

UGANDA / JUDGMENT

Women's Probono Initiative v Attorney General (Constitutional Petition No. 12 of 2021) [2025] UGCC 6 (10 July 2025)

[2025] UGCC 6

COURT

Constitutional Court of Uganda

BEFORE

Mulyagonja, JCC, Kihika, JA /JCC, Tibulya, JA/JCC, Kazibwe, JCC, Asa Mugenyi, JA/ JCC

CASE / FILE NUMBER

Constitutional Petition No. 12 of 2021

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

THE REPUBLIC OF UGANDA**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

Coram: Mulyagonja, Kihika, Tibulya, Kazibwe & Dr. Mugenyi JJCC.

CONSTITUTIONAL PETITION NO. 12 OF 2021

Women's Probono Initiative (WPI) Petitioner Ve rsus

The Attorney General..... Respondent

Judgment of Hon. Marsaret Tibulva JCC

- 1. The Women's Probono Initiative (WPI) (hereinafter referred to as the petitioner), a not-for-profit Human Rights advocacy organisation brought this petition under Article 137 (3) (a) of the Constitution, and Rule 3 of the Constitutional court (Petitions references) Rules S.I. 91105.
- 2. The petition is supported by the affidavit of M/s ELIZABETH ACHOLA c/o the Women's Probono Initiative (WPI).
- 3. The petitioner alleges that Sections 2(h) and 2 (gg) of the Penal Code Act (as it then was) which define the terms husband as "husband of a monogamous marriage" and wife as "wife of a monogamous marriage" exempt polygamous husbands from the crime of bigamy which is created under section 153 (now 142) of the Penal Code Act. It is argued that Section 153 (now 142) of the Penal Code Act therefore violates the right to equality and non-discrimination on the ground of sex which is guaranteed by Article 21 (1) of the Constitution and is therefore unconstitutional.

- 4. The Petitioner further alleges that the custom and practice of one man marrying more than one wife:
- a) The custom and practice of one man marrying more than one wife at any given time exempts polygamous husbands from the crime of bigamy in sections 2 (h), (gg), and 153 of the Penal Code Act.
- b) cultivates an environment where children and women compete for one man's attention thereby breeding emotional pain and torture that lead to violence and a violation of women's right to health contrary to Articles 24, 43 and 44 of the Constitution.
- c) The custom and practice of one man marrying more than one wife at any one given time violates women's rights to equal sharing of property with a single spouse during marriage contrary to Articles 21 (1)-(3), 31 (1) (b) and 33 of the Constitution.
- d) The custom and practice of one man marrying more than one wife at any one given time violates women's rights to equal sharing of property with a single spouse upon dissolution of marriage contrary to Articles 21 (1)-(3), 31 (1) (b) and 33 of the Constitution.
- e) The custom and practice of one man marrying more than one wife at any one given time violates women's rights to consortium contrary to Articles 21 (1)-(3), 31 (1) (b) and 33 of the Constitution.
- t) The omission by government to outlaw the custom and practice of one man marrying more than one wife at any one given time contravenes Articles 32 (2) & (5) and 33 (1) of the Constitution.
- g) That section 4 (2) of the Customary Marriage Act is null and void due to the fact that it permits polygamous marriages in contravention of articles 21 (1)-(3), 24, 29, 31, 33, 34 and 43 of the Constitution.
- 5. The petitioner contends that the custom and practice of one man marrying more than one wife is expressly allowed under Section 2(h) and 2(gg) of the Penal Code Act (as it was then), section 4(2) of the Customary Marriages

Registration Act, and the Marriage and Divorce of Mohammedan's Act. She invited the court to take judicial notice of that custom and practice.

- 6. The petitioner seeks declarations that:
- a. the custom and practice in issue is unconstitutional since it contravenes the right to equality and non-discrimination on the ground of sex which is guaranteed under Article 21(1) of the Constitution.

- b. the custom and practice of polygamy, which cultivates an environment where children and women compete for one man's attention, breeds emotional pain and torture leading to violence, thereby violating their right to health in contravention of Articles 24 and Article 44 (a) of the Constitution.
- c. the omission by the Ugandan Government to outlaw the said custom and practice contravenes Articles 32 (2) & (5) which requires that laws to prohibit laws, cultures, customs and traditions which are against the dignity, welfare or interest of women be put in place. It also contravenes article 33 (1) which requires that the government ensures that women are accorded full and equal dignity of the person with men.
- d. Section 4 (2) of the Customary Marriage (Registration) Act which permits polygamous marriages contravenes Articles 21 (1)-(3), 24, 29, 31, 33, 34, 43 and 44 (a) of the Constitution, and is null and void.
- 7. The petitioner further seeks orders that:
 - a. the word "monogamous" in the Penal Code's definition of "husband" appearing in Section 2(h) (as it then was) be struck out, so that the law may apply to all husbands (whether monogamous or polygamous).
 - b. the word "monogamous" in the Penal Code's definition of "wife" appearing in Section 2 (gg) (as it then was) be struck out so that the law may apply to all wives (whether monogamous or polygamous).
- 8. The Respondent opposed the petition contending that the custom and practice of polygamy, and the exemption of polygamous husbands from the crime of bigamy in section 153 (now 142) of the Penal Code Act do not violate the right to equality and non-discrimination and is not inconsistent with Article 21 (1) of the Constitution. It is further argued that polygamy is protected under Articles 21(1) (2), 29 (1) (b) (c), 31(1) (3) and 37, and is legally sanctioned as non-discriminatory under Article 21(5) of the Constitution.
- 9. Further, that the offence of Bigamy does not apply to polygamous men because they are legally permitted to marry more than one wife. Where women freely opt to enter into polygamous marriages, they implicitly consent to their husbands marrying more than one woman. Thus, there can be no offence of bigamy in respect of such marriages where polygamy is legally permitted and has been consented to by all the parties to the marriage.
- 10. According to the respondent, as far as adult women freely consent to contract polygamous marriages with full knowledge of their inherent marital characteristics and legal implications (e.g. in respect to property rights), and they do not opt for the legally available alternative of monogamous marriages, polygamy does not contravene women's rights under Articles 31 (1) (b) and 33 of the Constitution.

- I 1. It is also argued that the government has an obligation under Articles 29(t) (b), (c), 3t(3) and 37 of the Constitution, to avail options to polygamous marriages, so that citizens are allowed a choice in determining the type of marriage they may contract. The respondent accordingly denies that they contravened Articles 32(2) (5) and 33 (1) of the Constitution.
- 12. The respondent further asserts that by permitting polygamous marriages, section 4 (2) of the Customary Marriage (Registration) Act does not contravene Articles 21(1)-(3), 24, 29, 31, 33, 34 and 43 of the Constitution. According to them,,

polygamy is a cultural and religious practice, as evidenced by its recognition under the Customary Marriages (Registration) Act and the Marriage and Divorce of Mohammedans Act. The practice is therefore Constitutionally protected under the following provisions of the Constitution.

- i. Article 29(1) (b) which protects the right to freedom of thought, conscience and belief,
- ii. Article 29 (1) (c) which protects the right to practice any religion and manifest such practice,
- iii. Article 37 which protects the right to enjoy, practice, profess any culture and tradition,
- iv. Article 31 (3) which protects the right of adult men and women to freely consent to enter into marriage,
- u. Article 21 (1) and (2) which protects the right to equality before the law in social and cultural life, and freedom from discrimination on grounds of religion and social standing.
- 13. It is further argued that the Government has an obligation to allow persons to freely express and manifest their religious and cultural beliefs or practices in respect to marriages, and in fulfilment of this obligation it has legally recognized polygamous marriages under the Customary Marriages (Registration) Act and the Marriage and Divorce of Mohammedans Act.
- 14. The respondent further contends that no person is compelled to contract polygamous marriages. Monogamous marriages are a legally recognized alternative for persons who do not desire to enter polygamous marriages. Finally, that where adult women freely consent to contracting polygamous marriages in exercise of their right under Article 31(3), there is no contravention of their rights under Articles 21, 24, 31 and 33 of the Constitution.

Representation.

15. At the hearing on 11th June 2024, the Petitioner was represented by Rose Rwakikona and Patrick Murungi. The Respondent was represented by Claire Kukunda and Brian Musota.

Admissibility of the evidence.

16. The legal principle is that whoever asserts must affirm. This is enshrined in Section 101 of the Evidence Act which provides that "Whoever desires any court to give judgment as to any legal right or liability' dependant on the existence of facts which he or she asserts, must prove that those facts exist".

This principle shall be adhered to in resolving issues presented by this petition.

Issues.

- 17. The parties framed the following issues'
- r. Whether the custom and practice of one man marrying more than one wife exempts polygamous husbands from the crime of bigamy in Section 2(h)' 2 (gg) (as it then was) and section 153 (now 142) of the Penal Code Act, and is therefore inconsistent with the right to be free from discrimination on the ground of sex guaranteed in Article 21 (1) of the Constitution.
- ii. whether the custom and practice of one man marrying more than one wife cultivates an environment where children and women compete for one man's attention thereby breeding emotional pain and torture subsequently violates women's right to health contrary to Article 24, 43 and 44 of the Constitution.
- iii whether the practice and custom of one man marrying more than one wife at any given time contravenes women's rights to an equal share of property

at, in and upon dissolution of marriage guaranteed under Article 31 (1) (b) of the Constitution.

- Whether the omission by the Ugandan Government to outlaw the custom and practice of one man marrying more than one wife at any given time contravenes Article 32 (2), 32 (5) and 33 (1) of the Constitution.
- Whether Section 4 (2) of the Customary Marriage (Registration) Act is null and void to the extent that it permits polygamous marriages contrary to Articles 21 (1) - (3), 24, 29, 31, 33, 34 and 43 of the Constitution'

Whether the Petitioner is entitled to declarations and orders prayed for'

- 18. The respondent raised a preliminary objection in which it was contended that the annexures attached to the petitioner's affidavit in support of the petition contain hearsay evidence and evidence of opinion in form of Human rights reports whose contents have not been substantiated and authors not presented as witnesses. This kind of evidence, it is argued, is prejudicial to the respondent's right to fair hearing since it cannot be verified. It is therefore prayed that all the annexures to the affidavit in support be rejected.

- 19. The petitioner responded that the annexures in issue are reports and publications by globally recognised authors. This, it is argued, is admissible evidence on the authority of *Mifumi (U) Ltd & others Vs Attorney General & another*, Constitutional appeal No. 2 of 2014 in which the court relied on publications of scholars to assist it in disposing of the case.
- 20. The annexures in issue include the following:
 - a. a research paper by Susan Beller Ross titled "Polygyny as a violation of women's rights, equality in marriage: a historical comparative and international human rights overview", published by the University of Delhi,
 - b. a Uganda Bureau of Statistics demographic survey, 2011,
 - c. A ministry of health of Uganda AIDS indicator survey of 2011,
 - d. A Uganda Law Reform Commission study report on marriage and divorce, 2010,
 - e. A conference paper by Sylvia Thmale titled "the right to culture and the culture of rights; a critical perspective on women's sexual rights in Africa", June 30th to July 1st, 2006,
 - f. A paper by Riley Bove and Claudis Vaggia titled "Polygyny and women's health in sub-Saharan Africa", published in a journal on social science and medicine, 2008,
 - g. A Uganda government report on the IIN Convention on the rights of Children, 1996,
 - h. A judgment of the Benin Constitutional court,
 - i. Concluding comments of the Committee on the elimination of discrimination against women, 2002,
 - j. The CCPR General comment No. 18: non-discrimination, 1989,
 - k. CCPR General Comment No. 22: Article 18 (Freedom of thought, conscience or religion), 1993,
 - l. CCPR General Comment No. 28: Article 3 (the equality of rights between men and women), 2000.
- 21. The admission in evidence of government reports such as those listed at b, c, d and g above is permitted under sections 64 (e) and 73 (a) (ii) of the Evidence Act as an exception to the primary evidence rule. Similarly, the reception in evidence of the UN reports at parts i, j, k and l above is permitted under

sections 64 (e) and 73 (a) (i) of the Evidence Act as an exception to the primary evidence rule. The Benin Constitutional case in part "h" above may be cited as a persuasive authority under sections 64 (e) and 73 (a) (iii) of the Evidence Act. The academic writings (at parts a, e and f above) are admissible under section 87 of the Evidence Act.

22. I note that the respondent's objection to the reception of the annexures to the petition is general. They did not point to any specific aspects of any of the annexures they would have desired to cross examine any particular authors about. Moreover, the respondent does not raise any issue relating to the authenticity of the documents themselves. Based on these factors, I find that the objection lacks merit, and it is overruled.

Analysis of the issues.

Whether the custom and practice of one man marrying more than one wife exempts polygamous husbands from the crime of bigamy in Section 2(h), 2 (gg) (as it then was) and Section 153 (now 142) of the Penal Code Act, and is therefore inconsistent with the right to be free from discrimination on the ground of sex guaranteed in Article 21 (1) of the Constitution.

23. In my view, this ground is imprecise and ambiguous. While the complaint is premised on alleged discrimination, the article of the Constitution that is cited (Article 21 (1)) relates to equality. The two concepts of equality and discrimination differ as I shall demonstrate. Therefore, the issue as laid does not capture the petitioner's exact complaint. The situation is exacerbated by the fact that the pleadings, affidavit in support and submissions are not consonant, in that they advance differing complaints and arguments.

The concepts of equality and discrimination.

Equality.

24. Article 21 (1) provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. Clearly, the focus of subarticle (1) is the law.

Discrimination.

- 25. Article 21 (2) of the Constitution forbids discrimination against any person on the ground of sex, race, colour, ethnic origin, birth, creed or religion, social or economic standing, political opinion or disability. The import of Article 21 (2) was discussed in *Carolyn Turyatamba and 4 others vs Attorney General & another*; Constitutional Petition No 15 of 2006 in the following terms: "The prohibition against discriminatory conduct is based upon the universal principle of equality before the law. Therefore, there ought not to be one group of human beings entitled to privileged treatment as regards enjoyment of rights and freedoms over others, because of perceived superiority. "
- 26. Therefore, though the two concepts are closely related, they must be considered separately. This is indeed reflected in the head note to article 21 which is " Equality and freedom from discrimination. "
- 27. Regarding the ambiguity of the first issue, based on the parties' pleadings, the affidavit in support and their submissions, I determine that the petitioner's complaints are twofold:

- a) that polygamy creates inequalities between men and women thereby infringing on the right to equality before and under the law;
 - b) that monogamous men, the only category which may be charged with Bigamy, are unequally treated with polygamous men who are exempted from that offence.
- 28. The first issue as laid does not capture the above complaints. However, by virtue of the authority to render a judgment a Judge has inherent powers to define the dispute and identify what is in fact being contested. Based on this, I will frame sub-issues whose determination will comprehensively determine all the petitioner's contentions in the first issue.
- 29. The sub-issues for determination are:
- (i) Whether the exemption of polygamous men from the offence of bigamy under section 153 (now 142) of the Penal Code Act offends Article 21 (1) (3) of the Constitution, in so far as only monogamous men may be charged with the offence of bigamy.
 - (ii) Whether sections 4 (2) of Customary Marriage (Registration) Act, and Section 2 of the Marriage and Divorce of Mohammedans Act are inconsistent with Article 21 (1) (i) of the Constitution on grounds of sex.
 - i. Whether the exemption of polygamous men from the offence of bigamy under section 153 (now 142) of the Penal Code offends Article 21 (1) (3) of the Constitution.

The exemption.

30. Sections 2 (h) and 2 (gg) (as it then was) of the Penal Code Act define the words husband and wife in the following terms respectively; "husband" means husband of a monogamous marriage, while "wife" means wife of
- i Massabni v. Secretary-General of the United Nations, 2012-UN AT-238 paras 25-27.
- a monogamous marriage. Section 153 (now 142) of the Penal Code provides as follows:

"Bigamy

Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife commits a felony and is liable to imprisonment for five years; except that this section shall not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time".

31. That polygamous men are exempted from the offence of polygamy is therefore common cause.

The alleged contravention.

32. Article 21 (1) of the Constitution provides as follows

Equality and freedom from discrimination

- (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
- 33. The petitioner contends that polygamous husbands are exempted from the crime of Bigamy, and that this contravenes Article 21 (1) of the Constitution.
 - 34. The respondent contends that the exemption of polygamous husbands in section 153 of the Penal Code Act is not inconsistent with Article 21 (1) of

the Constitution since it does not violate the right to equality and nondiscrimination. Further that the offence of Bigamy does not apply to polygamous men because they are legally permitted to marry more than one wife. It is maintained that the custom and practice of polygamy is protected under Articles 21(1) - (2), 29(1) (b) (c), 31(1) (3), and 37 of the Constitution and is legally sanctioned as non-discriminatory under Article 21(5) of the Constitution.

Considerations.

- 35. The question of whether the exemption of polygamous men from the offence of bigamy under section 153 (now 142) of the Penal Code offends Article 21 (1) - (3) of the Constitution must be answered in the negative for two reasons.
- a. The law provides alternative marriage options to citizens, who may freely choose the type of marriage to contract.
- b. By virtue of the differing legal frameworks governing the two types of marriages, polygamous men are a different category from monogamous men. The two types of marriages are intrinsically "unequal". This renders article 21 (1) - (3) irrelevant to the discourse.

Principles of Constitutional interpretation.

36. Jurisprudence is firm and replete that the Constitution must be interpreted as an integral whole with no particular provision destroying the other but each sustaining the other². This is the rule of harmony, the rule of completeness and

^{lt;sup>2} See Tinyefuza vs. the Attorney General, Constitutional Appeal No.1 of 1997; Attorney General vs. Salvatori Abuki, Supreme Court of Uganda Constitutional Appeal No.1 of 1998; AG of Tanzania vs. Rev. Christopher Mitikila [2010] E. A 13; Ssemwogerere & others vs. Attorney General EALR

exhaustiveness and the rule of paramountcy of the written Constitution. In line with this principle, I will ensure that both purpose and effect are considered in interpreting the relevant Constitutional provisions.

Polygamous men are a different category from monogamous men: the equality question.

- 37. The import of Article 21 is to bolster equality of protection and treatment under the law with a view to attaining fairness, justice, and dignity for all persons. As earlier mentioned, each type of marriage is governed by a different legal framework, meaning that the two categories are intrinsically "unequal".
- 38. It is now firmly settled that for the right to equality to be evoked, the subjects of the alleged unequal treatment must be similarly placed' In the Canadian case of *Andrews v Law Society of British Columbia* 119891 I S. C. R. page 143, the Supreme Court of Canada was called to interpret the import of Section 15 (1) of the Canadian Charter of Rights and Freedoms which was couched in terms similar to those of article 21 (1) of the Constitution.
- 39. The brief facts of the case were that Mr. Andrews, a British subject permanently resident in Canada met all the requirements for admission to the British Columbia bar except that of not having been a Canadian citizen. He brought an Action for a declaration that the requirement for Canadian citizenship violated section 15 (1) of the Canadian Charter. The issue was whether the Canadian citizenship requirement for admission to the British Columbia bar infringed the equal rights provisions and freedom from discrimination enshrined in section 15 (1) of the Charter; and if so, whether the infringement was justified.

1200412 F.A276 at p.319); and *David Welsey Tusingwire vs. Attorney General*, Constitutional Appeal No. 4 of 2016 (unreported).

40. Section 15 (1) provided as follows:

"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour religion, sex, age or mental or physical disability.

- (2) Subsection (1) does not preclude any law, program or Activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour religion, sex, age or mental or physical disability".

- 41. McIntyre J considered that the above section provides for every individual ^asup>guarantee of equality before and under the law as well as the equal protection and benefit of the law without discrimination. He, however, clarified that "This is not a general

guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law... [Equality] is an elusive concept and, ... it lacks precise definition... It is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis v. United States*, 339 U. S. 162 (1950), at p. 184: It was a wise man who said that there is no greater inequality than the equal treatment of unequals. [emphasis added]

42. More to the point, McIntyre J cited R. v. Big M Drug Mart Ltd., 1985 / S. C. 295, where Dickson C. J. said at p. 347.

The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment... McIntyre J then clarified that is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the Charter. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions. "3

43. I noted the petitioner's submission that the Human Rights Committee in paragraph 24 of General Comment No. 28 to the International Convention on Civil and political rights (ICCPR), stated that polygamy is incompatible with the principle of equality of treatment with regard to the right to marry. Based on the law and the jurisprudence cited above, it is my view that the committee's opinion is flawed. In any event the Human Rights Committee's opinion is not binding on this court.

³<https://decisions.scc-csc.ca>.

- 44. There is no doubt that both polygamy and monogamy are Constitutionally protected religious and cultural practices. Articles 29 (1) (b) (c) & 37 which provide for freedom of conscience and belief and the right to religion and culture are relevant. Therefore, article 29 (5) which provides that " Nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision of this Constitution" saves the practices of polygamy and monogamy from any inconsistency claims.
- 45. In conclusion of the equality issue, it is of note that the laws, terms and conditions relating to contracting, subsistence and dissolution of polygamous marriages differ from those of monogamous marriages. The two categories of marriages are therefore dissimilar/unequal. This means that monogamous men may only complain if they were unequally treated with fellow monogamous men. The same is true for polygamous men.

Polygamous men are a different category from monogamous men; the discrimination question.

46. Article 21 (2) provides as follows:

"Without prejudice to clause (1) of this article, a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. "

47. Article 21 (3) provides as follows:

"For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. "

- 48. The meaning of the concept of discrimination was clarified in *Andrews v Law Society of British Columbia* (supra) in the following terms: "Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics [emphasis mine] of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed"
- 49. As has been found, the only common denominator between polygamous and monogamous men is that they are all men. Each category, however, claims its being or existence from different legal regimes, meaning that they are dissimilar.

- 50. The prohibition against discriminatory conduct is based upon the universal principle of equality before the law. The alleged differential treatment of monogamous vis polygamous men does not necessarily result in inequality and discrimination since the two categories are not "equal". Therefore, the exemption of polygamous men from the offence of bigamy is not discriminatory treatment against monogamous men.

Freedom of choice.

51. Crucially, polygamy and monogamy are not personal characteristics but are conditions which result from the exercise of a Constitutionally protected freedom of choice. The importance of the legal provisions which allow citizens to make marriage choices must be underscored. Article 31(1) & (3) which provides for the right to marry and found a family serves multiple fundamental purposes in

Article 31 (1) & (3) of the constitution.

society. It balances individual freedoms with state interests. It protects personal autonomy and privacy, and it recognizes marriage and family formation as core aspects of personal liberty. It allows individuals to choose their partners and shape their private lives without unjust state interference. The article therefore prevents forced marriages or state-imposed restrictions (e.g., bans on interracial or interfaith unions), thereby stabilizing the social structure.

52. The issue of freedom of choice to belong was on occasion considered by this court. In *Aboneka Micheal v Watoto Church (U) Ltd*, Constitution Petition No. 19 of 2018, a petition challenging the Constitutionality of the mandatory church requirement for a letter of blessing from bride's parents to conduct marriage, Justice Christopher Gashirabake, Justice of the Constitutional Court had this to say;

"... A keen reading of Article 29 (1) (c) indicates that the discretion is left to the different organizations to determine their own practices. Further it should be noted that a citizen is at liberty to choose to belong to that organization and manifest their practices or not. [emphasis mine] My understanding then is that if I am not comfortable with certain practices in an organization, I have the right to leave that organization. Furthermore, Article 37 which allows Ugandans to belong to any religious sect and promote the culture of that sect also brings in the aspect of choice. A deeper analysis of choice is desirable in situations involving restrictions on the right to manifest one's religion. Whenever one has an opportunity to exercise choice then, it is most likely that there is no violation of the said right". [emphasis mine]

53. Drawing on the foregoing, since men have an opportunity to exercise marriage choices, there can be no violation of their equality and non-discrimination rights. In conclusion of sub-issue (i) therefore, I would find that the exemption of polygamous men from the offence of bigamy under section 153 (now 142) of the Penal Code does not offend Article 21 (1)-(3) of the Constitution.

- Whether section 4 (2) of Customary Marriage (Registration) Act' and Section 2 of the Marriage and Divorce of Mohammedans Act are inconsistent with Article 21 (1)-(3) of the Constitution on grounds of It. sex.
- 54. The petitioner pleads that section 4 (2) of the Customary Marriage (Registration) Act is null and void since it permits polygamous marriages in contravention of articles 21 (1)-(3)' 24, 29,31, 33, 34, and 43 of the Constitution.
- 55. The petitioner submits that section 4 (2) of the Customary Marriage (Registration) Act places no limit on the number of wives a husband can have under customary law. Further, that section 2 of the Marriage and Divorce of Mohammedans Act permits men to marry up to four wives.
- 56. It is further argued that the right to equality and freedom from discrimination is guaranteed under Article 21(1) of the Constitution. Citing the case of Attorney General Vs. Salvatori Abuki, Constitutional Appeal No. 01 of 1998, the petitioner argues that statutes which provide unequal rights between a husband and wife at the dissolution of marriage violate the right to equality under the law. The case of Uganda Association of Women Lawyers Vs' Attorney General, Constitutional Petition No. 02 of 2003' in which this court invalidated the provisions of the Divorce Act which provided different/unequal grounds for divorce between a husband and a wife was also relied on.
- 57. Counsel also cited the case of DCC 02-144 of December 23, 2002, Benin' Constitutional Court, in which the Constitutional Court of Benin found that

there was unequal treatment between men and women arising from the option under section 74-5 of the Code of Persons and Family of Benin, which allowed a man to be polygamous whereas the woman could only be monogamous.

- 58. The respondent asserts that in permitting polygamous marriages, section 4 (2) of the Customary Marriage (Registration) Act does not contravene articles 21 (1)-(3), 24,29,31, 33, 34, and 43 of the Constitution. Further, that polygamy is a cultural and religious practice as evidenced by its recognition under the Customary Marriage (Registration) Act and the Marriage and Divorce of Mohammedans Act. Adult men and women are legally permitted to exercise their right under article 31 (3) by freely consenting to contract polygamous marriages which are recognized under the law. No one may be compelled to contract polygamous marriages since there is the option of monogamous marriages.
- 59. It is also argued that where women freely opt to contract polygamous marriages, they implicitly consent to their husbands marrying more than one woman. Further, that adult women who consent to contracting polygamous marriage are presumed to be aware about the inherent characteristics and legal implications (e.g. in respect to property rights) of polygamy. Polygamy does not therefore contravene women's rights under Articles 31 (1) (b) and 33 of the Constitution.

- 60. Reiterating that polygamy is recognized under the Customary Marriages (Registration) Act and the Marriage and Divorce of Mohammedans Act which are protected in Articles 21(1)-(2), 29 (1)(b)&(c), 31(3) and 37 of the Constitution, the respondent submits that polygamy does not contravene the right to equality, and it does not discriminate on the ground of sex.
- 61. Counsel concludes by citing *Mifumi (U) Ltd & 12 others Vs. Attorney General & Another*, Constitutional Petition No. 12 of 2007 and Appeal No.

02 of 2014 where it was argued that the petitioner did not lead evidence to prove that the custom and practice of polygamy is unconstitutional'

- 62. In rejoinder, the petitioner reiterated their earlier submissions and maintained that the custom and practice of polygamy is unconstitutional. They prayed that the court finds that it is notorious and need not be proved, and that the practice of polygamy should be judicially noticed.

Analysis

The issue of judicial notice

- 63. The petitioner prayed that this court takes judicial notice of the practice and custom of one man marrying more than one wife. The practice is however, expressly provided for under the customary Marriage (Registration) Act and the Marriage and Divorce of Mohammedan Act. The Black's Law Dictionary 9th Ed. defines judicial notice as court's acceptance for purposes of convenience and without requiring any party's proof. In *Mifumi (u) Ltd & 12 others vs. Attorney General & another* constitutional Petition No. 12 of 2007, Twinomujuni, JA (as he then was) stated that 'Judicial notice is taken of facts which are familiar to any judicial tribunal by virtue of their universal notoriety or regular occurrence in the ordinary course of nature or business...'
- 64. Section 56 (1) (b) of the Evidence Act requires that the court takes judicial notice of all laws in force. The Customary Marriage (Registration) Act and the Marriage and Divorce of Mohammedans Act which provide for polygamy are laws which are in force in Uganda. I therefore take judicial notice of these laws, and of the practice and custom of polygamy in Uganda'
- 65. The petitioner avers (paras 24-27 of the affidavit in support of the petition) that the practice of polygamy creates unequal rights in polygamous marriages

and that this violates the right to equality under the law as provided in Article 21(1) of the Constitution, Article 26 of the ICCPR, Article 15(1) of the CEDAW Article 3 of the Banjul Charter and Article 8 of the Maputo Protocol. The petitioner argued that since Uganda is a state member under the above international treaties, it is bound to implement their provisions by providing men and women with equal rights in marriage.

- 66. In my view the complaint that women are unequally and discriminatorily treated under section 4 (2) of the Customary Marriage (Registration) Act and under section 2 of the Marriage and Divorce of Mohammedans Act is without basis. Therefore, all the jurisprudence cited by the petitioner including the cases of Attorney General Vs. Salvatori Abuki, Constitutional Appeal No. 01 of 1998; Uganda Association of Women Lawyers Vs. Attorney General, Constitutional Petition No.02 of 2003; and the Benin Constitutional court case of DCC 02-144 of December 23,2002) is irrelevant to the discourse' The impugned legal provisions do not in fact treat women differently or discriminate against them.
- 67. Section 4 (2) of Customary Marriage (Registration) Act provides that customary marriages may be polygamous. Section 2 of the Marriage and Divorce of Mohammedans Act provides as follows.

" All marriages between persons professing the Mohammedan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as provided in this Act".

The Customary Marriage (Registration) Act

- 68. A customary marriage is defined in the following terms: "customary marriage" means a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part I of this Act. "s Part III of the Act only lays down the procedure to be followed by a person who does not belong to any indigenous tribe in Uganda but who wishes to contract a customary marriage.
- 69. The word "polygamy" is defined as a marital practice in which a person has more than one spouse [emphasis added] at the same time, while "polyandry" is defined as the practice of a woman having more than one husband at the same time)⁶. "Polygyny" on the other hand is defined as the practice of a man having more than one wife at same time⁷.
- 70. Going by its definition, the word "polygamy" is gender neutral. Because of this, section 4 (2) of Customary Marriage (Registration) Act which provides that customary marriages may be polygamous [emphasis added] cannot be assailed on the basis that it only permits men to contract polygamous marriages.
- 71. By defining a "customary marriage" as "a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community, or any marriage celebrated under Part III of this Act", the Customary Marriage (Registration) Act left issues relating to the form which customary marriages may take, to the dictates of the rites of the African community to which the subjects of such marriages belong.

⁵Section 1 (b) of the Customary Marriage (Registration) Act

⁵Black's Law Dictionary, 8th Ed, page 1 197.

⁷Black's Law Dictionary, 8th Ed, page 1 198.

- T2. Drawing on the foregoing, the fact that African women in Uganda do not contract polyandry marriages is not a function of section 4 (2) of Customary Marriage (Registration) Act. Rather, it is a function of the rites of the African communities (i.e., their tribal culture) from which they come.
- 73. Since section 4 (2) of Customary Marriage (Registration) Act is gender neutral, a Constitutional challenge premised on assertions that it contravenes Article 21 (1)-(3) of the Constitution is without merit' I therefore find that section 4 (2) of Customary Marriage (Registration) Act' is not inconsistent with Article 21 (1)-(3) of the Constitution on grounds of sex.

The Marriage and Divorce of Mohammedans Act.

- 74. Section 2 (now 3) of the Marriage and Divorce of Mohammedans Act also leaves issues relating to forms of marriages to the dictates of "the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place". Therefore, the fact that Moslem women in Uganda do not contract polyandry marriages is not ^a function of the Marriage and Divorce of Mohammedans Act. Rather, it is ^a function of "the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage takes place". A Constitutional challenge premised on a claim that section 2 of the Marriage and Divorce of Mohammedans Act contravenes article 21 (1)-(3) of the Constitution cannot be sustained.
- 75. I therefore find that section 2 (now 3) of the Marriage and Divorce of Mohammedans Act is not inconsistent with Article 21 (1)-(3) of the Constitution on grounds of sex.
- 76. In relation to Islamic marriages, the petitioners aver under paras 73 79 of the affidavit in support, that the right to religion does not provide for the right to be governed by religious laws and as such the practice of polygamy by religious groups is subject to limitation due to the fact that it violates the fundamental rights of women to equality in marriage and before the law. The petitioner cites the United States Supreme Court jurisprudence (Reynolds vs. United States, 98 U. S (1879) and asserts that a Constitutional right to freedom of religion does not permit polygamy.
- 77. I however think that the authority which the petitioner seeks to rely on is irrelevant in Uganda's Constitutional dispensation. The rule of harmony in interpreting Constitutional provisions dictates that Articles 21 (1)-(3) and ³² (2) must be interpreted in a way that does not destroy Articles 29 (1) (b), (c) & (e), 31 (1) & (3) and 37 of the Constitution.
- 78. Article 32 (1) (2) provide as follows:

Affirmative Action in favour of marginalised groups.

- (1) Notwithstanding anything in this Constitution, the State shall take affirmative Action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history tradition or custom, for the purpose of redressing imbalances which exist against them.
- (2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalized group to which clause (1) relates or which undermine their status, are prohibited by this Constitution.

79. In relevant parts, Article 29 of the Constitution provides as follows:

Protection of freedom of conscience, expression, movement, religion, assembly and association.

(1) Every person shall have the right to-

- (a)...
- (b) freedom of thought, conscience and belief. . . ;
- (c) freedom to practice any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;
- (d) .
- (e) freedom of association. . .

80. In relevant parts, Article 31 (1) & (3) provides as follows:

Rights of the family.

- (1) A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age-
 - (a) to found a family; and
 - (b) to equal rights at and in marriage, during marriage, and at its dissolution.

[clause (1) substituted by section 10(a) of Act 11 of 2005]

(2)...

(2a) ...

- (3) Marriage shall be entered into with the free consent of the man and woman intending to marry.

81. Article 37 provides as follows:

Right to culture and similar rights.

Every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

- 82. Recalling that under the prevailing legal regime the rights to practice a religion (Article 29), to marry, including the mode of marriage, (Article 31 (1) & (3)), and to culture (Article 37) involve making choices from legally available options, the argument that the religious practices in one type of religion create inequality and discrimination for women remains unsupported.
- 83. The fact that the law affords religious, marriage and cultural options negates the assertion that the right to equality and non-discrimination (Article 21 (1)-(3)) is trampled upon in the process of enjoyment of the articles 29,31 and 37 rights. Articles 21 (1)-(3) and 32 (2) must not, therefore, be interpreted in ^a way that destroys the Constitutional protection of freedom of conscience, religion, and association (Article 29), rights of the family (Article 31 (1) & (3)), and the right to culture (Article 37). (see Aboneka Michel Vs Watoto Church (U) Ltd (supra).
- 84. It must be emphasized that each of the principles enshrined in Articles 29 (1) & (2), 29 (1) (b) & (c), 31 (1) & (3) and 37 is a means to the same end; fostering a more inclusive society where everyone has equal opportunities, with a view to upholding the inherent worth of every individual thereby reinforcing democratic values.
- 85. In conclusion of this issue therefore, I find that the availability of religious, marriage, and cultural options is such that the right to equality and freedom from discrimination (Article 21 (1)-(3)) harmoniously coexists with the rights to practice a religion (Article 29), to marry, including the mode of marriage, (Article 31 (1) & (3)), and to culture (Article 37). There is therefore no basis for overriding any of the impugned Constitutional provisions.
- 86. Moreover, the impugned Constitutional provisions are protected by Article 21(5) of the Constitution which provides that "nothing shall be taken to be inconsistent with this article which is allowed to be done under any provision

of this Constitution." I find that the impugned articles of the Constitution are not inconsistent with article 21 (1)-(3), and that the practice of polygamy in the Islamic religion is consistent with the Constitution in keeping with article 29 (1) (c). The first issue is therefore resolved in the negative.

Issues 2: Whether the custom and practice of polygamy violates women and children's right to health contrary to Article 24, 43 and 44 of the Constitution.

- 87. The petitioner maintains that the custom and practice of one man marrying more than one wife cultivates an environment where children and women compete for one man's attention thereby breeding emotional pain and torture that lead to violence and a violation

of women's right to health contrary to Articles 24, 43 and 44 of the Constitution. The petitioner seeks to rely on the Ministry of Health Press Release of 2nd June 2012, in which it was reported that concurrent sexual relationships are a principal factor in HIV/AIDS transmission. They contend that by legalizing polygamy, the government directly facilitates multiple sexual relationships which lead to increased HIV/AIDS transmission.

- 88. It is further contended that the practice of polygamy creates an unequal parenting scheme. This in turn harms the children and wives of polygamous husbands by decreasing parental care, harming their health, and lowering their academic achievements. A father with two wives, each of whom has children is unable to provide more than fifty percent of his parental attention to all of those children. This creates a common family system in which the mother must shoulder the majority of parental responsibilities. Therefore, children from polygamous homes are prone to suffer from parental neglect as well as psychological problems and material deprivations.
- 89. The petitioner further contends that the hostility that comes from polygamous marriages result in anxiety, jealousy, witchcraft and physical or emotional pain which violates a woman's right to health and freedom from torture.
- 90. Citing Attorney General Vs Salvatori Abuki (supra) it was asserted that polygamy is inherently torture, and that the right to freedom from torture is non-derogable under Articles 24 and 44 of the Constitution.
- 91. The respondent asserts that the allegation that polygamy breeds emotional pain and torture is not supported by evidence. Further, that the annexures to the affidavit in support of the Petition are not credible evidence on which this Court may safely conclude that polygamy breeds emotional pain and torture, or that it leads to violence and violates women's right to health. The Respondent maintains that the existence of alternative marriage options to polygamy invalidates all complaints against polygamous practices.
- 92. It is also argued that the absence of evidence from either practicing polygamists who suffered the alleged social ills or an expert on the subject who could be examined on his opinions leaves the Petition baseless and potentially misleading on the subject. The respondent further asserts that the Petition contravenes Rule 12(1) of the Constitutional Court (Petitions and References) Rules, 2005.
- 93. Citing Constitutional Petition No, 12 of 2007 Mifumi (U) Ltd & 12 Others versus the Attorney General and another, the respondent argues that there is no evidence to prove that there is a practice, and that the practice is notorious enough to be a custom and lastly, that the social ills are a direct result of that custom/practice.

Analysis

94. As laid, issue number 2 is ambiguous in that none of the articles of the Constitution that were cited by the petitioner affords a "right to health". The assertion that "the custom and practice of polygamy violates women and children's right to health" is therefore misleading.

95. Article 24 of the Constitution provides as follows:

Respect for human dignity and protection from inhuman treatment.

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

96. Article 43 provides thus:

General limitation on fundamental and other human rights and freedoms.

- (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
- (2) Public interest under this article shall not permit-
 - (a) political persecution ;
 - (b) detention without trial;
 - (c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

97. Article 44 provides thus:

Prohibition of derogation from particular human rights and freedoms.

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

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
- (b) freedom from slavery or servitude;
- (c) the right to fair hearing,
- (d) the right to an order of habeas corpus

- 98. Based on the petitioner's pleadings and arguments I determine that the petitioner's complaints are that the custom and practice of polygamy contravenes article 24 of the Constitution in that it subjects women and children to torture or cruel, inhuman or degrading treatment or punishment. Further, that the practice of polygamy is a derogation from the right to freedom from torture and cruel, inhuman or degrading treatment or punishment contrary to article 43 of the Constitution.
- 99. However, Article 44 seems to be irrelevant to the discourse, since there is nothing to suggest that in the enjoyment of the rights and freedoms prescribed in Chapter four of the Constitution, any person prejudiced the fundamental or other human rights and freedoms of others or the public interest.
- 100. I have therefore identified two issues as follows;
- Whether the custom and practice of polygamy contravenes article 24 of the Constitution in that it subjects women and children to torture or cruel, inhuman or degrading treatment or punishment, and
- Whether the continued legal recognition of the practice of polygamy amounts to derogation from the right to freedom from torture and cruel, inhuman or degrading treatment or punishment contrary to article 43 of the Constitution. u
- Whether the custom and practice of polygamy contravenes article 24 of the Constitution in that it subjects women and children to torture or cruel, inhuman or degrading treatment or punishment' t.
- 101. The deponent to the affidavit in support (M/s Elizabeth Achola), avers that the basis of her knowledge/information about the issues she depones to is her research, studies and exposure to a polygamous environment. I accept her evidence in this regard. However I am not persuaded that M/s Elizabeth Achola's conclusions, relating to anxiety, jealousy, witchcraft and physical or emotional pain allegedly linked to practicing polygamy are applicable across the board. The deponent's evidence does not represent what takes place in all polygamous marriages. Therefore, assertions that polygamous husbands fail in their parental roles of providing for and supporting their children are speculative. Equally speculative is the assertion that all polygamous marriages create toxic environments for women and children, thereby exposing them to the social ills which the petitioner cites. Indeed, all the averments by the petitioner do not constitute evidence that the social ills she cites exist in all polygamous marriages in Uganda.
- 102. The contention that polygamy is directly associated with increased transmission of HIV/AIDS is not sufficiently substantiated. The Uganda AIDS Indicator Survey 2011 which the petitioner heavily relies on has various statistics relating to different categories of multiple-sexual partners. Therefore, while the impact of having multiple sexual partners on the transmission of HIV/AIDS cannot be downplayed, it is not entirely true that all polygamous marriages are affected. Moreover, HIV/AIDS transmission in

both polygamous and monogamous settings is dependent on how the sexual partners practice the known safety measures.

- 103. It is of note that the report relied on by the petitioner also points to the prevalence of high-risk transmission in non-marital and non-cohabiting partners. Crucially, researchers and scholars have varied opinions and findings about the role polygamy plays in the transmission of HIV/AIDS, with some concluding that polygamy is likely to be protective against HIV/AIDS transmissions.
- 104. The foregoing considerations therefore discount the proposition that polygamy is the major cause or increases the risk of transmission of HIV/AIDS. Importantly, there is no evidence suggesting that most polygamous spouses are HIV/AIDS infected. In my view, the petitioner over rates polygamy as a significant factor for the promotion of violence against women and as a cause for increased spread of HIV/AIDS.
- 105. Citing the Uganda report to the Committee on the Elimination of Discrimination against Women (CEDAW) Committee 2009, the petitioner

⁸See for example, Effect of concurrent sexual partnerships on rate of new HIV infections in a high-prevalence, rural South African population: a cohort study; Frank Tanser, Till Biirnihausen, Lauren Hund, Geoffrey P Garnett, Nuala McGrath, Marie-Louise Newell. www.thelancet.com Vol 378 July 16, 2011; Marital Concurrency and HIV Risk in 16 African Countries; Ashley M. Fox, <https://www.researchgate.net/publication/1259626870>

Is polygyny a risk factor in the transmission of HIV in sub-Saharan Africa? A systematic review, Martin M Gazimbi et al; African Journal of Reproductive Health December 2020; 24 (4):2 | 2;

Polygyny and the spread of HIV in Sub-Saharan Africa: A case of benign concurrency, Georges Reniers and Susan Watkins; Office of Population Research, Princeton University, Institute of Behavioural Science, University of Colorado at Boulder California Centre for Population Research, University of California - Los Angeles.

contends that polygamy increases the risk of women becoming victims of gender-based violence. In the report, it was noted that "practices and attitudes regarding women in marriage " and specifically polygamy, are a predisposing factor to sexual and gender-based violence.

- 106. In addition to M/s Elizabeth Achola's personal experiences, the petitioner sought to rely on information in paragraph 75 of annexure H to the affidavit in support, a Uganda government report on the Convention on the rights of children. The government reported thus: "it should be noted that the family in Uganda is faced with numerous problems, some of which arise from the family own structural characteristics and others from their own survival environments. In regard to polygamous and composite families, wives and children can suffer many psychological problems and material deprivations. Children especially suffer from parental neglect " .

- 107. The information in the report is not controverted by the respondent. ^I therefore accepted it as representing the situation in "polygamous and composite families" in Uganda at the time the report was made. I however think that the fact that "the family in Uganda is faced with numerous problems...In regard to polygamous and composite families, wives and children can suffer many psychological problems and material deprivations. Children especially suffer from parental neglect, " cannot form the basis for the conclusion that the custom and practice of polygamy contravenes article 24 of the Constitution. The report does not directly link the cited social ills to polygamy as an institution. This left room for other explanations, key of which is the possibility that the social ills may stem from broader systemic issues (e.g., poverty) rather than polygamy itself.
- 108. I note that paragraph 166 of the report speaks about the adoption of measures which were aimed at addressing the social ills that were cited. One

such measure was the adoption of the Domestic Violence Act which criminalizes the different forms of domestic violence. The Domestic Violence Act which is instrumental in fighting domestic violence has been in force since March 2010.

- 109. Since the petitioner suggests that polygamy is inherently torture or cruel, inhuman or degrading treatment or punishment, this assertion must be specifically interrogated.

Is polygamy or its practice inherently torture or cruel, inhuman or degrading treatment or punishment?

- 110. There can be no doubt that involuntary polygamy (e.g. forced marriages, underage unions, or systemic coercion which is defined by intentional infliction of suffering) aligns with human rights violations including torture or cruel, inhuman or degrading treatment or punishment.
- ¹^I1. However, where all parties are consenting-adults as is required under the Customary Marriage (Registration) Act and the Marriage and Divorce of Mohammedans Act, polygamy does not constitute torture or cruel, inhuman or degrading treatment or punishment. It is of note that even international law (e.g., Universal Declaration of Human Rights) condemns forced marriage but does not explicitly ban consensual polygamy.
- 112. That said, I acknowledge that women are not a homogenous category. Their category includes literate, illiterate, rich and poor women. I therefore think that women's experiences in marriage should not be solely assessed on the premise of age and consent. The decision to contract a marriage and the experiences in that union may be functions of power dynamics. This, however, is as true for polygamous unions as it is for monogamous ones. Therefore, the

^eArticle 16 of the Universal Declaration of Human Rights.

answer to resolving the social ills which the petitioner cites may lay more with empowering women, than with outlawing polygamy.

^I 3. There is no evidence that polygamous marriages in Uganda are characterized by domestic violence. I would therefore find that the custom and practice of polygamy does not contravene article 24 of the Constitution since it does not [inherently] subject women and children to torture or cruel, inhuman or degrading treatment or punishment.

ii. Whether the continued legal recognition of the practice of polygamy amounts to derogation from the right to freedom from torture and cruel, inhuman or degrading treatment or punishment contrary to article 43 of the Constitution.

- 114. It must be emphasized that the practice of polygamy in Uganda is ^a matter of choice. This underscores the principle of non-interference with citizens' exercise of their individuality, the essence of human rights. Coercing citizens into practicing monogamy for example, would be antithetical to the very idea of human rights. Except for enforcing children's rights to education and health (immunization), and compulsory vaccination (public health concerns), the government is not under any duty to coerce its citizens into enjoying any rights. Moreover, outlawing polygamy which this petition seeks, would deprive some citizens of the enjoyment of their Constitutionally protected rights to culture and to religion. Therefore, fostering voluntary engagement through education/sensitization, empowerment, and equitable systems aligns better with the spirit of human rights.
- 115. The finding that the custom and practice of polygamy does not contravene article 24 of the Constitution and that it does not [inherently] subject women and children to torture or cruel, inhuman or degrading

treatment or punishment supports a conclusion that its legal recognition does not amount to derogation from the right to freedom from torture and cruel, inhuman or degrading treatment or punishment contrary to article 43 of the Constitution. I would so find.

Issue 3. Whether the practice and custom of one man marrying more than one wife at any given time contravenes women's rights to an equal share of property at, in and upon dissolution of marriage guaranteed under Article 31 (1) (b) of the Constitution.

- 116. The petitioner cites several social ills which they attribute to the practice of polygamy, and which (they assert) contravene article 31 (1) (b). Key of these is the inherent imbalance in marital rights and responsibilities between husband and wife in the areas of inheritance and dissolution of polygamous marriages. It is argued that Sharia law recognizes a wife's right to inherit one-eighth of her deceased husband's estate if they have children, and one-fourth if they do not. Further that a woman whose husband has four wives must share that one-eighth with her three co-wives, yet the husband would inherit one-fourth of each wife's estate if they have children, and one-half if they did not.

- 117. According to the petitioner, unlike a monogamous husband who is fully committed to one wife who has rights and interests in, during, at dissolution of marriage and at death, a polygamous husband must divide his time and resources to support multiple wives. This, it is argued, breeds inequality. Also, that providing generously for each wife does not change the fact that the husband can only possibly contribute one-fourth of his income to one wife. A wife in ^a polygamous setting on the other hand commits her entire financial income and non-financial contributions to the maintenance of the family and children.
- 118. According to the petitioner, whether any equality exists between co-wives is irrelevant. Rather, the right to equality in marriage guarantees equality between a married couple: the husband and the wife. Therefore, even where a wife has equal rights in marriage to her co-wives, polygyny still violates Article 31(1Xb), since the wife does not have equal rights with her husband, during and after the marriage.
- I 19. Article 31 (1) (b) of the Constitution provides as follows:

Rights of the family

(I) A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age-

(b) to equal rights at and in marriage, during marriage, and at its dissolution.

- 120. As has been found, the practice and custom of polygamy is optional. Spouses who contract polygamous marriages are presumed to be aware of responsibilities and expectations, including the fact that their rights are subject to the rights of the other wives and children. Consenting adults cannot be heard complaining about terms and conditions they agree to abide by. While it is acknowledged that a spouse may contract a monogamous marriage only for it to be turned into a polygamous one without her consent, this, however, is a criminal offence.
- 121. The property rights of monogamous wives differ from those of polygamous ones. Comparing the entitlements of monogamous wives with those of ^a polygamous one is not helpful since the two categories of wives are "unequal".
- 122. Therefore, while I acknowledge the fact that all the cited social ills exist in polygamous settings, given that the practice of polygamy is a choice, a conclusion that its practice contravenes women's rights to an equal share of property contrary

to Article 31 (1) (b) of the constitution would contradict the concept of human rights.

- 123. Drawing on the foregoing, I would find that the practice and custom of one man marrying more than one wife at any given time does not contravene women's rights to an equal share of property at, in and upon dissolution of marriage guaranteed under Article 3 I (1) (b) of the Constitution.

Issue 4. whether the omission by the Ugandan Government to outlaw the custom and practice of one man marrying more than one wife at any given time contravenes Article 32 (2) & (5) and 33 (1) of the Constitution.

124. Article 32 (2) & (5) of the Constitution provides as follows:

Affirmative Action in favour of marginalised groups

- (2) Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group to which clause (1) relates or which undermine their status, are prohibited by this constitution.
- (5) Parliament shall make laws for the purpose of giving full effect to this article.

125. Article 33 (1) of the Constitution provides as follows:

Rights of women

- (1) Women shall be accorded full and equal dignity of the person with men.
126. As has been found, section 4 (2) of Customary Marriage (Registration) Act, and Section 2 of the Marriage and Divorce of Mohammedans Act which provide for polygamy are not unconstitutional. Therefore, those laws and the practice of polygamy are not against the dignity, welfare or interest of women or any other

marginalized group in terms of article 32 (1)' The Government is not under any obligation to outlaw polygamy.

127. Drawing on the above, I would find that the government's failure to outlaw polygamy does not contravene Articles 32 (2) & (5) and 33 (1) of the Constitution.

Whether the Petitioner is entitled to the declarations and orders prayed for.

- 128. Since all the grounds of the petition have been resolved in the negative, there is no basis for granting the declarations and orders that were sought. I would therefore dismiss the petition.
- 129. The petition raises matters of public importance. I would therefore order that each party bears their own costs.

Dated at Kampala, this 9th day of February, 2025. Ma t Tibulya

Justice of the Constitutional Court.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: Mulagonja, Kihika, Tibulya, Ka-zibue Ka urumi & Mugengi JJCC.

CONSTITUTIONAL PETITION NO. L2 OF 2021

WOMEN'S PROBONO INITIATM (W'PI) ::::::::::::::: PETITIONER

Versus

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

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my sister, Margaret Tibulya, JCC, I agree that this petition should fail for the reasons that she has given.

As my brothers Oscar Kihika, Moses Kazibwe Kawumi and Dr. Asa Mugenyi also agree, the petition stands dismissed and each party will bear its costs.

Dated at Kampala this I day of 2025. ..b+ Y)

Irene Mulyagonj

JUSTICE OF THE CONSTITUTIONAL COURT

THT REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA CORAM: MulyagoaJa, Kihlka, Tlbulya, Kazibwe Kawumi & Dr. Mugeayi JJCC.

CONSTITUTIONAL PETITION NO. 12 OF 2021

woMEN',S PROBONO INITIATM (WPI) PETITIONER

Versus

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT OF OSCAR JOHN KIHIIKA, JCC

I have had the opportunity of reading the dra-ft judgment of my learned sister Hon. Lady Justice Margaret Tibulya. I agree with the reasoning, analysis and conclusion of my learned sister that this petition fails.

I would just add a general comment. The Petitioner, in arguing that the practice of polygamy is unconstitutional, makes the fundamental mistake of assuming that society is homogenous. This assumption is far from the truth. The framers of our Constitution were alive to the fact that there are diverse communities and religious practices in Uganda some of which espouse polygamy and other norms. It is for that reason that Article 37 of our Constitution guarantees an individual's right of choice when it comes to matters pertaining to culture, tradition

llPage

creed or religion provided it is done in community with others. In other words, there ought to be respect for other people's beliefs and practices.

This petition fails and is dismissed with each party bearing its costs.

Dated at Kampala this 11th day of .. 2025.

I

OSCAR JOHN KIHICA

JUSTICE OF THE CONSTITUTIONAL COURT.

**THE REPUBLIC OF UGANDA IN THE CONSTITUTIONAL COURT OF UGANDA AT
KAMPALA CONSTITUTIONAL PETITION NO. 12 OF 2021**

BETWEEN

WOMEN'S PROBONO INITIATIVE(WPI)

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

**CORAM: HON. JUSTICE IRENE MULYAGONJA, JCC HON. JUSTICE OSCAR JOHN KIHICA, JCC
HON. JUSTICE MARGARET TIBULYA, JCC HON. JUSTICE MOSES KAZIBWE KAWUMI, JCC HON.
JUSTICE DR. ASA MUGENYI**

JUDGMENT OF MOSES KAZIBWE KAWUMI, JCC

I have had the benefit of reading in draft the Judgment prepared by my learned sister the Hon. Lady Justice Margaret Tibulya. I agree with the decision and orders she has proposed. I have nothing useful to add.

