages 620 – 640 Vol. 3 of the record, the Parliamentary Committee on Legal and Parliamentary Affairs had complied with the requirement for public participation.

The Attorney General refuted the appellants' contention that the Bill was smuggled onto the order paper. The Attorney General pointed out that under Article 94(4) the Speaker had powers to determine the order of business in parliament. He 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 appellants and that the amendment of the Order Paper by the Speaker was authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25).

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

He 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 that the Speaker properly did so.

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

The Attorney General submitted that the evidence [at page 719 of the record] shows that on 18th December, 2017 the Right Hon. Speaker informed the House that on the preceding Thursday, she directed the Clerk to upload the Committee report on their ipads and that therefore the highlighted Rule did not apply.

The Attorney General further submitted that at page 263 of the record, wherein the motion to suspend Rule 201 (2) was moved and debated, the said motion was supported by Hon Janepher Egunyu at Page 761 of the record and other members who rose up to debate and support the motion.

Relying on the decision of Alfonse 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 occasioned to the members.

It was submitted that the Speaker explained the reason for the non compliance with Rule 98(4) of the Rules of Procedure of Parliament as being the large numbers of members present inside the Parliamentary chambers. The Attorney General submitted that there was no requirement that each and every Member of Parliament must debate before closure and that the Appellants' contentions in that regard were mistaken.

In respect to the allegation of signing of the Committee Report by non-members, the Attorney General submitted 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. In light of his submissions, he contended that the requirement of the law in regard to quorum and non-validation of the report were considered and correctly adjudicated upon by the Constitutional Court. He prayed that this Court upholds the same.

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

In answer to the contention that the proceedings conducted in the absence of the official opposition were a nullity**,** the Attorney General reiterated his submissions made in the lower court. He however pointed out that Rule 24 of the Rules of parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of parliament shall be one third of all Members of Parliament entitled to vote.

In his view, it followed that the business of Parliament can go on in the absence of the leader of opposition and opposition Members of Parliament as long as there is the requisite quorum in Parliament. He added that under Article 94 of the Constitution Parliament may act notwithstanding a vacancy in its membership.

The Attorney General also defended the validity of the Report of the Legal and Parliamentary Affairs Committee against the contention that it was invalid 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 this allegation constituted a departure from pleadings that be disregarded.

It is submitted that had this matter been raised in time, evidence would have been led 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. He added that during recess, no parliamentary business is transacted without leave of the Speaker. He contended that the days could not start running unless 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. He added 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. He argued that, the Committee reported on the 14th December 2017 which date was two days before the expiry of the 45 days period.

He submitted further that in any event non 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 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. 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. He said 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.

Resolution of issue 2

The majority Justices of the Constitutional Court held that Parliament substantially complied with the Constitution and with its Rules of Procedure save for certain Rules of Procedure which the Speaker, in particular, violated.

The Justices of the Constitutional Court unanimously ruled that the following alleged infractions of the Constitution and Rules of Procedure of Parliament were without merit:

i. The payment of Shs.29,000,000/= as an alleged charge on the Consolidated Fund.

ii. Denying adequate time for debate in the house
iii. Alleged arbitrary suspension of members of Parliament
iv. Failure to close doors at the time of voting
v. Illegal crossing of the floor of parliament by members of the ruling party
vi. Proceeding in the absence of the Leader of Opposition and other opposition Members of Parliament
vii. Delay by the Legal and Parliamentary Affairs Committee to submit the Report on the Bill initiated by Honourable Raphael Magyezi

It is worth noting that the dissenting Justice equally held that the above alleged violations of the Rules of Procedure of the Parliament of Uganda and the provisions of the Constitution were without merit. He was in agreement with the majority on this aspect of the petition.

On the other hand, Kenneth Kakuru JCC, in his dissenting judgment held that the following alleged infractions of the Rules of Procedure and the Constitution had been proved by the Appellants and thus rendered the entire Act a nullity:

i. The unlawful sidelining of the motion of Honourable Patrick Nsamba and prioritizing the one of Honourable Raphael Magyezi.
ii. The failure to formally lay on the table, prior to debating, the Committee Report.
iii. The amendment of the order paper to include the motion by Honourable Raphael Magyezi without three hours' notice to members.

iv. The voting by non-members of the Legal and Parliamentary Affairs Committee on the majority Report.

v. The failure to carry out proper consultations on the Bill.

Elizabeth Musoke, JCC agreed with Kenneth Kakuru JCC that the Speaker acted unlawfully in sidelining the motion moved by the Honourable Patrick Nsamba and prioritizing the motion by the Honourable Raphael Magyezi. Her Lordship however did not agree with Kakuru JCC on the effect of this illegality. She went on to hold nevertheless that the motion by Honourable Patrick Nsamba did not have an accompanying draft Bill and would have been incompetent on that ground.

The Appellants invite this Court to find that the alleged infractions of the Rules of Procedure and provisions of the Constitution rendered the entire Act a nullity. Let me first address the alleged violations which the entire Constitutional Court ruled were non-existent or inconsequential before addressing the infractions found to have been proved by the dissenting Justice of the Constitutional Court and which the dissenting Justice ruled were fatal to the validity of the entire Act.

It is trite law that Parliament must comply with its own Rules of Procedure enacted under Article 94 of the Constitution and that failure to follow those Rules amounts to a violation of the said constitutional provision. See **Prof Oloka Onyango & Others vs Attorney General, (Supra)**

I have re-appraised the affidavit evidence on record proffered both by the Appellants and the Respondent. In particular, the largely undisputed affidavit evidence of Honourable Ibrahim Ssemujju Nganda in regard to the manner in which the motion by the Honourable Raphael Magyezi was introduced onto the order paper of Parliament after an unexpected amendment of the Order Paper.

He testified also, in his affidavit, about the manner in which the Committee on Legal and Parliamentary Affairs went about its responsibility of scrutinizing the Bill proposed by the Honourable Raphael Magyezi. In particular I take note of the largely undisputed testimony that the Speaker of Parliament initially approved of the need by the Committee to consult as widely as possible throughout the country on the said Bill but evidently the extent of the consultations is a subject of dispute.

I have also considered the affidavit evidence adduced by the Respondent especially the affidavit of Jane Kibirige, Clerk to Parliament, rebutting the averments by the Appellant Members of Parliament.

After a careful appraisal of the evidence on record, I do not, with the greatest respect, agree with the unanimous findings of the Justices of the Constitutional Court that the complaint concerning denial of adequate time for debate on the Bill, contrary to the Rules of Procedure, was without basis. The evidence on record and the exhibited proceedings in the Hansard demonstrate that there was unusual haste and a complete lack of transparency in the manner in which the Honourable Speaker handled the impugned Bill.

Similarly, the Honourable Speaker's ruling suspending 5 Members of Parliament on 18th December 2017 lacked transparency. While the suspension of some 25 Members of Parliament for disrupting order in the house on 26th September 2017 was lawfully and fairly handed down, the record does not show any cause for the suspension ordered on 18th December 2017. During the proceedings of 26th September 2017, a number of Members of Parliament disrupted proceedings when they sang the National Anthem repeatedly to block further business till the house was adjourned. Their suspension was in my view deserved and lawful.

By contrast, the record, particularly the Hansard, clearly demonstrates that the 5 Appellants did not engage in any form of misconduct or indiscipline warranting suspension from the proceedings of 18th December 2017. What appears on the record is that those members firmly and politely strove to draw the Hon. Speaker's attention to what they considered to be violations of Rules of Procedure. Then the suspension followed. However, the members did not invoke Rule 86(2) of the Rules of the House. As such the act of the Speaker remained unchallenged. In the circumstances the Speaker cannot be faulted.

As for the other alleged violations of the Constitution and the Rules of Procedure, I am in agreement with the unanimous decision of the Constitutional Court that those allegations were without merit. For avoidance of doubt, those are the following;

i. The payment of Ug. Shs.29,000,000/= as an alleged charge on the Consolidated Fund.
ii. Failure to close doors at the time of voting

iii. Illegal crossing of the floor of parliament by members of the ruling party

iv. Proceeding in the absence of the Leader of Opposition and other opposition Members of Parliament

v. Delay by the Legal and Parliamentary Affairs Committee to submit the Report on the Bill initiated by Honourable Raphael Magyezi

In respect to the payment of Ug. Shs.29,000,000/=, I am unable to agree with the interpretation advanced by the Appellants that this amounted to an unconstitutional charge on the Consolidated Fund arising out of a private Member's Bill. Article 93, in my view, prohibits the presentation of a private Member's Bill that contains financial provisions that have a prospective effect on the Consolidated Fund.

I agree with the decision by the Justices of the Constitutional Court that preparation of every Bill, including a private Member's Bill, requires facilitation and use of Parliamentary and other resources. Such do not translate to a charge on the Consolidated Fund. Were this the case, no private member's bill would be possible since it is the duty of Parliament to assist and facilitate every mover of such a bill. Certainly there is some expenditure involved but not what the appellants allege.

Concerning the contested proceedings conducted without closed doors, the crossing of the floor of Parliament, the proceedings conducted in the absence of the Leader of the Opposition, and some other opposition MP's as well, I find these were minor infractions that the Speaker of Parliament, in exercise of her discretionary powers, lawfully disregarded. The evidence on record, especially the affidavit of the Clerk to Parliament,

does explain away the said infractions and the recourse to the Speaker's discretionary powers. I do observe however that those occurrences were unusual.

I do not agree with the Appellant Male Mabirizi that the Committee Report was tabled outside the 45 days limit. I accept the explanation given by the Attorney General to the effect that no such delay occurred given that the appellants computation of the days wrongly included the time spent on parliamentary recess.

I will now consider the alleged violations of Rules of Procedure which the dissenting Justice found to have merit and held that they invalidated the entire Constitution (Amendment) Bill 2017. These were the following;

i. The unlawful sidelining of the motion of Honourable Patrick Nsamba and prioritizing the one of Honourable Raphael Magyezi.
ii. The failure to formally lay on the table, prior to debating, the Committee Report
iii. The amendment of the order paper to include the motion by Honourable Raphael Magyezi without three hours notice to members
iv. The voting by non-members of the Legal and Parliamentary Affairs Committee on the majority Report
v. The failure to carry out proper consultations on the Bill.

I have carefully reviewed the Constitution, Rules of Procedure and the authorities provided in regard to the five violations alleged above. Concerning the voting by non-members of the Legal and Parliamentary

Affairs Committee on the majority Report, I am unable to agree with the dissenting Justice that this violation was fatal. The evidence on record indicates that only two non-members were pointed out to have signed the majority report. The exclusion of their signatures from the Report would still leave a majority of members as signatories to the said report. I agree nevertheless that it was an irregularity.

In law, their participation in the proceedings was not fatal either as the Constitution provides for such eventuality. Article 94(3) of the Constitution is relevant. It is only the act of signing their names against the majority report that is problematic. I would have reached a different conclusion if the split in numbers between the majority and minority reports was adversely affected by those two members of Parliament.

In regard to the alleged violation of the Rules of Procedure namely; the sidelining of the Honourable Patrick Nsamba motion, the irregular amendment of the order paper to include the Honourable Raphael Magyezi's motion and the failure to formally table the Committee Report on the floor of Parliament, I am of the view that the motion of Hon. Patrick Nsamba could not precede that of Hon. Magyezi because the former had no draft Bill whereas the latter had. That is not to say that the introduction of the motion was not inordinate and suspect.

I appreciate the concerns of the dissenting Justice, that the cited acts and omissions grossly violated the Rules of Procedure especially considering that this was done in the context of effecting a Constitutional amendment. There was no apparent justification on the part of the Honorable Speaker to prioritize the Honourable Raphael Magyezi's

motion which was hastily introduced onto the Order Paper. I look at this in light of the haste that attended the transaction so soon following the Deputy Speaker's assurance earlier on that due notice would be given. Nevertheless I acknowledge that the Speaker exercised her discretion.

The Justices of the Constitutional Court ably set out the law regarding the mandatory nature of public participation and consultation in the constitution making process and legislative processes generally. There is no doubt that the process of effecting constitutional amendments requires and mandates involvement of the people in accordance with Article 1 of the Constitution.

The Honourable Speaker of Parliament, to her credit, was alive to the need for involvement of the people in accordance with Article 1 and she duly discharged her role in bringing the same to the attention of the August House.

Regrettably, several subsequent events detailed in the cogent affidavit evidence of the Appellants lead me to conclude that the attempt to involve the people in this process was less than would be expected. First, the relevant Committee of Parliament charged with collecting views from Ugandans across the country was unable, for unknown reasons, to carry out that exercise; contrary to the Speaker's earlier indications. Secondly, there is evidence on record that some members who were opposed to the proposed Constitutional amendments, were unlawfully blocked from openly collecting views from the public. This was most unfortunate. While I agree with the majority decision of the Constitutional Court that there were in evidence only a handful of interruptions of some members of

parliament, the fact that it occurred at all is unfortunate. It is equally exasperating to note that no system is in place to gauge the extent of consultation and participation such as the one in contest. The extent of the consultation would have been better assessed had a system been in place to measure consultation and participation. In the circumstances I cannot fault the majority Justices.

Assistant Inspector General of Police, Asuman Mugenyi, in his affidavit confirmed that he issued a directive that was uniformly enforced by all police stations in the country. Where MPs attempted to breach it police was on hand to disperse the gatherings. This directive, which was unanimously found to be unlawful, arbitrary and obnoxious, prohibited MPs opposed to the proposed Constitutional amendments from holding joint rallies or conducting public consultation beyond their constituencies.

The affidavit evidence on record indicates, without challenge, that a number of MPs who attempted to hold joint rallies or conduct public dialogues had their gatherings dispersed by the police as the Leader of Opposition testified. There is no affidavit evidence on record to support the finding by the majority Justices that the disruption of joint rallies and public consultations by those opposed to the impugned amendment were isolated events.

Consequently, I am in agreement with the dissenting Justice that the attempts at public participation were restricted. However for want of a proper measuring tool I find no basis to pronounce myself on the extent of public participation country wide.

I must now determine whether the entire Bill or parts of it are invalid in light of my findings above. I will also address the significance of the Speaker's Certificate of Compliance that accompanied the Bill sent for Presidential assent.

The learned Justices of the Constitutional Court, by a 4 to 1 majority, found that all the clauses which were introduced into the original Bill were invalid. However, they ruled that all procedural requirements for the original Bill had been met and that those original clauses were good law. The Justices invoked the doctrine of severability of Statutes in holding that the impugned clauses were invalid. They saved the original clauses of the Honourable Raphael Magyezi's Bill, those existent before the introduction of amendments by the Honourables Micheal Tusiime and Nandala Mafabi. The majority Justices held that the original clauses were validly passed.

I have addressed my mind to the process of enactment. It should not be doubted by anyone that both the provisions that were severed and those that were saved from severance were enacted as one entity.

On 3rd October 2017 the Constitution (Amendment) (No. 2) Bill, 2017 was tabled as a Private Members Bill by Honourable Raphael Magyezi, MP, Igara County West. He sought to amend Articles 61, 102(6) and 183 (2) (b) of the Constitution. The Bill was also meant to amend Article 104(2) and (3) as well as Article 104(6) of the Constitution.

In the course of the debate on the floor of Parliament, additional amendments were proposed and accommodated, notably those made by Honourable Michael Tusiime regarding extension of the term of the current Parliament and those made by Honourable Nandala Mafabi seeking the return of the Presidential term limits. Without dwelling on the merits of the questioned process, I can declare that the original Bill together with its amendments were voted on and passed, lock, stock and barrel.

The Hansard of Wednesday 20th December 2017 at page 5263 refers to the Report from the Committee of the whole House and captures the Honourable Raphael Magyezi stating as follows:

> ***'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.'***

The report was adopted that day and the Speaker invited Honourable Raphael Magyezi to move for the third reading. Roll call followed. Those for the Bill were 315. Those against were 62. Two members were absent. Thereafter the Speaker declared that the Bill had been passed.

Article 263 (2) (a) regards the certificate of compliance issuing from the Speaker to the President if an Assent is to be obtained. It states:

> ***'(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 <u>in relation to it</u>;

The emphasis above is added.

In the Certificate of Compliance the Speaker recorded:

'I certify that the Constitution (Amendment) (No. 2) Bill, 2017 seeking to amend the following Articles -

(a) Article 61 of the Constitution;

(b) Article 102 of the Constitution;

(c) Article 104 of the Constitution; and

(d) Article 183 of the Constitution

was supported by 317 Members of Parliament at the second reading on the 20th day of December, 2017 and supported by 315 Members of Parliament on the third reading on the 20th day of December, 2017, in Parliament, being in each case not less than two thirds of all Members of Parliament, the total membership of Parliament at the time, being 434; and that the provisions of Articles 259, 262 and chapter Eighteen of the Constitution have been complied with in relation to the Bill.'

In the event, the Bill that the Honourable Speaker proceeded to proffer to the President for assent was different from the one Honourable Raphael Magyezi had initially proposed. However it was similar to the one that the House had gone on to pass on 20th December 2017.

Given the circumstances, the Bill the President assented to bore little resemblance to the one the certificate of compliance, issued by the Honourable Speaker, certified as having been passed in Parliament. The certificate of compliance indicated that only four articles in the Constitution had been affected by the amendment. The Constitution

(Amendment) Act No. 1 of 2018 assented to by the President showed ten Articles were affected by the amendment.

It is not contested that the President signed what was actually passed by the House. What is in contest is the veracity of the certificate of compliance. Yet the legislation was passed as one whole and it was the Speaker herself, upon passing of the law, who declared that the legislation had been passed as a complement. The Hansard of 20th December 2017 bears testimony to this. The Bill as originally intended metaphorically lost its claim to innocence when other provisions were added to it. There was, therefore, in my view no certificate accompanying the Bill to be assented to as is mandatory under Article 263(2)(a) of the Constitution.

A certificate is meant to certify the contents of the Bill to be assented to. Since the document tendered by the Speaker as the certificate did not tell the truth when certifying the legislation to be assented to, I hold there was no certificate. The assent in my view was made in vain. This is a fundamental procedural irregularity which cannot be cured by severance as the Justices of the Constitutional Court attempted to do. To do so would tantamount to the judiciary entering the legislative arena which should not be countenanced.

This irregularity has company. It should be seen in the light of other irregularities that attended the impugned enactment which are highlighted elsewhere in this judgment. Contrary to Article 93 of the Constitution, Parliament proceeded to legislate on the impugned enactment including provisions that required a certificate of no financial

implication. No effort was made to secure it following the additions and in the endeavor the legislature went on to debate and pass the amendment bill without the necessary certificate. The resulting legislation is therefore illegal. Needless to say the additions that were later accommodated with the original provisions rendered the entire Bill subject to Article 263 (1) of the Constitution. The mandatory separation of at least 14 days ordained by the Constitution between the second and third reading of the Bill was not observed. It was deliberately ignored. All the above omissions point to the failure of the legislature to follow the procedure laid down by the Constitution for its amendment. For these reasons, the majority Justices of the Constitutional Court erred in law when they applied the doctrine of severance to hold that some clauses of the Constitution (Amendment) Act 2017 had been lawfully passed. I shall be addressing severance in issue 8 herein.

For now I must answer this issue in the affirmative.

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

Appellants' Submissions

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

Counsel argued that they 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.

The Appellants contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting was complied with by all police personnel. The Police in blocking the said consultations invoked the directive of the Director of Operations, AIGP Asuman Mugenyi, which directive was unanimously declared by the Constitutional Court to be unlawful, arbitrary, obnoxious, unfortunate and unconstitutional.

Counsel averred that the bill was passed amidst violence within and outside Parliament. Counsel alleged that there was violence throughout the Country during public consultations. Counsel added that the entire process was vitiated and rendered the ensuing Bill unconstitutional.

It was argued that 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, the Speaker was prompted to write a letter to the President of Uganda inquiring into the existence of armed personnel in the precincts of Parliament.

Counsel stated that the unlawful invasion and/or heavy deployment at 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, that it undermined Parliamentary independence and that as such it 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. Counsel argued that application of the qualitative test by the

learned Justices of the Constitutional Court was erroneous. Counsel faults the majority Justices for wrongfully introducing the qualitative test used in electoral law in a dispute dealing with non-compliance with constitutional provisions in the legislative process.

Counsel criticized the Constitutional Court finding that the violence was not so prevalent to vitiate the enactment process. Counsel submitted that the violence had a chilling effect on other members of the public that wished to participate as well as some members of Parliament that would have wished to oppose the amendment. Counsel said 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 this was contrary to Art 3 (2) of the Constitution.

In conclusion, the Appellants 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. Counsel stated that the violence was unjustified in the circumstances and that this 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 impugned 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 impugned Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Respondent'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 of 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.

The Attorney General contended that the evidence on record clearly illustrated that the proceedings of Parliament on the 21st, 26th and 27th September 2017 were characterized by unprecedented chaos, disorder and misconduct from the Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House. However, he argues that somemMPs 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.

The Respondent submitted 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 respondent 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 named 25 Members of Parliament.

It was the Respondent's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with the 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.

The Attorney General submitted that 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 alleging that the Constitutional Court did not address this issue. He submitted that when the evidence was evaluated 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 that they were then able to come and vote on the Constitutional Amendment Bill No. 2 of 2017.

The Attorney General stated that the appellants, as was the case in the Constitutional Court, did not adduce 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 Act No. 1 of 2018 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 that there is no need to invalidate the same.

The respondent 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.

The Attorney General argued that the appellants never raised this issue at the Constitutional Court and that therefore they are 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.

He pleaded that, 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 Respondent 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 severally 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 Respondent 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.

Resolution of Issue 3

In my resolution of the Appellants' complaints regarding the disruption, by police, of joint consultative rallies and meetings organised by the Members of Parliament opposed to the constitutional amendments, I already determined that the unlawful and unconstitutional actions of the police force rendered the attempts at public participation and

consultation futile. For that reason alone, I would answer this issue in the affirmative.

However, for the sake of completeness, I will briefly address the affidavit evidence on record and the arguments in respect of the events that transpired inside the Parliamentary chambers on 27th September 2017.

In respect of the violence in Parliament, the Respondent contends that the Appellants and other rowdy Members of Parliament were to blame particularly for the events of 27th September 2017. While it is true that some Members of Parliament did not behave honorably throughout the proceedings concerning the impugned amendment, I am unable to agree with the Respondent that the events of 27th September 2017 when unknown security agents invaded Parliamentary chambers and assaulted a number of MPs are justified.

First, the evidence on record indicates that the members of the UPDF were unlawfully involved since there was no state of emergency declared to warrant their involvement. Members of the national army are only required to intervene in curbing civilian unrest in cases of emergency under the Constitution.

Consequently, their unwarranted involvement in dragging MPs from Parliamentary chambers and assaulting them was unconstitutional. That operation was in breach of Article 97 of the Constitution regarding the immunities and privileges of Members of Parliament.

Secondly, the Right Honourable Speaker of Parliament, in her letter to the Head of State, protested the invasion of Parliament by the unknown

security agents attached to the army who assaulted MPs and dragged them from Parliamentary chambers. Clearly the head of the House was not privy to the operation.

It is pertinent to note that the Speaker pointed out to the President, in agreement with evidence of the Appellants, that some MPs who had not even been suspended were also targeted by the said security agents and assaulted before being dragged out of the parliamentary chambers. The affidavit evidence of Gerald Karuhanga, Ibrahim Ssemujju Nganda and the Winifred Kiiza is corroborated by the Speaker's protest to the Head of State in this regard.

An extract of the Speaker's letter to the Head of State, which was relied on and annexed to the affidavits of Honourables Gerald Karuhanga and Winifred Kiiza, is worth reproducing to put the whole episode in its proper perspective;

"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 opportunity to view camera footages 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 who the commander of the Operation was since the Parliamentary Commission/Speaker did not request for any support"

The said letter, addressed to the Head of State, was copied to the Prime Minister, the Minister of Internal Affairs, the Inspector General of Police and the Commander of the Special Forces Command.

Clearly, the events of 27th September 2017 and the Speaker's formal protest cum inquiry to the Head of State corroborate the Appellants' claims, especially the affidavit averments of Honourables Gerald Karuhanga and Ibrahim Ssemujju, that they were assaulted, harassed and targeted by security agents on account of their opposition to the impugned Constitutional amendments. Such deplorable acts carried out by some elements of the country's security forces were most unfortunate and should never be allowed to happen again.

I do not agree with the Justices of the Constitutional Court who sought to lay blame for the violence inside parliament solely on the rowdy Members of Parliament. As the Speaker of Parliament confirmed in her

letter, she viewed the video footage of the saga and observed that some Members of Parliament whom she had not suspended for being rowdy were equally targeted, assaulted and taken to various police stations. The learned Justices ought to have given due consideration to the above concerns raised by the Speaker which were never satisfactorily answered by the Respondent. In my view, the Justices misdirected themselves on this issue and reached an erroneous conclusion.

Consequently, I hold that there was violence orchestrated by state security agents inside and outside Parliament targeted at some Members of Parliament who were forcefully dragged out of parliamentary chambers despite the fact that they had not been suspended by the Honourable Speaker for any misconduct.

I cannot underestimate the chilling effect of this violence on the rest of the August House. Certainly, no meaningful legislative role could be played by parliament in this atmosphere of intimidation, harassment and outright violence visited on some individual legislators.

I therefore answer this issue in the affirmative.

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

Appellants' Submissions

The Appellants contend 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 and the Constitution as well as the invasion of Parliament.

The Appellants contend that whereas the applicability of the substantiality test is expressly provided for in electoral laws, in constitutional matters the test is totally different. The Constitution being the supreme law of the land provides for no scintilla of violation in their view.

Counsel relied on the decision of this 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.

Appellant Mabirizi submitted under Article 137 of the constitution, the Constitutional Court has no jurisdiction to apply the 'substantiality' test. That court has no powers to determine disputes and grant remedies outside its jurisdiction. He stated that the Constitutional Court derives its power from Article 137 of the Constitution which gives it no jurisdiction and power to determine whether the constitutional contravention affected the resultant action in a substantial manner. He contended that its work is to determine whether the actions complained of are inconsistent with or in contravention of the Constitution and when it finds in favour, to declare so, give redress or refer the matter to investigation.

In his view, since this role under Article 137 of the Constitution, is limited to only determine whether there was contravention of the constitution, not the degree of contravention, there is no way the Constitutional Court could go ahead to investigate, moreover without any pleading to that effect, whether the contravention of the Constitution affected the enacted law in a substantial manner.

Respondent's Submissions

The Attorney General submitted that the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion.

He further relied on the finding of Odoki, C.J in **Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001**. The Attorney General submitted that the substantiality test is used as a tool of evaluation of evidence. He contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. He said that as such, whether it is in the 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. The Learned Attorney General therefore supported the majority decision of the Constitutional Court for having had recourse to the substantiality test.

Resolution of Issue 4

In my resolution of the second issue, I found that the violation of provisions of the Constitution and the Rules of Procedure of Parliament went to the root of the validity of the Constitution (Amendment) Act No. 1 of 2018. For that reason, consideration of this issue is moot. However, I will briefly address this issue for the sake of clarity.

It is argued for the appellants that in arriving at its decision, the substantiality test was erroneously applied by the majority Justices of the Constitutional Court. The Appellants argue further that the substantiality test is not known to our Constitutional law but that it is a creation of electoral laws which apply it in appropriate issues. In this respect, section 59(6) (a) of the Presidential Elections Act, 2005 and section 61(1) (a) of the Parliamentary Elections Act, 2005 were mentioned.

The Respondent on the other hand agreed with the majority decision of the Constitutional Court in this connection arguing that the substantiality test had been used as a tool of evaluation of evidence and that ultimately the verdict was that there had been general compliance with the constitutional requirements and procedure for the enactment of the Act in issue.

The Respondent proceeded to refer to the fights and scuffles in the environs of Parliament as well as the alleged non-compliance with the procedure necessary to be followed during legislation. It was the contention of the Respondent that all these were first considered but that later court found that the amount and extent of the evidence adduced was not sufficient to merit nullification of the entire process.

It is true our electoral law allows for the substantiality test as noted by the Appellants. Section 59(6) (a) of the Presidential Elections Act, Act 16 of 2005 reads:

> ***"(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

(a) noncompliance 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 <u>that the non compliance affected the result of the election in a substantial manner;</u>"

The emphasis above is added.

Needless to say both the provision in the Presidential Elections Act and that in the Parliamentary Elections Act relate to decisions to be made in the wake of election petitions. The matter in contention however is different in origin. Article 137 (1) and (3) of the Constitution is relevant in this respect.

It reads:

" 137 <u>Questions as to the interpretation of the Constitution</u>

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

(2) ....

(3) A person who alleges that -

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

(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 <u>a declaration to that effect, and for redress where appropriate</u>.

....

……
….".

The emphasis above is added.

According to Black's Law Dictionary, 8th edition, a declaration is a formal statement, proclamation, or announcement. It defeats the purpose of a petition when a petitioner seeks for a declaration that for reasons stated there was a miscarriage in the procedure which rendered the result nullified only to receive the reply: "although there were some unwelcome incidents not compatible with what is expected to happen in the process, the process was well carried out since the alleged incidents are of little moment". That borders on obfuscation.

Lest we forget Court here is mandated to declare. In my view, court goes beyond the call of duty when it enters the field of justification.

In their judgments, the majority Justices of the Constitutional Court ruled that the incidents attending the enactment process did cause concern but that what transpired, though illegal, was not so significant that they could cause the annulling of the impugned enactment. A declaration under Article 137 of the Constitution ought to be unequivocal. I am not at one with the way the majority Justices of the Constitutional Court resolved this question.

The majority Justices of the Constitutional Court erroneously in my view applied the substantiality test prevalent in the electoral law to determine the consequences of non-compliance with the law in legislative processes.

With due respect to the majority Justices, it is trite law the failure to scrupulously comply with provisions of the Constitution or Rules of Procedure during the enactment of legislation is fatal. See **Oloka Onyango & Others vs Attorney General, (Supra)**

The substantiality test is not relevant in adjudicating questions regarding validity of a constitutional amendment and there is not a single Common Law or civil jurisdiction that applies it as a test for validity of legislation. I have not been able to come across one and the Respondent did not cite any.

I would therefore answer the issue in the affirmative.

ISSUE 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? ”*

Appellants’ Submissions

Counsel for the appellant faulted the majority Justices of the Constitutional Court for not addressing the contention that the clauses on removal of age limits in the impugned Act violated Articles 1, 8A and 38 on orderly succession and peaceful transfer of power as a principle of democracy.

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 **Ssekikubo and others vs. Attorney General** for application of democratic principles. According to counsel, the Court below did not consider this argument and therefore made no decision on it.

He submitted that when Parliament chose to invoke consultations on section 3 it brought itself under articles 1 8A and 38 of the Constitution. It submitted that Parliament recognized the issue as being one of a fundamental controversy that could threaten cohesion of the country. It decided the people must be the arbiter. According to counsel, the process must therefore produce a result of what the people want.

Counsel referred to the affidavit of Professor Ssempebwa which refers to the Constitutional Review Commission 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. He argued that as found in the evidence of Professor Ssempebwa paragraph5, 8(f), and (q); Professor Latigo paragraphs 13, 14, 15, 16, 21 23, 24, 25 and 26 and Francis Gimara's affidavit paragraphs 6, 7, 8, 9, 10, 11, 16, 17 and 19 there was abuse of human rights violence, harassment, humiliation, assault, detention 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 Ssempebwa 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 through disregard of the Constitutional provisions.

He contended that, had the Court held that orderly succession is one of the principles of democracy, it would have come to the conclusion that given our history, removal of the age limit is in conflict with the principles of democracy on 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 had considered all these facts.

Appellant Male Mabirizi submitted that removal of the age limit under article 102 was a 'constitutional replacement' which has no place in a constitutional democracy. He argued that 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.

Appellant Mabirizi contends that although the element of qualifications of the President are capable of amendment, it should be in a compliant and careful way not to destroy the entire constitutional system & base.

Respondent's Submissions

Counsel for the Respondent submitted 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.

Counsel submitted that the Justices of the Constitutional Court were unanimous and rightly held that the amendment power of parliament extends to Articles 102 and 183. He added that 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 that the amendment takes way the sovereignty of the people of Uganda enshrined under Article 1, the sovereignty of the people is not infected at all. In the Attorney General's view, 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. He relied on the majority judgments to support this view.

In conclusion, 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. 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.

Resolution of Issue 5

In my consideration of the question of whether age limit clauses form part of our Constitution's basic structure, I already ruled that age restrictions are not fundamental pillars on which the 1995 Constitution stands and that removal of the upper age limit restrictions per se does not fundamentally alter the nature of the said Constitution.

There is no doubt that most of the Preamble to the 1995 Constitution is useful, well thought out and has a historical background to it. However, in arguing for the alleged uniqueness and fundamental importance of age limit restrictions in the Constitution, the Appellants' argument goes too far off the point in my view.

As the learned Justice Remmy Kasule JCC ruled, at page 78 of his judgment, maximum age limit restrictions were not even originally proposed by the Odoki Constitutional Commission Report that informed the draft constitution which was debated by the Constituent Assembly and gave birth to the present Constitution. The Appellants' contentions regarding the uniqueness of upper age limit restrictions in the Constitution are misplaced.

Before the enactment of the Constitution (Amendment) Act No. 1 of 2018 there were limits to the ages of persons eligible to be nominated for the offices of President or District Chairperson (Local Council V Chairperson). Regarding the office of President Article 102 of the Constitution relevantly reads:

> ***`102 Qualification of the President***
>
> ***A President is not qualified for election as President unless that person is.....***
>
> ***.....***
>
> ***(a).....***
>
> ***...***
>
> ***(b)not less than thirty five years and not more than seventy five years of age;***
>
> ***(c).....***
>
> ***...***

As concerns the office of District Chairperson the relevant provision is in Article 183 (2) (b) which provides:

> ***`183 <u>District Chairperson</u>***
>
> ***(1).....***
>
> ***.....***

(2) A person is not qualified to be elected district chairperson unless he or she is.....

(a).....

(b) at least thirty years and not more than seventy five years of age;.....'

The Justices of the Constitutional Court properly found that the Constitution bears provisions of diverse moment, a fact underlined by the varying ways in which different provisions may be amended. Chapter Eighteen bears testimony to this. The process for its amendment is given nowhere else apart from the Constitution itself, the supreme law of the land. It is not a question of wishes or sentiments to be addressed. Rather our guide is what is ordained in the Constitution. In Chapter Eighteen Article 259 provides:

`259 Amendment of the Constitution

(1) Subject to the provisions of the 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 260 relates to amendments requiring a referendum. Evidently neither Article 102 nor Article 183 calls for a referendum in its process of amendment.

Amendments requiring approval by District Councils are specified in Article 261. Again neither Article 102 nor Article 183 feature there.

There is provision for those not specifically provided for either under Article 260 or 261 or even those specially entrenched under Article 44. For the residue a simpler method is prescribed under Article 262 and that is where amendment for either Article 102 or Article183 fall. It simply provides:

> ***"262 <u>Amendment by Parliament</u>***
> ***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".***

Given the provisions of Article 262, specific amendment of Article 102 and Article 183 is not a process demanding exacting procedure before finally being enacted by Parliament. Provided the lawful procedure laid down in the Constitution is followed. I find that the clauses on age limit restrictions can be amended without infecting any other provision of the Constitution.

In the circumstances I see no basis to fault the finding of the majority Justices of the Constitutional Court.

I therefore answer this issue in the negative.

Issue 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?"***

Appellants' Submissions

Appellant Mabirizi, who solely raised this ground of appeal, submitted that, had the learned Justices harmonised 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 called upon court to make an interpretation that a president ceases to be qualified to hold office the moment he/she ceases to possess the qualifications which were the basis of his/her eligibility to stand for office.

In his view, the provisions of Article 80 of the Constitution which provide for instances when a Member of Parliament loses his/her seat also apply to a sitting president by analogy and when the Constitution is interpreted harmoniously. He therefore prayed that this Court issue a declaration that the incumbent President is ineligible to hold office upon attaining the age of 75 years.

Respondent's Submissions

The Learned 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. He supported that interpretation and argued that it was the right one.

Resolution of Issue 6

The Appellant's novel interpretation of Article 102 is clearly without merit. I agree with the unanimous decision of the Constitutional Court that the eligibility criteria for nomination at the time of elections is different from disqualifying factors for a sitting Member of Parliament, Local Government leader or even President.

The decision of the Court of Appeal in **Ouma Adea vs Oundo Sowedi & Deogratias Hasubi, Election Petition Appeal No.51 of 2016** which was cited by the Constitutional Court, is relevant in appreciating this distinction. In the said decision, their Lordships of the Court of Appeal unanimously held that the Appellant was disqualified from nomination as district chairperson on account of his criminal conviction under the Anti-Corruption Act.

The Appellant's counsel argued that the Appellant was actively challenging the said conviction in the appellate system and that the same was therefore not conclusive and could not be relied on to bar him from presenting himself for nomination as a candidate for district chairperson, Busia. He cited, by way of analogy, Section 95 of the Parliamentary Elections Act which protects a sitting Member of Parliament from losing his/her seat on account of a criminal conviction provided he/she has not exhausted his/her appellate rights.

The Court of Appeal Justices disagreed and held that a sitting Member of Parliament could not be treated in the same manner he or she would be treated at the point of nomination. Nominees who have criminal

convictions that operate as a bar to their candidature cannot be validly nominated even if they have not exhausted their appellate rights. However, a sitting elected official who has not exhausted appellate rights is allowed to remain in office in spite of a criminal conviction that would bar him or her from nomination.

While I agree with Appellant Mabirizi that the decision is certainly not the best analogy on this point, I am unable to fault the interpretation reached by the Constitutional Court. If the framers of the Constitution had intended that the upper age limit of 75 years would be a disqualifying factor for a sitting President, they would have expressly stated so. Most importantly, they would have lowered the upper age limit at the point of nomination to 70 years.

In fixing the upper age limit at 75 years, the framers of the Constitution were certainly aware that candidates aged 70 to 74 years would surely offer themselves for nomination. It would be an absurdity if this category of candidates had to vacate office upon reaching the age of 75 years following successful election to the presidency. The finding by Justice Remmy Kasule, JCC, that upper age limit restrictions were historically not even part of the draft report leading to the 1995 Constitution further reinforces this position.

If the Appellant's novel interpretation were what was intended, it would have made more sense for the said provision to bar individuals who would attain the age of 75 years while in office from being validly nominated in the first place.

Since the Constitution did not expressly prohibit this category of candidates, it would be a usurpation of the legislative role for this Court to hold otherwise under the guise of constitutional interpretation. The interpretation supported by the Appellant would require an express provision of the Constitution. Presently, there is none.

In the circumstances, to hazard the suggestion that a President in office would be bound to step down upon celebration of 75 years of life would be moot not only because it is not provided for under the Constitution but also because age in the case of the office of the President features only on the occasion of nomination and nowhere else. There is no doubt that once qualified for nomination and elected the individual would go ahead and serve the full term.

The unanimous finding of the Justices of the Constitutional Court is the proper statement of the law. It should not be disturbed.

I therefore answer this issue in the negative.

Issue 7:

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

It was submitted by the Appellant, Appellant Male Mabirizi, that the right to a fair hearing was compromised in a number of ways by the Constitutional Court. He stated that the learned Justices of the

Constitutional Court misdirected themselves when they injudiciously 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 in accordance with Rule 12(3) of the Constitutional Court (Petitions and References) Rules, SI. 91 of 2005; The provision states:

> "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 **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 made 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.**

Appellant Mabirizi contended that Court ought to have exercised its discretion to summon the Speaker, the Deputy Speaker, the Minister of Finance, Honourable Raphael Magyezi, the Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee as well as the President.

He went on to argue that the 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 of the averments in the affidavits for the respective witnesses. It was Appellant Male Mabirizi'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

Appellant Male Mabirizi further complains that the mode adopted for submissions during the hearing of the petition was also materially defective for the following reasons;

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

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

In his view, all these procedural irregularities occasioned a miscarriage of justice.

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

He 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. He said that thereby it came thereby coming to a wrong decision.

He went on to state that the Court failed to determine the petition expeditiously thereby invalidating the decision. He relied on **Chief Ifezue V. Mbadugha-Nigeria** for the view that a Judgment delivered out of time by three months was null and void. In addition he complained about

being denied an opportunity to sit at the bar as he addressed the Court since he was unrepresented by Counsel. Lastly, he argued that he was frequently interrupted by the Court in the course of his submissions thereby occasioning him a miscarriage of justice.

Respondent's Submissions

The Respondent submitted that the 2nd Appellant did not satisfy or otherwise meet the threshold required for an Appellate Court, herein the Supreme Court hearing the instant Constitutional Appeal, to interfere with the discretion of the Constitutional Court.

In regard to refusal to summon certain individuals for cross examination, the Attorney General relied on **Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo& 4 Others Vs. The Attorney General & 4 Others**, and **Mbogo& Others vs. Shah [1968] E.A.**

The Attorney General contended that there were no irregularities at the hearing which occasioned a miscarriage of justice. In his view, the Justices of the Constitutional Court properly exercised their discretion throughout the hearing.

Resolution of Issue 7

The Appellants fault the Constitutional Court for allegedly denying them a fair hearing in so far as they were not allowed sufficient opportunity to cross examine the deponents of certain affidavits. They also complain about the procedure adopted by the Court in requiring submissions on certain issues before cross examination of deponents. Lastly, the Appellants complain that they were denied their right to make a rejoinder to the Respondent's submissions.

Certainly, the right to a fair hearing is fundamental and is non-derogable in all circumstances. However, courts of law are also enjoined by Article 126 (2) to administer substantive justice without undue regard to technicalities. It was with this principle in mind that this Court rejected the Appellant's contentions in **Bakaluba Peter Mukasa vs Betty Nambooze**, **S.C. EPA NO. 4 OF 2009** that he had been denied a fair hearing at an election petition challenging his election on grounds that the Respondent was allowed to rely on allegations that had not been properly pleaded. This Court overruled the Appellant's contentions on grounds that he had substantially been granted a fair hearing despite the irregular pleading of some of the allegations against his election as Member of Parliament.

The Appellants' complaints present a similar scenario in my view. The Appellants do not demonstrate that they suffered any miscarriage of justice as a result of the said omissions by the Constitutional Court. They simply complain that the Justices of the Constitutional Court were wrong. While it is true that the Appellants should have been allowed a rejoinder to the submissions of the Respondent, the appellants did not show how the denial of this opportunity prejudiced their case.

Secondly, it was not shown by the appellants how requiring the Appellants to submit on issues that were purely of law, such as that on the applicability of the basic structure doctrine and the extensions of the tenure of parliament and local governments, prejudiced their ability to prosecute the petitions.

In regard to the appellant's complaint on refusal to summon certain individuals for cross examination; in **Constitutional Appeal No. 01 of 2015, Theodore Ssekikubo & 4 Others vs Attorney General & 4 Others** this Court observed:

`This leaves the discretion to allow cross-examination purely in the hands of Court. In constitutional petitions, this power is expressly conferred upon the Constitutional Court by Rule 12 of the ***Constitutional Court (Petitions and References) Rules, 2005, Statutory Instrument No. 91 of 2005*** *which provides that:-*

"(2) With leave of the Court, any person swearing an affidavit which is before Court, may be cross-examined or recalled as a witnesses if the Court is of the opinion that the evidence of the witnesses is likely to assist the Court to arrive at a just decision"(underlining is added for emphasis).

From the wording of Rule 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 as 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. ***(See. Mbogo and Others vs Shah [1968] E.A.93.)'***

In the **Ssekikubo** case this Court went on to hold that the decision of the Justices of the Constitutional Court not to call a witness for cross-examination was a discretion the Court exercised after it had afforded both sides opportunity to address Court on the issue. No side was denied

a right to fair hearing. The Constitutional Court adopted the proper course in restricting the cross examination of deponents to matters within their affidavits. I do not see how that prejudiced the Appellants. This court will not interfere with a lawful exercise of discretion by the trial Court. The complaints made by the Appellants in respect of denial of a fair hearing are in respect of exercise of discretion by the Constitutional Court in a bid to expedite the hearing of the petitions.

Ironically, one of the Appellants Mabirizi complains about the late delivery of the Constitutional Court's decision without considering that a protracted and lengthy hearing that seeks to explore and test all manner of complaints and authorities is partly a cause of the delay in decision making. For instance, in this appeal, appellant Mabirizi put together 82 grounds of appeal even though a perusal of his memorandum of appeal shows that his substantive complaints against the decision of the Constitutional Court are hardly in excess of 20. There is no doubt that this sort of onerous pleading and prosecuting cases itself makes it difficult for a Court to reach a timely and accurate decision.

In the same vain, concerning the complaint that authorities they presented by the appellants in support of their petitions in the Constitutional Court were not considered is answered by my findings that though many authorities were brought in Court, it isn't in the character of this Court to cite all authorities tendered to it. Some may be relevant and others not so relevant. They may also be too numerous to serve any useful purpose. Suffice it to say, all the Justices of the Constitutional Court founded their decisions on relevant authorities.

I am therefore unable to fault the Constitutional Court for the measures that were invoked to expedite the hearing of the consolidated petitions. No miscarriage of justice was occasioned to any of the Appellants and I cannot interfere with the said exercise of discretion.

Consequently, I answer this issue in the negative.

Issue 8

"What remedies are available to the parties?"

Appellants' Submission

The appellants 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 in its entirety 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.

Appellant Male Mabirizi also 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.

Respondent's Submissions

The Respondent supported the findings of the Constitutional Court and prayed that this Court upholds the same.

Resolution of issue 8

The majority Justices of the Constitutional Court applied the doctrine of severance and held that the entire Constitution (Amendment) Act 2018

was not affected by the numerous illegalities proved to have been committed in its passing. I have already held that I disagree with that conclusion.

It is gainful to address the doctrine of severance which was relied upon by the majority Justices of the Constitutional Court. Their decision was ultimately based on that doctrine. It is incumbent on a court faced with an option to severance to define carefully the extent of the inconsistency between the Act in question and the Constitutional requirements.

In **Attorney General for Alberta vs Attorney General for Canada**, [1994] AC 503, 518 the Board considered the severability of statutory provisions viewed for constitutionality, stating:

> ***'The real question is whether what remains is so inexplicably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all..... .'***

That above is the Canadian experience.

In the United States of America there is the case of **Missouri Roundtable**, 3965.S.W. 3d 348 which I find relevant for purposes of the matter in hand. The case is cited in the **Missouri Law Review** Vol 79. Iss. 3[2014], Art 10. The Missouri Law review at page 840 thereof notes:

> ***`Since one of the grounds for the inapplicability of Section 1.140 is non-sensical when applied to procedural***

constitutional violations, the procedural violations taint the entire affected act, it makes more sense to restrict it to substantive constitutional violations. Legislative intent is regularly used in ascertaining the substantive constitutionality of a statute, and it is possible for such violations to be restricted to only a portion of a bill. As such, statutory severance under section 1. 104 is not applicable to procedural violations - in particular the single-subject rule – and it is applicable only to substantive constitutional violations. This reasoning supports the conclusion in <u>Missouri Roundtable</u> that substantive and procedural constitutional violations have separate analyses in the context of severance.'

Earlier on at page 835 of the Review the following passage appears:

'Judge Fischer, however, filed a concurrence in the case, stating that he believed that the judicially created doctrine of severance should be abolished. Specifically, he argued two grounds that supported his contention: first, that the doctrinal severance provides "no incentive [for legislators] to follow the clear and express procedural mandates of the Missouri Constitution [,]" and second, that it potentially violates state separation of powers. Elaborating on the effort of judicial severance on the separation of powers, Judge Fischer stated that it may subvert the legislative process by allowing legislation that might not have received enough votes to become law to survive. Procedural constitutional violations, severance, and the discussion prompted by them came into sharp focus in <u>Missouri Roundtable</u>.'

Returning to these Constitutional Appeals, several procedural irregularities were referred to. Some of these were disposed of by the Constitutional Court. Some others are before this Court for determination. The majority Justices of the Constitutional Court in their

wisdom ordered for the severance of some of the sections in the Constitution (Amendment) Act, No. 1 of 2018. Other sections were saved on the ground that they were the provisions originally intended to be legislated on and that on their own they did not infringe on the Constitutional provisions in the course of their process of enactment.

Reference has been made to the case of **Salvatori Abuki vs Attorney General**, Constitutional Case No. 2 of 1997 in justification of the doctrine of severance. For the record the decision in that case was later appealed.

On appeal in **Attorney General vs Salvatori Abuki,** Constitutional Appeal No. 1 of 1998 the Supreme Court declared:

> ***`That section 7 of the Witchcraft Act is void for inconsistency with Articles 24 and 44(a) of the Constitution, in that it authorizes the making of an exclusion order prohibiting a person from entering in his or her home, this treatment or punishment which is torturous, cruel, inhuman and degrading'.***

The significance of the **Salvatori Abuki** case is that it struck down or severed section 7 of the Witchcraft Act from the rest of the Act. That kind of severance should be distinguished from the one in issue where the process of enactment was attended by glaring illegalities.

For the reasons given above I find that the enactment in its entirety cannot be saved by way of severance. It must be annulled not partially but as a whole.

In view of my findings on the second, third and fourth issues, the consolidated appeals partly succeed.

A declaration is issued that the Constitution (Amendment) Act 2018 is unconstitutional having been enacted in violation of the Constitution. I would declare that the entire Constitution (Amendment) Act 2018 was illegally enacted and is null and void.

The Appellants appealed against the award of costs in the Constitutional Court arguing that the amount awarded was inordinately low. The award of costs in the Constitutional Court is contained in the judgment of Owiny Dollo DCJ. It relevantly reads:

> ***'.....***
>
> ***4. Court awards professional fee of U. shs 20m/= (Twenty million only) for each Petitioner (not Petitioner). This however does not apply to Petition No. 3 of 2018 where the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person .'***
>
> ***5. Court awards two-thirds disbursements to all Petitioners, to be taxed by the Taxing Master.'***

These appeals involve questions of great public interest. They were initiated as public interest petitions. I have already set down the views of the Justices of the Constitutional Court regarding costs that were awarded. Regarding public interest litigation this court has expressed the view that courts while taking into consideration the provisions of Section 27 of the Civil Procedure Act should not automatically enforce orders on costs in public interest litigation because of pertinent factors.

In **Muwanga Kivumbi vs Attorney General**, Constitutional Appeal No. 06 of 2011 Tibatemwa Ekirikubinza JSC who wrote the lead judgment stated inter alia:

> ***`A proper reading of the above cases reveals that the Court re-affirmed the already established legal principles inherent in section 27 (2) of the Civil Procedure Act.***
>
> ***.....***
>
> ***The principles which can be deduced from the section are that:***
>
> ***(i) The award of costs is left to the discretion of the court.***
>
> ***(ii) Costs normally follow the event-the general rule is that a successful party will be awarded costs .***
>
> ***(iii) Just as it is in other areas of the law where the court is empowered to make decisions, the courts discretion must be exercised judicially.***
>
> ***However, while accepting that the principles inherent in section 27 apply to public interest litigation cases, the above authorities emphasized that costs in public interest litigation cases should only be awarded in rare cases, that the court must balance the need to compensate the successful litigant on the one hand with the value (s) underlying public interest litigation such as growth of constitutional jurisprudence which would be stifled if potential litigants know that there is a possibility of being saddled with costs in the event of the case being dismissed***
>
> ***In other words, in public interest litigation, a court should exercise its discretion to award costs infrequently. Furthermore, where costs are awarded in***

public interest litigation cases, the award should be minimal.'

Kisaakye JSC agreed with the above dicta and went on to give further justification:

'In awarding and assessing costs in constitutional litigation, courts should not lose sight of the danger that would arise if the constitutional order in this country were to break down. In my view, society owes a litigant, who averts such a breakdown in the constitutional order through a constitutional petition pointing out areas of contravention of the Constitution, a duty to reimburse him or her for the direct costs he or she incurred in the process of filing and prosecuting the petition and/or appeal. Such a litigant should not bear the economic burden of maintaining the constitutional order for the rest of Ugandans.'

The South African experience is **Trustees For The Time Being of the <u>Biowatch Trust vs Registrar, Genetic Resources & Others [2009] ZACC 14</u>** where Sachs J stated:

.

19. ***`This is not to deny that vulnerable sectors of society are particularly dependent on the support they can get from public interest groups. A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this court's Jurisprudence. Intervention by public interest groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally ..... There has also been pioneering litigation brought by groups concerned with gender equality, the rights of the child.....and in relation to freedom of expression. Similarly, the protection of environmental rights will not only depend on the***

diligence of public officials, but on the existence of a lively civil society willing to litigate in public interest. This is expressly adverted to by the National Environmental Management Authority (NEMA) which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.

.....

.....

56. I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door-at the end of the day, it was the state that had control over its conduct.'

The opinion expressed by Sachs J in the South African case are at one with the views of this court and I find them persuasive.

In this matter I find the appellants successful both in this court and in the Constitutional Court. However, the prayer for general damages by appellant Male Mabirizi is misplaced and has no basis in a constitutional petition challenging the validity of the passing of the impugned Act. Equally, his claim to be a professional is out of context as he represented himself. Only an enrolled advocate with audience before this Court could

claim for instruction fees. I should add that, even an enrolled advocate representing himself would not be eligible for professional fees.

In conclusion, I would make the following orders:

(i) The consolidated appeals partially succeed.

(ii) The Constitution (Amendment) Act 2018 is hereby struck down in its entirety for having been passed in violation of the Constitution and Rules of Procedure of Parliament.

(iii) The awards in the Constitutional Court are upheld.

(iv) Parties to meet their costs in this Court.

Dated at Kampala this ..... day of ..... 2019.

.....

JUSTICE PAUL K. MUGAMBA
JUSTICE OF THE SUPREME COURT