THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; TIBATEMWA-EKIRIKUBINZA; & MUGAMBA, JJ.SC; 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

[Appeal from the Judgment of Justices of the Constitutional Court (Owiny-Dollo, DCJ; Kasule; Kakuru; Musoke & Cheborion, JJCC) 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 KATUREEBE, CJ

I agree with the Judgment of my learned Sister, Stella Arach-Amoko, JSC which has been read. I agree that the appeal should fail and that each party should bear their own costs. I also agree that the preliminary objections do fail for the reasons she has given.

I however wish by way of emphasis, to add my own thoughts to some of the issues raised in the appeal. The background to the appeal as well as the representation has been given in the said learned Justice's Judgment and I will not reproduce them here. I will go straight to the issues I want to discuss namely, issues 1, 2, 3, 4 and 5.

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

The Constitutional Court by majority decision declared that sections 1, 3, 4 and 7 of the Constitutional (Amendment) Act No. 1 of 2018 which, among others, removed age limit for the President and Local Council V Chairpersons were passed in full compliance with the Constitution and thus remain lawful and valid provisions of the Constitution (Amendment) Act No. 1 of 2018.

The appellants were dissatisfied with this finding and contended, among others, that the said provisions offended the basic structure of the Constitution of the Republic of Uganda. At the hearing, this issue was argued by counsel for the appellants in Constitutional Appeal No. 03 0f 2018, as well as Mr. Mabirizi, the appellant in Constitutional Appeal No. 02, who represented himself.

Before I proceed to resolve this issue, I wish to break down what is understood by the basic structure doctrine in different jurisdictions.

The basic structure doctrine is a judge-made Indian principle stating that a country's Constitution has certain basic features that cannot be amended by its legislative body. The amendment of such features would result in drastic changes to the Constitution thus rendering it unrecognizable. This doctrine was first affirmed by a German jurist known as Professor Conrad Dietrich. The doctrine was then entrenched in the constitutional jurisprudence of India in the 1960s and 1970s which has since fundamentally influenced the development of

constitutionalism and rule of law in a number of democracies across the world.

The parameters of the doctrine have been laid out in a number of decided cases.

In the case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC,** the Supreme Court of India stated that:

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

The Court went on to rule that while Parliament has wide powers to amend the Constitution, it did not have the power to destroy or emasculate the basic elements or fundamental features of the Constitution. The Supreme Court declared that the basic structure or features of the Constitution rest on the basic foundation of the Constitution. The basic foundation of the Constitution is the dignity and the freedom of its citizens which is of supreme importance and cannot be destroyed by any legislation made by the Parliament. **(See** paragraphs 316 and 317 of the decision in **Kesavananda Bharati).**

The Supreme Court of India further elucidated on the said doctrine in the case of **Minerva Mills v. Union of India, AIR 1980 SC 1789**, where court held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a constitution. The Court went further to hold that the claim of any particular feature of the Constitution to be a "basic" feature would be determined by the Court in each case that comes before it.

This doctrine has also been instrumental in shaping the constitutional jurisprudence of different countries across the world such as Bangladesh, South Africa, Kenya, Taiwan, Thailand, Argentina, Belize, Colombia; etc.

In Kenya, the court of Appeal in the case of **Njoya vs Attorney General and Others (2004) AHRLR 157** held that:

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

The Supreme Court of Bangladesh, in **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, while adopting the basic structure doctrine held:

"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament... Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".

Justice Albie Sachs of the South African Constitutional Court in the case of **Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)** while discussing the applicability of the basic structure doctrine noted as follows:

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

From the above decided cases, it comes out clearly that in interpreting a constitution, the history of and the prevailing circumstances in a given country ought to be taken into account. As such, it is true that the question of whether or not the doctrine of basic structure applies, depends on the constitutional history and the constitutional structure of each country. As was underscored by the Justices in the Constitutional Court, each Constitution is a product of historical events that brought about its existence.

In an earlier case decided by the Constitutional Court of Uganda: **Saleh Kamba & others Vs. Attorney General & others, Constitutional Petition No. 16 of 2013;** Kasule JCC stated as follows:

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

In Uganda, I am of the view that the basic structure does find its roots in the 1995 Constitution. I am in agreement with the finding by the Constitutional Court that the principal character of the 1995 Constitution, which constitutes 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.

The pillars of the 1995 Constitution are rooted in the preamble to the Constitution. The Preamble of the 1995 Constitution captures the basis for the provisions of the Constitution in so far as it gives a historical context in which the Constitution was being promulgated. One has to visualize what the framers of the Constitution had in mind when they wrote:

"WE THE PEOPLE OF UGANDA:

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

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

COMMITTED to building a better future by establishing a social-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

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

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

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda."

The learned Justices of the Constitutional Court, each, gave an elaborate political history of Uganda which was characterized by political treachery, military coups, gross violation of human rights, emasculation of institutions such as Parliament, the Judiciary and the marginalization of the people etc.

This, in my view, is what the framers of the Constitution must have had in mind when they wrote the Constitution. It is the reason Article 1 of the Constitution was written the way it was – putting the people at the centre of everything and giving all political power to the people. But it is also important to note that the same article 1(1) states that the people will exercise their power in accordance with the Constitution. This means that the Constitution reigns supreme over all people and all organs of the State. All must act in accordance with the Constitution.

In article 1(2) is the cardinal principle that the people **"shall be governed through their will and consent."** This is to answer the part of history where a radio announcement could inform the country of a new President and new government as a result of Military Takeover – without the knowledge let alone consent of the people.

Article 1(3) emphasizes the Constitution as the source of **"all power and authority of Government and its organs"**. At the same time, the clause emphasizes that the Constitution itself derives its authority from the people. It is important to note that, even here, the emphasis is that by this Constitution, the people consent to be governed in accordance with the Constitution. Clause 4 spells out how the people will be governed. It states:

> *"The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."*

In my view, this article goes a very long way to lay the foundation for the Constitutional governance of the Country by the people on the basis of free and fair elections or referenda. To me this is the first pillar on the basic structure of our Constitution, based on the concerns in the Preamble. So the people have a right to choose their representatives to whom certain powers have been delegated under the Constitution. But a power has been reserved to demand for referenda.

This is more clearly brought out by looking at article 255 of the Constitution as amended by the Constitution (Amendment) Act No. 2 of 2005. It states as follows –

255. Referenda generally

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

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

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

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

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

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

Clearly, what this means is that the Constitution is amendable; one, by the representatives of the people (Parliament) as per article 258 thereof; two, by representatives together with the population in a referendum as per article 259 thereof; three, by representatives together with district councils as per article 260 thereof; and four, by referenda on any question as demanded either by any person or by Government as per article 255 thereof. It is important to note that article 255 (4) makes it crystal clear that the only matter that cannot be subjected to a referendum is the issue of fundamental and other rights and freedoms as guaranteed under chapter 4 of the Constitution and the power of the courts to question the validity of the referendum.

The basis for the above position must be article 20 (1) of the Constitution which states:

> *"Fundamental rights and freedoms of the individual are inherent and not granted by the state."*

The next pillar of the basic structure of our Constitution is Article 2 which provides for the Supremacy of the Constitution. I have decided to emphasize Article 1 of the Constitution because it is relevant to this Constitutional Appeal in so far as the appellants have raised the issue of the Basic Structure of the Constitution and averred that the Constitution (Amendment) Act violates that Basic Structure. Indeed even the Speaker, when she was sending out the Members of Parliament to go for consultations, she did state that the Bill touched on Article 1 of the Constitution.

There are other fundamental Pillars of the Uganda Constitution as found by the learned Justices of the Constitutional Court. All the Justices agreed that the basic structure doctrine applied to Uganda. The only point of departure seems to be where they point to those doubly entrenched provisions, i.e. those requiring referendum or District Council resolutions as the only ones that form the basic structure, and the rest which Parliament may amend on its own as not being part of the basic structure.

I am of the view that a provision may not have been given double entrenchment under article 260 or 261, but it is still a fundamental part of the structure of the Constitution. For example Article 260 of the Constitution provides for those parts of the Constitution that are doubly entrenched and would require a referendum to amend. One of those is

Article 44 in Chapter 4 of the Constitution. That article is on the non-derogable nature of certain rights. Parliament could amend this article provided a referendum is held. But, as already pointed out above, the whole Chapter 4 on the Protection and Promotion of Fundamental and other Human Rights and Freedoms is such an essential pillar of the Constitution that the results of a referendum may not touch it [as per article 255 (4) supra].

To my understanding, the Basic Structure doctrine may be equated to a family house. It must have a strong foundation, strong pillars, strong weight-bearing walls, strong trusses to support the roof. The roof could be grass thatch, as happens in many of our homesteads. The roof could be iron sheets of particular gauge. The iron sheets could be of different colours. If the wind blew away part or all of the roof, the basic structure should remain and the next day the family can put the roof back. But if the weight bearing pillars were undermined or removed, the whole structure would collapse. It would not be a dwelling house any more.

I agree with the view expressed by Justice Albie Sachs in the case of Executive Council of Western Cape Legislature (supra) that

"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its 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."

The question then is which provisions of the Constitution can be equated to a pillar in a House Structure and which can be equated to iron sheets or doors which can be removed and replaced with relative ease but without affecting the basic structure.

With regard to the Leadership of the Country, I am of the view that the other fundamental pillars, apart from Article 1, are Article 5 and 98.

Article 5(1) states that "Uganda is one Sovereign State and a Republic." Although this is not doubly entrenched under Article 260, Parliament would not change this without changing the character of the Constitution. But does that mean that the people themselves would not change this if they so wished? This is where article 255 may come in i.e. demand for a referendum.

Article 98 states that there shall be a President of Uganda. Article 103(1) states that the President shall be elected by universal adult suffrage through a secret ballot. If Parliament were to amend this and provide, for example, for a Prime Minister, or even a President appointed by Parliament, it would be a departure from the basic structure of the Constitution. It would shake the pillar of Uganda as a Republic, headed by a President elected by universal suffrage. This is a pillar of the Constitution. Again, the people themselves could demand to change it. But whether the President is 40 years or 75 years, in my view, is not part of the fundamental pillars.

Does that mean therefore that those identified pillars are cast in stone and can never be amended? My answer is no. In light of article 255, those articles can be amended if the people so desire and call for a

referendum; only with the exception of matters set out under article 255 (4) thereof. This would be in line with article 1 of the constitution.

Now coming to the case before the Court, the question is whether the amendment to remove the age limit for the President and the Local Council V Chairpersons from the Constitution affected the basic structure of the 1995 Constitution of Uganda? To answer this question, and using my above analogy, I need to determine whether the effect of the above said amendment was to the strong pillars, to the weight-bearing walls, or to the roof in as far as the 1995 Constitutional structure was concerned?

Mr. Lukwago for the appellants in appeal No. 03 of 2018 submitted that the learned Justices of the Constitutional Court misconstrued the application of the basic structure doctrine in their finding that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure doctrine and, as such, Ss. 3 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 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 and not to the age limit.

Counsel further argued that the 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 relied on the authority in **British Caribbean Bank v The Attorney of Belize Claim**

No. 597/2011; Kesavananda case (supra) and **Minerva Mills case (supra)** in emphasizing the essence of the preamble when determining the basic structure of a given constitution.

Counsel therefore invited the Court to take cognizance of the fact that the framers of the 1995 Constitution deemed it absolutely necessary to enshrine within the text of the Constitution such provision as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy; which included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. All these provisions, counsel submitted, were designed and intended to guarantee orderly succession to power and political stability which, to date, remains a mirage for Uganda. Counsel argued that by amending Article 102 (b) to remove the presidential age limit, after the earlier scrapping of 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. Counsel prayed that issue 1 be answered in the affirmative.

In reply by the respondent, 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 do not derogate from the basic structure of the 1995 Constitution. The respondent argued that the articles that were found by the framers of the Constitution to be fundamental and to form part of the basic structure were carefully entrenched as a safeguard against the risk of abuse of the Constitution through irresponsible amendment

of those provisions. The respondent argued that the entrenched articles of the Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. Only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

The respondent concluded that the framers of the Constitution were alive to the fact that our society is not static but dynamic and that over the years, there would arise a need to amend the Constitution to reflect the changing times. As such, Parliament having complied with the provision under Article 259 of the Constitution, it was within their powers to enact sections 3 and 7 of the Constitution (Amendment) Act 2018 into law and this did not in any way contravene the basic structure of the Constitution and neither was it inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

In further examining what constitutes the basic structure of the Uganda Constitution, let me first consider the findings by the learned Justices of the Constitutional Court on this matter.

Owiny-Dollo, DCJ held that what constitutes the basic structure of the Constitution has not been conclusively settled; hence, whether or not any particular feature of the Constitution amounts to a "basic" feature, is left to Court to determine. In doing so, Court must ascertain and be guided by the character of the Constitution in issue. He stated that the principal character of the 1995 Constitution, which constitutes 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.

The Hon. DCJ went ahead to rule that in the fullness of their wisdom, the framers of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution considered to be fundamental features of the Constitution. They carefully entrenched these provisions with various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fettered Parliament's powers to do so and thereby denied it the freedom to treat the Constitution with reckless abandon. The Hon. DCJ laid out provisions in the Constitution that require the people to exercise their original constituent power in the amendment of the Constitution, which he said were a clear manifestation of the safeguards in-built within the Constitution to secure the provision of Article 1 of the Constitution; which recognises that the ultimate power is vested in the people.

In the view of the Hon. DCJ, the entrenched clauses and the non-derogable rights as stated under Article 44 of the Constitution constitute the basic structure of the 1995 Constitution of Uganda.

Kasule, JCC was of the view that by application of the doctrine of basic structure, the Parliament of Uganda cannot amend the Constitution to do away or to reduce those basic structures such as sovereignty of the

people (Article 1); the supremacy of the Constitution (Article 2); defence of the Constitution (Article 3); non-derogation of particular basic rights and freedoms (Article 44); democracy including the right to vote (Article 59); participating and changing leadership periodically (Article 61); non-establishment of a one-party State (Article 75); separation of powers amongst the legislature (Article 77), the Executive (Article 98), and the Judiciary (Article 126); and Independence of the Judiciary (Article 128); without the approval of the people through a referendum as provided for under Article 260 of the Constitution.

Musoke, JCC held that whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. More importantly, courts will consider factors such as the Preamble to the Constitution, National Objectives and Directive Principles of State Policy, the Bill of rights, the history of the Constitution that led to the given provision, and the likely consequences of the amendment.

Justice Musoke found that, in Uganda, the Preamble to the Constitution captures the spirit behind the Constitution clearly bringing it out that the Constitution was made to address a history characterized by political and constitutional instability. Another critical aspect of the basic structure of the Constitution of Uganda was the empowerment and encouragement of active participation of all citizens at all levels of governance, among other aspects as laid out in the National Objectives and Directive Principles of State Policy. The other aspects constituting fundamental pillars of our Constitution according to the Hon. Justice were sovereignty of the people as guaranteed under

Article 1 of the Constitution and the Bill of Rights to be found in Chapter Four of the Constitution, particularly the non-derogable rights under article 44 thereof.

Cheborion, JCC held that the Ugandan Constitution was designed to recognize, to a certain extent, the basic structure doctrine in its Preamble, National Objectives and Directive Principles of State Policy as read together with Article 8(A). The Hon. Justice was of the view that, in the Ugandan context, the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution.

Kakuru JCC, (in his dissenting judgment), held that whether or not the doctrine of basic structure applies, depends on the constitutional history and the constitutional structure of each country. Every Constitution is a product of historical events that brought about its existence. Uganda's constitutional history is unique and differs in many aspects from that of Kenya and Tanzania, its neighbouring countries. In that regard therefore, the question as to whether in this Country's Constitution, there are indeed express or implied conditions that limit the amending power of Parliament can only be answered by looking at our unique constitutional history.

According to Kakuru JCC, as far as he could discern, the basic structure of the 1995 Constitution was made of the following pillars:

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

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

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

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

e) *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.*

f) *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.*

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

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

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

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

Justice Kakuru concluded that Parliament, in his view, has no power to amend, alter or in any way abridge or remove any of the above pillars or

structures of the Constitution, as doing so would amount to its abrogation as stipulated under *Article 3 (4).* This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided. He therefore found that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves.

I find that the Justices of the Constitutional Court aptly brought out what constitutes the basic structure of the Constitution of Uganda. Counsel for the appellants in Constitutional Appeal No. 03 of 2018 agrees with the features that the Justices pointed out as being basic but contends that one aspect was left out of that list, that is, the matter of age limit of the President or the Local Council V Chairpersons. This Court therefore needs to examine whether this matter forms part of the basic structure of our Constitution, contrary to what all the Justices of the Constitutional Court found. Mr. Lukwago for the appellants have advanced a number of reasons as to why the appellants believe that the age of the President or Local Council V Chairperson form part of the basic structure.

The main reason advanced by Mr. Lukwago was the failure by the Constitutional Court to take into account the constitutional history of Uganda, the Preamble and the National Objectives and Directive Principles of State Policy embedded in the Constitution of Uganda, as has already been set out in this judgment.

I have taken into consideration the submissions of counsel, the evidence and all materials that were laid before the Constitutional Court and this Court. I have in extenso set out the Preamble. I have

seen nothing to suggest that in the constitutional history of Uganda, one of the problems has been either a very young or a very aged President. There is also nothing to suggest that the ideals espoused both in the preamble and in the National Objectives and Directive Principles of State Policy were directed at the age of a person seeking the office of President or Local Council V Chairperson. What is clear is that those ideals were directed against over stay in power without the free will and consent of the people. That is the essence of Article 1; but not when and at what age one gets into power.

Mr. Lukwago, in his submissions, tried to link the issue of age limit with that of the removal of term limits. In my view this argument is not tenable for two reasons. First the age limit provision is about the qualifications of a person's eligibility to stand for election for President, irrespective of whether that person has ever been elected or not. It may well be the first time that person is presenting him or herself for election. As such it has nothing to do with longevity in office. This provision simply means that a citizen of Uganda who may have distinguished himself/herself in Public Service, Private Sector or any field, is not eligible for election as President because he or she is 75 years of age even when that person has never served as President. On the other hand, term limits were meant to check persons who have already served as President but limit them to two terms, irrespective of age. A person elected President when he or she is 40 years of age would have had to quit at 50 years. There was no question of waiting for 75 years.

I must quickly point out that the issue of term limits is not before this Court nor was it an issue in the Constitutional Court. Term Limits

were removed and that removal was never challenged in court. As the Constitution stands today, it has no provision for term limits.

The question remains how does removal of age limits violate the basic structure of the Constitution? Mr. Lukwago argued further that the provision for age limit was meant to stop leaders who are either too young or senile (as he puts it). No evidence was adduced whatsoever to show that a person below 35 years of age, as long as they are adults, or a person of 75 years has an inherent inability to be President.

No examples were cited to us from those countries that have applied the basic structure doctrine whether they have provisions for age limits of their leaders.

On the contrary at this very moment across the world, we have countries that have defied that school of thought. In Malaysia, in May 2018, Prime Minister Mahathir Mohamad was popularly elected at the age of 92, becoming the oldest political leader in the World. And of greater interest to know is the fact that he is a person who had before led that country, retired and left others to take over. The people felt he should return to power and they indeed re-elected him. In Austria, Sebastian Kurz, the current Chancellor was elected in December 2017 at a very young age of 31 years. In British history, William Pitt the Younger, became the youngest British Prime Minister in 1783 at the age of 24 years. He left office in 1801 but was re-elected in 1804 and served up to 1806. On the negative side, neither Hitler nor Idi Amin who committed such heinous atrocities were 75 years or above, or below 35 years.

All the above examples suggest that the problem is not the age of the leader. None of the people who terrorized Uganda and the subject of the Preamble were anywhere near 75 years of age. On the other hand the Preamble does express the desire to promote equality. The National Objective II (1) provide for the empowerment and encouragement of all citizens to actively participate in the governance of the Country at all levels. To deny a person a chance to participate in vying for leadership of the Country because of age would affect the people's sovereignty and power to choose a leader of their choice. In other words, rather than empowering the people, the age restriction will constrain the people's discretion in choosing a leader of their choice. Age should be a factor that the people will consider in making their choice, as candidates canvass for the people's support during campaigns. Depending on the issues in the country at the time, the people may choose an older person or a young person. It is their sovereign right to do so.

In my considered view therefore, the Justices of the Constitutional Court were correct to find that the restriction on the age of a President or the Chairperson Local Council V was not a basic pillar of the Constitution of Uganda and was therefore not part of the basic structure. In terms of the analogy set out herein above, the restriction on age may be a roof or shutter on a house; very important on the house but capable of being altered without changing the basic structure of the particular house. It is not a foundation or a strong pillar on the house which, if changed, would lead to the collapse of the house. I have therefore found no reason to interfere with the findings of the learned Justices of the Constitutional Court on this point and I uphold the same accordingly.

Much of the above findings cater for the arguments raised under issue 5. The only additional argument was that the Constitutional Court failed to consider the appellants' assertion that the provisions of sections 3 and 7 of the impugned Act were in contravention of Articles 1, 8A and 38. In my opinion, the allegations by the appellants to the effect that the Constitutional Court did not give due consideration to the alleged infringement of articles 1 and 8A are not correct. The learned Justices of the Constitutional Court are on record as having considered and made findings on the relationship between sections 3 and 7 of the impugned provisions on the one hand and articles 1 and 8A of the Constitution on the other.

The Constitutional Court found that the removal of age limit for the President and Local Council V Chairperson did not affect or infect article 1 of the Constitution. The removal did not in any way negate the people's power to choose a leader of their choice. If anything it just increased the spectrum of the people's choice. The impact of the age limit removal on article 8A was aptly discussed under the basic structure doctrine. None of the aspirations espoused in the National Objectives and Directive Principles of State Policies point to the desire to have a limit on the age of either the President or the Local Council V Chairperson.

Regarding the allegation touching on article 38 of the Constitution, the said article provides as follows:

38. Civic rights and activities

1. Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

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

With due respect to learned counsel for the appellants, I do not see how the above provision is infringed by the removal of age limit. I am instead persuaded by the argument that rather than restricting the participation of Ugandans in the affairs of government, the removal of the restriction on age enhances such participation. I am therefore unable to fault the Constitutional Court in their findings on this point.

Before I take leave of this ground, I wish to make this observation:

The core of the Preamble, in my view, is the empowerment of the people of Uganda to freely and fairly elect their political leaders. The people must be empowered to decide how they should be governed through deciding on issues by way of referendum when and where necessary. To achieve this, it is the duty of the State to put in place the requisite legal framework and create the requisite peaceful environment by which the people can have genuine free and fair elections or referenda. Once people feel that they are empowered to freely elect their leaders and the elected leaders have the confidence that they were genuinely elected, there will be no question of people going to the bush to fight over rigged elections, nor will there be need for elected leaders to legislate themselves into power by unilaterally extending their term of office beyond that which was constitutionally given to them and without recourse to the people. These were the acts that contributed to the

history of "political and constitutional instability" and led to forces of tyranny, oppression and exploitation that is the core concern of the preamble.

In my view, it was not and could not be the core concern of the Preamble that citizens should legislatively be barred from offering themselves for election. Even if a person were to be legislatively barred from standing for election on account of age, if the subsequent election is not free and fair, the concerns of the Preamble to the Constitution will not have been met. Therefore, it is my considered opinion that article 1 of the Constitution constitutes the basic structure of our Constitution. Age limit on leaders is not part of the basic structure and, therefore, the people's representatives in Parliament can amend that particular provision.

The **first** and **fifth** issues are therefore answered in the negative.

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

The appellants in their grounds of appeal and submissions made several allegations regarding non-compliance by Parliament with the procedure set out in the Constitution and in the Rules of Procedure of

Parliament. I have classified these allegations and I intend to handle them under the following sub-headings:

1. Violation of Article 93 of the Constitution regarding imposing a charge on the Consolidated Fund.
2. Lack of requisite consultation and/or public participation.
3. Breach of Order of Business of the House.
4. Denying Members adequate time to consider and debate the Bill, Non-observance of Rule 201 relating to tabling of the Bill, the three days rule and lack of secondment of the motion to suspend Rule 201 (1) of the Rules.
5. Suspension of some Members of Parliament.
6. Failure to close doors to the Chamber at the time of voting.
7. Denying members of the public access to Parliament.
8. Signing of the Committee Report by members who had not participated in the committee proceedings.
9. Proceeding on the Bill in absence of the Leader of Opposition and other Opposition MPs.
10. 'Crossing' of the Floor by ruling party Members to the Opposition Side.
11. Failure to comply with the 45 days Rule by the Legal and Parliamentary Affairs Committee – Rules 128 (2) and 215 (1).
12. Non observance of the 14 days Rule between the 2nd and 3rd Reading of the Bill, Discrepancies in the Speaker's Certificate of Compliance and illegal assent to the Bill by the President.

1. Violation of Article 93 of the Constitution regarding imposing a Charge on the Consolidated Fund

The relevant part of article 93 of the Constitution provides as follows –

93. Restriction on financial matters.

Parliament shall not, unless the bill or the motion is introduced on behalf of the Government—

(a) proceed upon a bill, including an amendment bill, that makes provision for any of the following—

(i) ……..

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

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

(iv) ……; or

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

Counsel for the appellants in Constitutional Appeal No. 03 of 2018 faulted the Constitutional Court for making a finding that the impugned Act violated the provisions of Article 93 of the constitution but declined to nullify the entire Act holding that non-compliance only affected Sections 2, 6, 8 and 10 of the impugned Act that was extending the term of Parliament and local government councils from five to seven

years since they were introduced by way of amendments that imposed a charge on the consolidated fund. The Court accordingly applied the doctrine of severance to strike out the said provisions.

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

On the issue of the UGX 29,000,000/=, counsel submitted that the constitutional Court erred in law and in fact in holding that the facilitation of UGX 29,000,000/= to Members of Parliament did not make the enactment of the Constitution (Amendment) Act, 2018 to be contrary to Article 93 of the Constitution. Counsel submitted that the Appellants had before the constitutional court shown that Article 93 was contravened when a charge was made on the Consolidated Fund by paying each Member of Parliament UGX 29 million as facilitation to each Member of Parliament including ex-officio members to carry out consultations with the public regarding the Bill. Counsel invited this Court to make a finding that this ex-gratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

For the appellants in Constitutional Appeal No. 04 of 2018, Counsel submitted that the Constitutional Court having found that some of the provisions in the challenged Act contravened Article 93 of the Constitution, the Court would have come to no other conclusion other than nullifying the whole Act. Counsel submitted that according to the wording in article 93 of the Constitution, Parliament was prohibited from proceeding with the bill or a motion with the effect of imposing a charge on the consolidated fund. Counsel therefore submitted that the fact that the offending provisions were later found to be unconstitutional did not change the fact that Parliament proceeded with the Bill and motion in contravention of the Constitution. The provisions of the Constitution deal with a Bill. It is the Bill which was in issue and the Court ought to have made a decision on the constitutionality as at the time of considering the Bill and not after the Bill became law.

Counsel further challenged the finding by the Constitutional Court to the effect that the shillings 29 million paid to Members of Parliament to carry out the consultations was not a charge on the Consolidated Fund because it came out of the budget of the Parliamentary Commission. Counsel submitted that even if the money came through the Parliamentary Commission it still was charged on the Consolidated Fund since the respondent did not prove that it was contained in the budget estimates for Parliament for the financial year 2016/2017 and in the Appropriation Act.

It was argued by Mr. Mabirizi that the amendments had impact on electoral and court processes. The budget for the Electoral Commission and the Judiciary were charged on the consolidated fund. As such, the

added activities to the Electoral Commission and the Courts translated into increased charge on the consolidated fund.

In reply, the Attorney General submitted that Article 93 of the Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill or motion that had financial implications as provided therein except when introduced on behalf of the Government. The Attorney General continued that the above notwithstanding, Article 94 of the Constitution guaranteed the right of a Member of Parliament to move a private member's bill. Relying on the decision of this Court in **P.K. Ssemwogerere & Anor Vs Attorney General, Constitutional Appeal No. 1 of 2002**, the Attorney General submitted that the above two provisions of the Constitution had to be construed harmoniously with each sustaining the other and not destroying the other.

The Attorney General further submitted that pursuant to Article 94 of the Constitution, Parliament made Rules of Procedure governing the way it conducted business. Referring this Court to Rule 117 of the Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial Implications. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implication and did not contravene Article 93 of the Constitution.

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

submitted that there was ample evidence before the Court to establish that Parliament only proceeded with the bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that this position was confirmed by the Constitutional Court.

The Attorney General concluded that the Justices of the Constitutional Court were right to strike out the provisions of the impugned Act that did not comply with the Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of severance. He thus invited this Court to uphold the decision of the Constitutional Court to the effect that the bill as presented by Hon. Magyezi did not contravene Article 93 of the Constitution.

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that the Clerk to Parliament had ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that the said facilitation to Members of Parliament did not make the enactment of the impugned Act inconsistent with Article 93 of the Constitution. The Attorney General argued 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; the Article did not concern itself with the money used in processing the bill, allowances or facilitation that was paid out to the Members of Parliament to process the Bills.

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

The finding of the Constitutional Court was that the Magyezi Bill in the form it was first presented had no provision for imposition of a charge on the Consolidated Fund. It was the amendments that were brought in the course of debating the original bill that had the effect of imposing a charge on the Consolidated Fund. Parliament went ahead to debate and pass the bill into law. The Constitutional Court was of the view that addition of prohibited matters in a bill that was properly before Parliament could not vitiate the entire bill and applied the principle of severance.

It is important to point out that the import of article 93 is directed to the content and not the process of the bill; i.e. the bill, if moved by a private member, must not contain a provision that imposes a charge on the Consolidated Fund. It is not that no funds should be incurred in the course of processing the bill. As such, the provisions in the bill have to be looked at to ascertain whether any of them had that effect. Sections 1, 3, 4 and 7 of the Bill did not contain a provision that created a charge, and had no effect of imposing a charge on the consolidated fund beyond that already budgeted for by the institutions responsible to enforce them. They were therefore not provisions that were a target for article 93 of the Constitution. The import of the certificate of financial implications was that the Minister was satisfied that those provisions could be accommodated within the medium term framework without imposing any extra expenditure beyond that budgeted for within that period.

On the other hand, the provisions in sections 2, 5, 6, 8, 9 and 10 had the effect of imposing a charge on the consolidated fund beyond what could be accommodated in the medium term framework. These provisions called for expenditure say on a referendum which was necessary to bring them into operation. The latter provisions were therefore passed in contravention of article 93 of the Constitution.

The issue therefore raised by the appellants is whether the Constitutional Court was in order and was capable of severing the latter provisions from the original provisions of the bill. My opinion is that if the bill at the time it was brought was in compliance with the law, there is no reason it becomes void by reason of an illegal addition. It would be different if the original bill as presented contained improper provisions. It would equally be different if the provisions contained in the original bill were the improper ones and those added were the proper ones. In those two latter cases, one could successfully argue against severance because you cannot amend what is already a nullity. But in a situation where the original content was within the provisions of the law, I do not see how addition of illegal provisions contaminate the bill to the extent that the two cannot be separated.

I think it is important at this stage to elucidate on the procedure of presenting, amending and passing of bills.

Hon. Magyezi sought and obtained permission from Parliament to move a Private Member's Bill in accordance with the Constitution and the Rules of Procedure of Parliament. The Bill was given a first reading and committed to the relevant Committee of Parliament for further scrutiny. During the proceedings of the Committee, some members indicated

they wanted to move some amendments to the Bill. The Committee made its report to Parliament and the Bill was given a second reading and its principles debated. At the conclusion of the debate, the Bill was committed to the Committee of the whole House for further scrutiny, clause by clause. It is at this stage of the Committee of the Whole House that amendments to the Bill may be made, debated and accepted or rejected. This is done by each and every clause and every amendment thereto being subjected to a vote. The wording of the question put is: *"That clause … as amended do stand part of the bill."* Clearly, at this stage, there is a bill that is properly before the Committee of the Whole House as committed to it by the Parliament. Where the amendment is accepted and passed, it becomes part of the Bill. If it is rejected for any reason, then it does not become part of the Bill. The question that now arises is this: Doesn't an amendment proposed at the Committee stage have to comply with the Constitutional provisions?

In my view, any amendment to the Bill that is proposed must be examined as to whether it complies with the requirements of the Constitution. If the provisions proposed in the amendment contain or make provision for a charge on the Consolidated Fund, other than by reduction, then it is barred by Article 93 of the Constitution and Parliament must not proceed with it. If Parliament proceeds with it and passes it, it is passing a nullity. Parliament might as well have rejected it right at the beginning. If it is left to the Court to discover that nullity, then that provision that should never have been part of the Bill must be severed from the rest of the Bill that is sought to be amended. It would be wrong to hold that because an amendment to the Bill was wrongly

passed, then the whole Bill is vitiated. It is my considered view that, that which was moved and passed in accordance with the law should be saved, and that which was wrongly made part of the proper Bill should be severed from it.

It is therefore my considered view that the principle of severance was applicable in this situation and the Constitutional Court rightly applied the same. I shall return to the principle of severance in relation to the impugned bill later in this judgment.

On the question of the UGX 29,000,000/=, this does not constitute making provision for imposition of a charge on the consolidated fund. As I have already stated, article 93 is directed to the content and not the process of the Bill. The expenses incurred during the processing of a bill are already catered for in the budget of Parliament. Matters like consultation during the process of legislation are provided for in the budget of Parliament. The evidence of the Clerk to Parliament affirmed this position. Such an expenditure is therefore not captured under the provision in article 93 of the Constitution. I have therefore found no reason to interfere with the majority judgment of the Constitutional Court on this matter.

2. Lack of requisite consultation and/or public participation

The basis for the requirement for consultation of and participation of the public in the conduct of legislation is based on recognition of the sovereignty of the people as enshrined in article 1 of the Constitution. The people have the sovereign right to choose who governs them and

how they should be governed. For emphasis, I will lay out the said article in full. It provides –

1. Sovereignty of the people.

(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

(2) Without limiting the effect of clause (1) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent.

(3) All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.

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

It can be discerned from the above provision that there are instances when the people expect to exercise their sovereignty directly and at other times through their elected representatives. Elected representatives like Members of Parliament have delegated authority and, as such, it is expected that when making a law that is so fundamental to the people's existence and well-being, they must consult their electorate. It is however important to note that, in Uganda, the manner and form of public consultation is not set out either under the Constitution or any enabling law.

I have taken into consideration the view expressed by the Kenyan Constitutional Court in the case of **Law Society of Kenya Vs.**

Attorney General, Constitutional Petition No. 3 of 2016 which was relied upon by Mr. Lukwago for the appellants herein. The Kenyan Constitutional Court had this to say:

"... public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply "tweet" messages as it were and leave it to those who care to scavenge for it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances to exhort the people to participate in the process of enactment of legislation by making use of as many fora as possible such as churches, mosques, public "barazas", national and vernacular radio broadcasting stations and other avenues where the public are known to converge and disseminate information with respect to the intended action..."

In my considered opinion, I am not persuaded by the view that consultation has to be a fully quantitative exercise. One should avoid the temptation of taking public consultation or participation in a legislative process as though it were a referendum exercise. It has to be borne in mind that in a situation that does not call for a referendum, the elected representatives hold the mantle to do such as they perceive their electorates' views. I am persuaded to agree with the submission of the Attorney General that the above holding by the Kenyan Constitutional Court had more to do with the specific provisions that

are in the Kenyan Constitution and the County Governments Act of Kenya. As such, the same standard or parameter is neither universally applicable nor can it apply with equal force in Uganda. That notwithstanding, evidence herein shows that Members of Parliament held public meetings in their constituencies over the matters at hand.

The issue of representation of the people is very important. The Preamble to the Constitution of Uganda itself recognizes this Principle. Although the Preamble states **"WE THE PEOPLE OF UGANDA,"** it is clear that not all the people of Uganda were in that room to write the Constitution that is why the Preamble further states:

"NOTING that a Constituent Assembly was established <u>to represent us</u> and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda;

"DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution……" (emphasis added)

Clearly the people were speaking and acting through their elected representatives in the Constituent Assembly. This principle is carried through to Article 1(4), Article 38, Article 63(1) and Article 78.

So when the Constitution gives Parliament the power to make law or to amend the Constitution, that power is being given to the representatives of the people. To me therefore, the primary responsibility to consult the people of Uganda on any proposed legislation, and more particularly on a Constitutional amendment, must

fall squarely first and foremost on the elected representatives of the people. There is nobody in Uganda who does not belong to a Constituency, including the Special Constituencies, so as to be able to access a Member of Parliament to give them their views. The facilitation of Shs. 29 million given to each of the Members of Parliament must be seen in this context: to enable them perform their Constitutional duty of consulting the people of Uganda on an important Constitutional amendment. It is in that regard that the Speaker addressed Parliament thus at the time the Bill was being sent to the Committee: "**Honourable Members, the Bill is sent to the Committee on Legal and Parliament Affairs. However, I would like to remind you, Honourable Members, that this matter touches Article 1 and 2 of the Constitution: people must be involved in this deliberation. Thank you." (Hansard, Tuesday 3 October 2017 page 4791)**

In my considered view, for Members of Parliament to discern the views of their electorate, they are not bound to go through a quantitative let alone a mathematical exercise. The Members of Parliament remain with some discretion to discern the views of their electorate and have authority to bind them. Likewise, even during the Constituent Assembly not all the provisions of the Constitution came from the people. Some were proposed and passed by the Constituent Assembly delegates themselves, some even without regard to the Odoki Commission recommendations.

The only point of concern was the interference with the consultation process of particularly opposition Members of Parliament. There is evidence that AIP Asuman Mugenyi issued a directive which by its terms and on the face of it was meant to thwart consultation by a

section of legislators. The directive was simply illegal and ought to be condemned. Evidence shows that, in fact, it was largely ignored and most of the Members of Parliament were able to conduct their rallies.

The question however is whether such an interference vitiated the entire consultation process. As I have pointed out above, the consultation is not equated to a voting or referendum process. The substance of the matter is whether the particular legislators were able to discern and collect the views of their respective constituencies over the matter in issue. The Hansard indicates that on the floor of the house, various Members of Parliament including from the opposition communicated what they gathered as the views of their people. There is no indication that any member had failed to discern or collect the view of their electorate particularly as a result of insufficient time, resources or interference by the state actors. It would appear that even where state actors tried to disrupt some Member's consultation, the Members of Parliament felt they had achieved the consultation and got views of their people enough for them to contribute to the debate and decide. One example is **Honourable JOY ATIM ONGOM (UPC, Woman Representative, Lira)** who stated thus on the Floor:

"Thank you so much Madam Speaker for giving me this opportunity. Thank you also for giving us the opportunity to go and consult our Constituencies. I consulted with my people – Lira District has got three Constituencies: Erute South, Erute North and Lira Municipality. In Lira Municipality alone, I had over 6,000 people in one gathering but it was unfortunate that were dispersed with teargas ..... The Voters gave me their information and my people said, "NO" to the amendment of Aricle 102(b). They said I

should not touch it....” ***(Hansard, Wednesday 20 December 2017 page 5203)***

In my view it would be wrong and unrealistic to say this MP did not consult her people despite the interference.

Another MP was the **Honourable MICHAEL KABAZIGURUKA (FDC, Nakawa Division, Kampala)** who stated thus:

“Madam Speaker, you sent us out to consult our Constituencies and indeed, I managed to consult my people despite my current condition. I consulted the people of Nakawa, largely in all the Parishes. We have 23 Parishes and the majority of the people of Nakawa asked me not to support the amendment of Article 102(b).” ***(Hansard Wednesday 20 December 2017 page 5202)***

Honourable THEODORE SSEKIKUBO (NRM, Lwemiyaga County, Sembabule) stated:

“I would like to put it on record that the people of Lwemiyaga and indeed the people of Uganda, once you are a Member of Parliament you speak for Ugandans. They have an emphatic sentiment that the President must retire and that there should be no amendment of Article 102 of the Constitution.” ***(Hansard, Wednesday 20 December 2017 page 5202)***

Honourable FRANCIS MWIJUKYE (FDC, Buhweju County, Buhwenju) had this to say:

"Madam Speaker, I carried out consultations and addressed 14 rallies in my Constituency in Buhweju County, Buhweju District, Ankole Sub-region. While there, the people of Buhweju told me to come to the Parliament of Uganda, and tell you that they are interested in peace and development and therefore we should not amend the Constitution." ***(Hansard, Wednesday 20 December page 5204)***

The **Honourable ANGELLINE OSEGGE (FDC, Woman Representative Soroti)** stated thus:

"In Soroti District where there are 10 sub-counties and three Constituencies including Dakabela, Soroti and the Municipality, in no meeting that I called did anybody rise up to say that they support the amendment of Article 102(b) of the Constitution.

Madam Speaker, there are women in Soroti District that earn a living by cracking Katine Rock. When I went to have a meeting with them, they told me to come and tell you that if you think they have forgotten what they did some years ago, they have not. They said that they are going to abandon producing children and focus on Uganda. That is a very deep sentiment from a village women that you cannot take for granted. What does it show? They take it as unfair. There is no amount of washing or laundering that will make this amendment look clean." ***(Hansard, Wednesday 20 December page 5205)***

The Honourable MP demonstrates how far down to the ordinary person she went in her consultations. On what basis would this court tell her that there were no consultations of her people?

Honourable JULIUS OCHEN (INDEPENDENT, Kapelebyong County, Amuria) stated:

"Madam Speaker, I rise on the Floor of this Parliament to raise issues that my people have told me to raise. When you sent us for consultations, I conducted consultations in Kapelebyong County and I received people from other Constituencies in Teso who are resettling there. I was able to consult 8,073 people in five sub-counties and the people of Kapelebyong told me, "Go and tell the People of Uganda never to touch and tamper with the Constitution of the Republic of Uganda. Only 15 people associated with that move." *(Hansard, Wednesday 20 December 2017 page 5206)*

On the other hand**, Honourable ALEX BYARUGABA (NRM, Isingiro County South, Isingiro)** had this to say:

"Madam Speaker, I would like to thank you for giving each one of us an opportunity to express the views of our Constituents. I take the honour and opportunity to share with you the views of the People of Isingiro South..."

The Honourable MP goes on to tell of his having been a Member of the Constituent Assembly and the importance of Article 1 of the Constitution. He goes on to state:

"It was on this basis that I took my consultative meetings with a population of about 220,000 people. I traversed all the sub-counties and collected the following: Yes, sometime in the Parliament, term limits were removed. My people instructed me to come back and share with you that we must keep this Country

together and that term limits must be re-instated and entrenched. Secondly, they said that we should go ahead, reconstruct and amend Article 102(b) and they gave me their reasons..." ***(Hansard, Wednesday 20 December 2017 page 5199)***

I have endeavored to reproduce these Speeches from the Hansard to show how the duly elected representatives of the people from different corners of the Country and different Political persuasions confirmed that they had consulted their people. So did almost every Member who contributed to the debate.

Furthermore I must note that the above was in addition to the public participation and consultation that was done by the Committee on Legal and Parliamentary Affairs over which ample evidence was adduced before the Constitutional Court. There is also the fact that this was a matter that was debated in the media, on Radio and Television shows throughout the Country.

In my view, public consultation or participation was, on the whole, achieved notwithstanding the unconstitutional interference by some State actors. The impugned Act cannot be vitiated by that unconstitutional conduct alone, where clearly the people ignored it. The Members of Parliament as representatives of the people did their job of consulting the people.

3. Breach of Order of Business of the House.

It was alleged by the appellants that the motion to introduce the impugned Bill was smuggled onto the order paper. Counsel for the appellants in Appeal No. 3 of 2018 submitted that the Bill leading to the

enactment of the impugned Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure by virtue of the fact that the same was smuggled onto the order paper. Counsel contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. In the proviso to the said rule, counsel submitted, the Speaker is only given a prerogative to determine the order of business in Parliament.

Counsel for the appellants further submitted that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. In Rule 29, there must be a weekly order paper including relevant documents that shall be distributed to every Member through his/her pigeon hole and where possible, electronically. Counsel submitted that all these Rules were flagrantly violated.

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

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

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

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 25 of the Rules of Parliament wherein she had power to set the order of business; and under Rule 7, the Speaker presides at any sitting of the house and decides on questions of order and practice. He further submitted that while doing this, the Speaker made a ruling on the various motions before her including the motion by Hon. Nsamba.

The Attorney General concluded that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the Constitutional Court finding that the Bill was properly brought before the floor of Parliament.

In his judgment, **Owiny-Dollo, DCJ** held that it was clear that under the Rules, the Speaker enjoyed wide, and almost unfettered, discretionary power to determine the Order of Business in the House. He held that from the Hansard, the record showed that the Speaker expressed satisfaction with the Magyezi motion for leave to introduce a private Member's Bill; which had met the test laid down under Rule 47, and so, could be included in the day's Order Paper. The Hon. DCJ concluded that the rules of procedure do not require the Speaker to

seek permission from the Members of Parliament, or any other person, to include the motion on the Order paper; which, if she failed to do, would have justified her being accused of smuggling the motion onto the Order paper. **Kasule JCC** was in agreement with the learned DCJ on this aspect.

Musoke JCC held that putting Hon. Magyezi's Bill onto the Order Paper ahead of the earlier one went against the Rules of Procedure of Parliament. She went on that nonetheless, it was only Hon. Raphael Magyezi's motion that had a proposed draft of the Bill attached to it. Hon. Nsamba's Bill which was filed prior did not have a proposed draft Bill attached to it contrary of Rule 121 of the Rules of Procedure of Parliament. She accordingly held the view that failure to abide to the particular rule did not in any way affect the process or the eventual outcome which is the Constitution (Amendment) Act No. 1 of 2018, since the Members of Parliament went ahead to debate and pass the Bill with amendments.

Kakuru JCC held that it was evident that the Rt. Hon Speaker of Parliament erred when she proceeded with the motion of Mr. Magyezi, on 27th September 2018 instead of proceeding with the motion of Mr. Nsamba which had been received earlier as required by the Rules of Parliament. The Speaker also erred when she amended the order paper to specifically introduce therein and include the motion of Mr. Raphael Magyezi without sending the same to Members of Parliament at least three hours before the sitting. Rule 26(1) clearly stipulates that, this requirement must be fulfilled "at least three hours before the sitting without fail". He found that this was a mandatory requirement which was not complied with.

Article 94(1) of the Constitution provides –

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

Under article 94 (4) of the Constitution, *"the rules of procedure of Parliament shall include the following provisions –*

> *a) the Speaker shall determine the order of business in Parliament and shall give priority to Government business;*
>
> *(b) a member of Parliament has the right to move a private member's Bill;*
>
> *(c) ……..*
>
> *(d) ……."*

It is clear from the above provision that under the rules envisaged to be made by Parliament to regulate its own procedure, the general rule in that regard is that the Speaker shall determine the order of business in Parliament.

Rule 25 (1) and (2) of the Rules of Procedure of Parliament 2017 provides –

> ***25. Order of business***
>
> *(1) The Speaker shall determine the order of business of the House and shall give priority to Government business.*

(2) Subject to sub rule (1), the business for each sitting as arranged by the Business Committee in consultation with the Speaker shall be set out in the Order Paper for each sitting …

It was argued by the appellants that the Speaker smuggled the Magyezi Bill on the Order Paper ahead of the Nsamba and Lyomoki Bills which were listed first on the Order Paper. From the above provisions, the Speaker of Parliament has the primary power to determine the order of business in the house. Through the rules of procedure of Parliament, power to arrange business is delegated to the Business Committee which, in consultation with the Speaker, sets out the house business in the Order Paper. It cannot be said that this internal arrangement was meant to take away the power of the Speaker that is bestowed on her by the Constitution. In my view, the Business Committee is delegated by the House to sort out business for the House. It is an internal management tool.

In line with the doctrine of separation of powers, the courts are and should be wary of interfering with the internal workings of Parliament. As long as Parliament has acted within the provisions of the Constitution and the set rules of procedure, the court cannot and should not dictate how the Speaker and the House run its business; of course, with the exception of where there is abuse of power and/or where Parliament does not act within the confines of the law. This view was echoed in the case of **Attorney General vs Major General David Tinyenfunza, Constitutional Appeal No. 1 of 1997 (SC)** where Kanyeihamba, JSC had this to say –

"The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases calling for intervention for the purposes of determining constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the courts must refrain from entering arenas not assigned to them either by the constitution or laws of Uganda. It cannot be over-emphasized that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly, causing injury thereby".

The above view brings to mind the principle of exhaustion of local remedies within institutions and public bodies. The Rules of Procedure of Parliament allow a member to move a motion challenging the decision of a Speaker of which a member is dissatisfied with. Where a member does not take up that option, which the law provides to him or her, it is not open in my view to call in the court to determine how the Speaker should conduct the business of the House. As I already indicated above, this is, provided the Speaker has acted within the provisions of the constitution and the rules of procedure.

In this case I note that the Speaker took time to explain to the House the procedure that has to be followed for Private Members Bills. The Speaker went into detail to explain which of the motions received had complied with the Rules and which would then get on the Order Paper. Thereafter she determined the Order of Business as she is allowed by the Rules to do so.

I am therefore in agreement with the learned DCJ and Kasule JCC in their findings on this matter. I do not agree that the procedure adopted by the Speaker was in breach of the Constitution or the Rules of Procedure of Parliament. The Speaker acted within the confines of her power and discretion.

4. Denying Members adequate time to consider and debate the bill, non-observance of rule 201 relating to tabling of the bill, and lack of secondment of the motion to suspend rule 201 (1) of the Rules

It was argued by Mr. Mabirizi that the bill was not laid on table in accordance with rule 201 and that the three days required under sub-rule 2 of rule 201 were not observed in flagrant breach of that provision. He submitted that the motion to suspend rule 201 (2) of the Rules of Procedure of Parliament was not seconded. The appellant further submitted that opportunity was not given to all the members to debate the bill and those who did so were not allocated sufficient time to debate the bill which was contrary to the provisions of rule 133 (3) of the rules of procedure. He argued that this adversely affected the whole process of enacting the impugned Act.

In reply, the Attorney General submitted that evidence had shown that the Right Hon. Speaker had, in time, directed the Clerk to upload the bill on the iPads of all Members of Parliament and, as such, Rule 201 (2) did not apply. The Attorney General further submitted that when the motion to suspend Rule 201 (2) was moved and debated, the same was supported by Hon. Janepher Egunyu and other members who rose up to debate and support the motion.

Owiny-Dollo, DCJ held that it was permissible for Parliament to suspend its own rule under rule 16 of the rules of procedure; provided the motion thereby is seconded. However, Rule 59 (2) of the Rules of Procedure of Parliament provides that in the Committee of the Whole House, a seconder of a motion shall not be required. The learned DCJ held that in the instant matter, Parliament was proceeding as a Committee of the Whole House and, as such, the rule 59 (2) was applicable. Accordingly, although the motion by Hon. Mwesigwa Rukutana was not seconded, it offended no rule at all.

The above finding was supported by the other Justices of the Court except **Kakuru JCC.** On his part, Kakuru JCC held that the Speaker of Parliament failed to apply Rule 201(2) which is mandatory. He held the view that "laying on the table" means physically presenting the bill on the table of Parliament and does not include sending an electronic copy to members. He noted that Parliament had amended and adopted new rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact that the Rule remained unchanged following the 2017 amendment meant that there was no intention to adopt a new procedure or turn the existing practice into law. He disagreed with the submissions of the Hon. Deputy Attorney General on the floor Parliament to the effect that when the Members of Parliament were availed with iPads, Rule 201 no longer served any useful purpose. The learned Justice therefore found that Parliament, while passing the impugned Act, failed to comply with Rule 201(2) of its Rules of Procedure, which is mandatory. Such failure

contravened Article 94(1) of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018.

Rule 16 (1) of the Rules of Procedure of Parliament provides –

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

Rule 59 of the Rules of Procedure provides –

> *(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.*
> *(2) In Committee of the Whole House or before a Committee, a seconder of a motion shall not be required.*

Rule 201 (2) of the Rules of Procedure provides –

> *Debate on a report of a Committee on a bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker.*

The relevant provisions of rule 133 of the Rules of Procedure of Parliament provide as follows –

> ***133. Procedure in Committee of the Whole House on a Bill***
>
> *(1) When the House resolves itself into a Committee of the Whole House, the Clerk shall call the number of each clause or sub clause if*

any, of the Bill in succession for consideration of the Committee of the whole House.

(2) If no amendment is proposed on the clause, or all proposed amendments have been disposed of, the Chairperson shall propose the question "That the clause (or the clause as amended) do stand part of the Bill".

(3) Where in case of a clause called—

(a) the Chairperson is satisfied that there has been sufficient debate on it; or

(b) all Members who wish to speak on it have spoken;

the Chairperson shall put the question to the Committee for its decision.

In regard to the laying of the bill on the table, the question that arises is: What is the purpose of that provision? In my view, it is to formally convey the bill before Parliament and the space of three days is to give time and opportunity to members to study the bill in readiness for its debate.

In the instant case, the evidence shows that the bill was conveyed to the members through their iPads four days before the date it was formally laid before Parliament. There is ample material to establish that the Members of Parliament were issued with iPads to facilitate the work of Parliament. We also have in place the Electronic Transactions Act which paves way for use of electronic means of communication when conducting Government business. In that regard therefore, the non-laying of the bill physically on the table, the same having been

conveyed to the members through an acceptable medium, remains a technicality. In substance the Members of Parliament had received sufficient notice of the bill and were not prejudiced by the suspension of the three days rule. I think this is one instance where the substance of the matter should not be defeated by a technicality. I therefore differ from the finding of Kakuru JCC in that regard. I agree with the decision of the majority Justices on this point and on the finding that it was not required for the motion to suspend rule 201 (2) of the rules since the matter arose at the committee of the Whole House.

On the issue of the time and opportunity given to members to debate the bill, I notice that rule 133 (3) (a) and (b) are in the alternative; that is, either the Chairperson (of the Committee of the whole House) is satisfied that there has been sufficient debate on it; or all Members who wish to speak on it have spoken; the Chairperson shall put the question to the Committee for its decision.

According to the above provision, once the Speaker is satisfied that there has been sufficient debate on the bill, she has the power and discretion to put the question to the Committee for its decision. This, in my view, means that all members do not have to have debated the bill before the Speaker can put the question. It is therefore a question of discretion and depends on the circumstances of each particular case. The only question is whether in the instant case, the Speaker exercised her discretion judiciously.

The Hansard shows that numerous members debated the bill before the Speaker put the question to the Committee for its decision. The Speaker did not exercise her powers arbitrarily. I have found no reason to fault

her exercise of discretion. I therefore uphold the decision of the majority Justices on this aspect.

5. Suspension of some Members of Parliament

It was argued for the appellants that the Speaker grossly violated the Rules of Procedure of Parliament when she arbitrarily suspended 6 Members of Parliament from the House. Counsel submitted that she did not accord the said MPs a fair hearing before suspending them, she did not assign any reason for their said suspension, and that she acted ultra vires since she was functus officio at the time she pronounced her arbitrary decision suspending the said MPs. Counsel further submitted that by virtue of the illegal suspension of the MPs, the Speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

Rule 82(1)(c) of the Rules of Procedure of Parliament provides that **"while a Member is speaking, all other Members shall be silent and shall not make unseemly interruptions".**

Rule 84 provides that in all other matters, the behavior of members shall be guided by the code of conduct of members of parliament prescribed in Appendix F.

Item 5 in the Code of Conduct of Members of Parliament provides as follows –

> *Members shall at all times conduct themselves in a manner which will maintain and strengthen the public's trust and confidence in the*

integrity of Parliament and never undertake any action which may bring the House or its Members generally, into disrepute.

Rules 87, 88 and 89 make provision for the circumstances under which a member may be suspended from the House and the procedure to be adopted by the Speaker.

From the above provisions, there is no doubt that the Speaker has power to suspend Members of Parliament from the House if a member is in breach of the House Rules and the Code of Conduct.

According to the Hansard, there is a background of what happened in the House before the Speaker suspended the 25 Members of Parliament on 27th September 2017. But the Hansard is silent on what transpired in the House before the suspension of the six members of Parliament on 18th December 2017. The Speaker simply announced the suspension. She assigned no reasons. Counsel for the appellant is therefore right that the Speaker acted arbitrarily and suspended the said Members of Parliament illegally.

The Path open to the Members was to challenge the decision of the Speaker as provided for in the Rules of Parliament. Their suspension by itself cannot stop the business of the House provided there is quorum to conduct business.

6. Failure to close doors to the Chamber at the time of voting

Rule 98 provides for the procedure for making of a roll call and tally by the Speaker. The present bill that was being debated is one of the kind of bills that called for that procedure. Under sub-rule 3 thereof, **"the Speaker shall then direct the doors to be locked and the bar drawn**

and no Member shall thereafter enter or leave the House until after the roll call vote has been taken".

It is true that the above rule is mandatory and that it was breached. But there is an explanation in evidence as to why the rule could not be complied with by the Speaker in the circumstances that prevailed at the time. It was indicated that the house was full and there were no seats for all Members of Parliament. There was no evidence that any strangers took advantage of this situation and participated in the voting.

I agree that rules must be obeyed. I however also emphasize that the substance and purpose of the rules is equally or even more important. In absence of evidence to the contrary, I do not see how that procedural breach by the Speaker vitiates the entire process. In my view, the said breach could not render the entire amendment process unconstitutional.

The Parliamentary Chamber as currently in existence may be too small for the numbers of members of Parliament which was not envisaged before. Under article 95 (2) of the Constitution, it is conceivable that the Speaker can constitute Parliament at any place of sitting upon a proclamation to that effect. If that is possible, what if such a place is a building without doors? Or it has doors but people are not fitting. In my opinion, it is the substance of the matter that is important in the prevailing circumstances. As long as no body is proved to have taken advantage of the non-closure of the doors, the omission to do so only remains a matter of form.

7. Denying members of the public access to Parliament

The third appellant, Mr. Mabirizi, complained that he was denied access to the gallery during the passing of the Constitution (Amendment) Act 2018. There was no evidence of any other member of the public who suffered a similar fate.

Musoke JCC in her judgment made reference to Section 5 of the Parliament (Powers and Privileges) Act, 1955 which provides that no stranger shall be entitled as of right to enter or to remain within the precincts of Parliament. She held that considering the incidents that had taken place within the precincts of the House at that time, entry into the House was reasonably subjected to limitations. The Speaker had discretion to either allow the public access to the gallery or not, under the provisions of Section 6 of the Parliament (Powers and Privileges) Act, 1955. The learned Justice thus found that restricting entry to the gallery, inconveniencing as it may have been to the members of the public, did not negatively impact the process leading to the passing of the impugned Act.

I am persuaded to agree with the learned Justice on this matter. I have also taken into consideration the provision of rule 230(3) of the Rules of Procedure of Parliament which vest in the Speaker the power to control admission of the public to the Parliament premises so as to ensure law and order as well as the decorum and dignity of Parliament. I find that in the circumstances that prevailed, the Speaker acted within her powers and had reason to do so. The inconvenience suffered by the appellant (Mr. Mabirizi) cannot be reason to render the entire process unconstitutional or irregular.

8. Signing of the Committee Report by members who had not participated in the committee proceedings

The appellant, Mr Mabirizi, alleged that members who did not participate in the committee proceedings signed the report. In another breath, the appellant referred to them as non-members of the Committee. However, looking at the Hansard, there is evidence that these members had been assigned to the Legal and Parliamentary Affairs Committee only that at the time they were assigned, the Committee had completed consideration of the Bill and was preparing the report. The correct position therefore was that these were members of the Committee who had not participated in proceedings of the Committee.

The questions that arise are; one, whether the signing by those members was wrong in law; and two, whether such signature by those members invalidated the Committee report.

It is clear to me that the signing of the report by the said members did not add to or subtract anything from the report. It was therefore a superfluous act that has no legal consequence. If that act was used to attain the quorum for the Committee, for example, that would have been a substantive defect that would negatively affect the report. According to **Rule 201(1) of the Rules of Procedure of Parliament,** the report of the committee shall be signed and initialed by at least one third of the members of the committee. The Constitutional Court rightly found that even if the signatures of the impugned members were removed, the quorum would still have been realized. I therefore do not see how the superfluous act of the said members signing the report would vitiate the Committee Report.

9. Proceeding on the Bill in absence of the Leader of Opposition and other Opposition MPs

It was argued by Mr. Mabirizi that in absence of the Leader of Opposition, the Chief Whip and other members from the Opposition, the Parliament was not fully constituted. I have not found the legal basis for this argument. Article 88 provides for the quorum in Parliament as follows:

(1)*The quorum of Parliament shall be one-third of all members of Parliament entitled to vote.*

(2) The quorum prescribed by clause (1) of this article shall only be required at a time when Parliament is voting on any question.

(3) Rules of procedure of Parliament shall prescribe the quorum of Parliament for the conduct of business of Parliament other than for voting.

Rule 24 of the Rules of Procedure of Parliament makes provisions that are in line with the above constitutional provision.

In the instant case, there is no allegation that the House did not have quorum when the proceedings were taken on the bill, let alone at the time of voting. The argument by Mr. Mabirizi appears to be that because Parliament operates under a multi-party arrangement, absence of the Leader of Opposition, Chief Whip or some members of Opposition invalidates the proceedings of Parliament. This argument is however not grounded on any law. In any case, the Constitutional Court rightly found that the Leader of Opposition had voluntarily walked out of Parliament; the Chief Whip and the other Opposition Members had

been suspended by the Speaker under her powers. There was no legal basis for Parliament not to proceed under such circumstances. There is therefore no merit in this ground.

10. 'Crossing' of the Floor by ruling party Members to the Opposition Side

"Crossing the floor" is a terminology used when a politician changes their allegiance or votes against their party in Parliament. It does not refer to physical movement from one side to the other. The argument by Mr. Mabirizi in this respect misapplied the term.

According to the Hansard, it is true that the Speaker did tell the Members of Parliament to fill up the empty seats during the proceedings since the opposition members had walked out and there was free space on that side. This was not an act of "crossing the floor" within the legal or political meaning of the term. Under **Rule 9 (4) of the Rules of Procedure of Parliament** the Speaker has a duty to ensure that each member has a comfortable seat in parliament. I find that this act did not in any way contravene either the Constitution or the Rules of Procedure of Parliament.

11. Failure to comply with the 45 days Rule by the Legal and Parliamentary Affairs Committee

This matter was not considered by the Constitutional Court. Nevertheless, I shall proceed to consider the same.

It was submitted by Mr. Mabirizi that the report of the Committee was not valid since it delayed beyond 45 days contrary to Rule 128 (2) and 140 of the Rules of Parliament.

The practice is that whenever a bill is read for the first time in the house, it is referred to the appropriate committee for consideration. This committee is obliged to report back to the House within 45 days as provided for in Rule 215(1) of the Rules of Procedure of Parliament.

The Attorney General in his reply submitted that the Committee acted well within the provisions of Rules 128 and 140 of the Rules of Procedure of Parliament in that whereas the Bill was referred to the Committee on 3rd October 2017, the House was sent on recess on 4th October 2017. Further that during recess, no parliamentary business is transacted without leave of the Speaker and, therefore, the days could not start running until the leave was obtained.

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

The submission by the learned Attorney General settles this point. The Committee could not commence with business until they secured leave of the Speaker. The days therefore started running from 3rd November 2017 when the said leave was secured. There was therefore no breach of the 45 days rule.

12. Non observance of the 14 days Rule between the 2nd and 3rd Reading of the Bill, Discrepancies in the Speaker's Certificate of Compliance and illegal assent to the Bill by the President.

The issue has arisen as to whether the assent of the President to the Constitution (Amendment) Bill was valid and constitutional given that there were some provisions therein that were not certified by the Speaker as having been passed in compliance with the Constitution. Issue has also been raised of the non-compliance of the bill with article 260 in regard to the separation of the second and 3rd readings by 14 days.

In addressing these issues, I am of the view that it is necessary to review the provisions of the Constitution relating to the passing of Bills and the assent of the President.

I will start with Article 91 of the Constitution on the exercise of Legislative powers. This article states as follows:-

91. (1) "Subject to the provisions of this Constitution, the power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President."

(2) A bill passed by Parliament shall, as soon as possible, be presented to the President for assent.

(3) The President shall, within thirty days after a bill is presented to him or her –

(a) assent to the bill;

(b) return the bill to Parliament with a request that the bill or a particular provision of it be reconsidered by Parliament; or

(c) notify the Speaker in writing that he or she refuses to assent to the bill.

(4) Where a bill has been returned to Parliament under clause (3)(b) of this article, Parliament shall reconsider it and if passed again, it shall be presented for a second time to the President for assent.

(5) Where the President returns the same bill twice under clause (3)(b) of this article and the bill is passed for the third time, with the support of at least two-thirds of all members of Parliament, the Speaker shall cause a copy of the bill to be laid before Parliament, and the bill shall become law without the assent of the President.

(6) Where the President –

(a) refuses to assent to a bill under clause (3)(c) of this article, Parliament may reconsider the bill and if passed, the bill shall be presented to the President for assent;

(b) refuses to assent to a bill which has been reconsidered and passed under paragraph (a) or clause (4) of this article, the Speaker shall, upon the refusal, if the bill was so passed with the support of at least two-thirds of all members of Parliament, cause a copy of the bill to be laid before Parliament, and the bill shall become law without the assent of the Present.

(7) Where the President fails to do any of the acts specified in clause (3) of this article within the period prescribed in that clause, the President shall be taken to have assented to the bill and at the expiration of that period, the Speaker shall cause a copy of the bill to be laid before Parliament and the bill shall become law without the assent of the President.

(8) A bill passed by Parliament and assented to by the President or which has otherwise become law under this article shall be an Act of Parliament and shall be published in the Gazette.

The first operative words of Article 91(1) are very important. Whatever has to be done in the passing of bills by Parliament and the assent thereto by the President is subjected to the provisions of the Constitution. It therefore becomes necessary to consider which other provisions of the Constitution are relevant. If the Constitution itself has declared that certain matters must not be legislated on, then even if Parliament passed such a bill and it got the assent of the President, such a bill would be a nullity *ab initio*. For example Article 92 prohibits the passing of retrospective legislation to alter the decision of a Court. It states:

"Parliament shall not pass any law to alter the decision or judgment of any Court as between the Parties to the decision or judgment."

Likewise, Article 75 states as follows:

"Parliament shall have no power to enact a law establishing a one-party state."

To my mind, if Parliament were, for any reason, to pass such laws as above, those laws would be null and void *ab initio* notwithstanding that they may have been assented to by the President.

Apart from where the Constitution has expressly prohibited the passing of any law on a given subject, there are provisions of the Constitution which govern how certain bills must be passed through Parliament before the Constitution can recognize them as duly passed. Such provisions are those governing the amendment of the Constitution which is the subject of this appeal.

Article 259 allows the amendment of the Constitution but also subjects such amendment **"to the provisions of this Constitution."** It states as follows:

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

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

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

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

Following on that is Article 260 on amendments requiring a referendum. It states as follows:

260. (1) "A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this Article <u>shall not be taken as passed unless</u> –

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been referred to a decision of the people and approved by them in a referendum.

(2) The provisions referred to in clause (1) of this article are -

(a) this article;

(b) Chapter One – articles 1 and 2;

(c) Chapter Four – article 44;

(d) Chapter Five – articles 69, 74 and 75;

(e) Chapter Six – articles 79(2);

(f) Chapter Seven – article 105(1);

(g) Chapter Eight – article 128(1); and

(h) Chapter Sixteen.

Likewise, Article 261 governing amendments requiring approval by district councils provides as follows:-

261. (1) "A bill for an Act of Parliament seeking to amend any of the provisions specified in clause (2) of this article shall not be taken as passed unless –

(a) it is supported at the second and third readings in Parliament by not less than two-thirds of all members of Parliament; and

(b) it has been ratified by at least two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda.

(2) The provisions referred to in clause (1) of this article are –

(a) this article;

(b) Chapter Two – article 5(2);

(c) Chapter Nine – article 152;

(d) Chapter Eleven – articles 176(1), 178, 189 and 197."

Then Article 262 on amendments by Parliament states as follows –

262 (1) "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."

It is crucially important to take note the language of the Constitution that runs through the above provisions. The Constitution stipulates specific conditions which must be met. If they are not met then **the bill "shall not be taken as passed."**

It does not matter whether the Parliament passes the bills with even a 100% majority. If the conditions precedent have not been met, that bill just did not pass as far as the Constitution is concerned. So even if such a bill were sent to the President for assent and he purported to

assent to the bill, such assent would be meaningless and of no constitutional effect.

The Constitution has itself decreed that there was no bill passed for assent. It would make no difference, in my view, that the Speaker would have certified under Article 263 that there was compliance with the Constitution when in fact there was no such compliance.

This now brings me to consider the situation where, in the passing of a bill, some specific provisions brought in as amendments to the Bill touch on matters that require compliance with the conditions precedent set by the Constitution which are not met, and yet other provisions of the bill that do not require to meet those conditions precedent and are passed within the provisions of the Constitution.

In my view, when the Constitution provides for the bringing of a bill to amend the Constitution, that provision must, *mutatis mutandis,* include reference to amendments moved to a bill already on the floor of the House. If a Members moves an amendment at the Committee stage, that amendment must be scrutinized as to whether it complies with the Constitutional requirements. If it does not, then it cannot be deemed passed even if Parliament were to pass it. It can only validly become part of the bill it seeks to amend if it complies with the Constitution.

This appears to be the situation before us. The original bill as moved by Hon. Magyezi did not contain matters that required compliance with the provisions of article 260 or 261. The impugned amendments were introduced during the Committee stage in Parliament. As the procedure is at Committee stage, amendments are moved, voted on and passed one by one. The Speaker and the entire House ought to have

realised at that stage that those amendments could not possibly pass since they had not complied with the conditions precedent stipulated in articles 260 and 261. So when the Committee of the whole House rose to report to the House, Hon. Magyezi as mover of the Bill stated that the Bill entitled the Constitution (Amendment) Bill had been passed with some amendments. But he also reported that some other amendments touching on a number of Articles had been moved and passed. He therefore moved that the Bill and all the amendments do pass. The Speaker put the question and the whole Bill was passed.

Subsequently a bill was prepared containing all the amendments that were passed, including those that touched on articles 260 and 261, even when there had been no referendum and no ratification of district councils. The Bill was sent to the President for assent. Article 263 (2) states as follows:

> *"A Bill for the amendment of this Constitution <u>which has been passed in accordance with this Chapter</u> shall be assented to by the President <u>only if</u>:*
>
> *(a) it is accompanied by a Certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it."*

The Bill was indeed accompanied by a Certificate of Compliance by the Speaker. But by that Certificate, the Speaker only certified those clauses which had been in the original Bill and left out the rest of the clauses in the Bill. It would appear that the Speaker woke up from some deep slumber and realized that the House had passed some

clauses which according to the Constitution itself **"SHALL NOT BE TAKEN AS PASSED..."**

It is not clear to me whether the President considered the terms of the Certificate of Compliance before he assented to the Bill. But in my view, as argued above, those clauses in the Bill which clearly offended the conditions stipulated in the Constitution were never passed. They were void *ab initio.* With or without the assent of the President, they were a nullity which could not be cured by the assent. But on the other hand, the Bill had clauses that had been passed in accordance with the Constitution and certified so by the Speaker. The assent of the President could only bring into law those provisions that had complied with the Constitution.

In my view, this is a matter that calls for the application of the principle of severance. It is a matter of command of the Constitution that if a provision did not meet the conditions stipulated by the Constitution, it would not pass. Those amendments that were added to the Bill which had been duly introduced in the House in accordance with procedure, and which did not comply with the Constitution were never passed. That should save the original Bill.

The question that vexes us is, if you have a law that contains matters that are lawful and those that are not so lawful, do you declare the whole law to be unlawful? In the case of ***KINGSWAY INVESTMENTS LTD –VS- KENT CC [1969] ALLER 601 at 611 and 612,*** **(**also quoted in ***John B Saunders' Words and Phrases Legally Defined, 3rd Edition at page 174*****), *Lord Denning MR,*** stated thus**:**

"This question of severance has vexed the law for centuries, ever since PIGOT''s case (18). Seeing that in this case the condition is said to be void because it is repugnant to the Act, I am tempted to go back to the old distinction taken by Lord Hobart when he said:

> **"The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest."**
>
> **..... But I think that the distinction between the Act and Common Law no longer exists. I prefer to take the Principle from the notes in the English Reports in PIGOT's case (21) :"**
>
> **"The general principle is, that if any clause, etc, void by Statute or by the Common Law, be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void --- but if the part which is good depends upon that which is bad, the whole instrument is void."**

I am persuaded by this statement of principle. Here, of course we are dealing with the Constitution. But by analogy, that which is declared void by the Constitution can be and should be separated from that which is good. This principle is captured in Article 2(2) of the Constitution which states thus:

> *"If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to <u>the extent of the inconsistency, be void</u>."* (emphasis added)

In my view, the prudent thing for the President to have done would have been to send the Bill back to Parliament so that it would have been cleaned up to conform to what the Speaker was certifying as having been passed in compliance with the Constitution. But it is not fatal to the whole bill that the President simply assented to it. My view is that in those circumstances, only those provisions that complied with the Constitution could be brought into Law. The rest that were, according to the Constitution, not taken as passed, were void ab initio and could not be saved either by the certificate of the Speaker or the assent by the President.

In general therefore, the second issue is answered in the negative.

ISSUE 3: Whether the learned justices of the Constitutional Court erred in law and fact when they held that the violence/ scuffle inside and outside Parliament during the enactment of the 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.

Counsel for the appellants in Appeal No. 03 of 2018 submitted that the bill was passed amidst violence within and outside Parliament, and also in the whole Country during public consultations; thereby vitiating the entire process, and thus making it unconstitutional. Counsel submitted further that the unlawful invasion and/or heavy deployment at the Parliament by combined forces of the Uganda People's Defence Forces, the Uganda Police Force and other militia before and on the day the impugned bill was tabled before Parliament amounted to amending the

Constitution using violent means, undermined Parliamentary independence and as such was inconsistent with and contravened the Constitution.

Counsel for the appellants in Appeal No. 04 of 2018 submitted that the violence inside Parliament included the arrest, assault and detention of Members of Parliament and their forceful exclusion from representing the Constituents. Counsel submitted that the actions complained of violated several provisions of the Constitution and the Constitutional Court erred in failing to come to definite conclusions that Article 23, 24 and 29 were contravened. As a result the Court neither made any declarations nor granted redress as required by Article 137 of the Constitution for those contraventions.

Counsel went further to submit that the circumstances under which a person can be deprived of personal liberty are spelt out in Article 23 of the Constitution. The entry into Parliament by security forces arresting, assaulting and detaining members does not fall in any of these exceptions. It was not challenged that some Members of Parliament were not only evicted but held without charge in places of detention. The Court was required to examine whether the limitations placed on the fundamental right of liberty of the Members of Parliament fell within the ambit of Article 43 as outlined by this Court in the case of **Onyango Obbo and Anor vs. Attorney General.**

Counsel went further that the onus was upon the respondent to show that the limitation to liberty was necessary in order to protect the fundamental rights of others or in public interest and that the limitations met the standard of being demonstrably justifiable in a free

and democratic society. The respondent clearly did not execute this burden. There was no attempt whatsoever to bring the actions of the security forces within the defenses stipulated in Article 43. The Court instead embarked on rationalizing the limitations on the member's right to liberty. There was no evidence whatsoever for misconduct being a basis for the constitutional limitations on their liberty. On the contrary it was the Speaker's Orders which ought to have been faulted as the events of 26th and 27th September showed.

Mr. Mabirizi, the appellant in Appeal No. 02 of 2018, submitted that the decision of the Justices of the Constitutional Court on the question of violence had the effect of promoting impunity and threatening future rule of law and democratic governance. He submitted that the amendment of the Constitution through violence was foreseen by the framers of the Constitution who made a strong prescription against violence of any kind in the constitutional amendment process and invalidated each and every thing arising out of violence and created an offence of treason. As such the perpetrators of violence in the Constitutional amendment process committed the offence of treason as envisaged under article 3 of the Constitution.

In reply, it was submitted by the respondent that from the available authorities, it was apparent that the Rt. Hon. Speaker was legally mandated to ensure that order and decorum was 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 submitted that rule 88 (6) of the Rules of Procedure of Parliament sets out the procedure of ensuring the eviction of a Member of Parliament who refuses to leave after

he/she has been suspended from the House and it provides for recourse to use of force.

On the appellants' submission that the forceful removal of the MPs on the 27th September 2017 amounted to a treasonous act under article 3(2) of the 1995 Constitution, the respondent submitted that the appellants had severely misconstrued article 3 (2) of the Constitution as this was a singular event that came about due to the misconduct of the MPs whereas the debate, passing and eventual enactment of the Constitutional Amendment Act No. 1 of 2018 was carried out strictly in accordance with the Constitution. The respondent prayed to Court to uphold the decision of the majority Justices of the Constitutional Court on the question of violence in and outside Parliament.

I believe there is need to get the facts clearly and in the proper perspective on this matter. From the submissions of Counsel for the appellants, their case appears tto be as if there was a plot on the part of the state to attack parliament to interfere with theier legislative process. But I think it is necessary to go through the Hansard to esatbish exactly what happened.

The record is clear that Parliament was not simply invaded out of the blue as the appellants attempted to paint the impression. There was a background, and quite a lengthy one, to what happened in Parliament on the days in issue, particularly, 21st, 26th and 27th September, 2017. The Hansard clearly reflects this.

During the proceedings of ***Wednesday, 20 September 2017***, the Deputy Speaker expressed concern over the growing anxiety that was apparent amongst the Members of Parliament and the general

population which needed to be contained by reassuring the public that the parliamentary process would be carried out transparently. In the Hansard as contained in Volume 1 of the record of Appeal for Appeal No. 03 of 2018, at page 115, the Deputy Speaker is quoted thus –

> **"Honourable members, like I communicated yesterday, there seems to be some anxiety and I do not know where it is coming from but it is there even in the public ... The public should have trust in their representatives that they brought here and let them handle what happens here. The public should go on with its business out there and whatever Parliament will decide, they will decide when the time for that decision comes ... If you go around Parliament or the streets, you can see that there is a sign of anxiety – a lot of it. Yesterday, there were no cars in town. Even where jam used to be, I could not see cars ... Yesterday, a member here rose to complain about Police deployment, we invited them to come. I would have been surprised if there was no deployment around Parliament because from some statements that I saw, they were saying that there is going to be war in this place. When you alert security people that there is going to be war somewhere, they will want to see how the war will be carried out. We have actually invited them. Therefore, to be surprised that they are around, I think it is not to be acting fair ..."**

At page 153 of the same record of appeal, in the proceedings of ***Thursday, 21 September 2017***, the Deputy Speaker is quoted as saying:

"... What we have seen today is exceptional and I do not know what necessitated the blockade. In my opinion, it has gone way beyond what should have been ... We need to demonstrate that what they fear is not in this House. We need to demonstrate to all that whatever everybody else fears is not in this House. It cannot be the Members of this House to create chaos. Are we together on this? We need to demonstrate that it cannot be the Members of this House to light fire, throw stones and probably begin removing shoes from their feet and tossing them around. That it cannot also be the presiding officer of this House to smuggle in things that have not gone through processes; so that the whole House can predict and prepare to engage in a debate on any matter ... we should be given ample time to sufficiently prepare to debate but not the kind of preparations I have seen whereupon some Members were talking about on television – going to the gym ... If you declare that we are coming to fight here, it means all Members are allowed to come with whatever can be used to fight ... if we make statements that make it look like this House is going to be a warfare place, then we attract people who should not be here ..."

At page 155, the Leader of Opposition, Hon. Winifred Kiiza, had this to say –

"[Mr. Speaker] Today we want to continue thanking you for steering this House amidst the circumstances. What happened today is something we should condemn in the strongest terms possible ... to find [Parliament] occupied by the military to the extent that members of Parliament cannot even have free

access to come and represent their people is something that must be condemned in the strongest terms possible and never again should it happen. ... I would, therefore, like to ask that Government comes up with an explanation as to why there was a siege and a coup in Parliament ..."

At page 157, the Prime Minister and Leader of Government Business stated thus –

"Mr Speaker, colleagues are aware that there has been some degree of tension and excitement in Kampala and some areas of the country because of the political exchanges that are taking place. Secondly, this has caused some violence and tension in some areas ..."

At page 159, the Prime Minister continues thus –

"... because of the environment that has created some bit of political excitement, which could easily get out of hand, it is absolutely necessary that the security organs and forces be on alert ... Mr Speaker, because of the security environment that has been created, it is absolutely necessary for security organs, in particular the police, to ensure that the necessary and effective preventive measures are taken so that the security of Parliament and the country is under control. By the way, the police have more information. Incidents have been reported by colleagues like Hon. Karuhanga and others and they are going to be investigated and necessary measures will be taken in case the findings illustrate that something wrong has been done ..."

At page 160, Hon. Odonga-Otto stated –

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

On the sitting of Thursday, 26 September 2017, the build up to the tension within the House continued. At page 166 of the record of appeal, Hon. Nzoghu stated:

"Thank you, Madam Speaker. As you can see, today the house is full to capacity but some Members here are not safe because guns have been sneaked into the House. The procedural point I would like to raise is that for the safety of Members, I would like to seek your indulgence to let us get out and be checked, one by one, as we enter."

Then Hon. Ssemujju, at page 167, stated:

"Madam Speaker, when I entered this Parliament at 2.00 pm, Hon. Kibuule – and the cameras in this Chamber can show that – crossed from the other side to this side and warned me that today, I am going to face death ..."

The Hansard indicates on pages 167 and 168 that some Members refused to go on with the proceedings in the House until a search for the gun was done. The alleged gun was not found but some Members alleged that it had been sneaked out in due course. Indeed in the proceedings of Wednesday, 27 September 2017, the Speaker confimed to the House that she had confirmed that Hon. Kibuule, MP for Mukono County North, had endangered the safety of Members by bringing a firearm into the Chamber of Parliament contrary to the House Rules.

The proceedings of ***Wednesday, 27 September 2017*** were the culmination of all this tension into actual scenes of chaos and violence. Following the incident of Tuesday 26, September 2017, the Speaker named and suspended 25 Members of Parliament and directed them to exit the Chambers immediately in accordance with Rules 77, 79 (2) and 80 (2) of the Rules of Procedure of Parliament. When the Members did not oblige, the Speaker invited the sergeants to remove the named members. The Speaker then decided to suspend the House proceedings for 30 minutes for the sergeants to effect the removal of the Members. At page 315 of Volume 1 of the record of appeal for Appeal No. 4 of 2018, the Hansard shows what happened. After naming the Members, the Speaker stated:

> **"I invite you to exit the Chamber. Exit the Chamber. Can I invite the sergeants to remove the Members who have been named. Exit the Chamber, honourable Members. I will suspend the House for 30 minutes and when I return, you should be away. We shall resume in 30 minutes and you must be out of this House."**

It is during that break that the scuffle and actual fighting occurred in Parliament when the security forces were called in to forcefully remove the Members who had been named and suspended by the Speaker. Evidence of what happened in the House that led to the intervention of the security forces is contained in the affidavit of Mr. Ahmed Kagoye, the Sergeant-At-Arms dated 29th March 2018. I reproduce the relevant paragraphs here below:

"5. That I know that my duties as Sergeant-At-Arms, include, supporting the delivery of effective security to Parliament, to execute all orders of the House and Committees and to perform chamber duties among others.

6. That I was in attendance of some of the Parliamentary proceedings leading up to the debate on the Constitution (Amendment) (No. 2) Bill 2017 and the enactment of the Constitution (Amendment) Act, 2018.

7. That I know that during the sitting of Parliament 21st, 26th and 27th September 2017, some Members of Parliament conducted themselves in a manner contrary to the Rules of Procedure and severally prevented Parliament from conducting the Business of the day ...

8. That I know that owing to the gross misconduct by some Honourable Members of the Parliament, the Rt. Hon. Speaker of Parliament was compelled to adjourn Parliament prematurely on 26th September 2017 and exited the chamber through a back/ side entrance not ordinarily meant for the Rt. Hon. Speaker's procession.

9. That as the responsible person being deeply concerned and alarmed by the events of 21st and 26th September 2017, I determined that there was a real likelihood that the same situation or worse might arise in the next day's sitting of 27th September 2017.

10. That I also know that under Section 18(f) of the Parliament (Powers and Privileges) Act, Cap 258, it is criminal for any

person to create or join in any disturbance which interrupts or is likely to interrupt the proceedings of Parliament or a Committee while Parliament or the Committee is sitting.

11. That as a result of the disruptive events that took place in the House on the stated days, I found it necessary to request and indeed requested the Commandant of the Parliamentary Police Directorate, to stand ready to provide security backup to my security staff of the Chamber in the event that the sitting of 27th September 2017 prevent the recurrence of the events of 21st and 26th September 2017 ...

12. That I know that during the sitting of 27th September 2017, the Rt. Hon. Speaker of Parliament named and suspended 25 Honorable Members of Parliament that had disrupted Parliamentary business on 26th September 2017 and that had forced the House to adjourn prematurely and in disarray.

13. That I know that on the naming and suspension of the 25 Honourable Members of Parliament, the suspended Members of Parliament refused to vacate the House despite repeated calls by the Rt. Hon. Speaker of Parliament to these Members to leave the House.

14. That I know that the Rt. Hon. Speaker suspended the House at 3.16 pm on 27th September 2017, and in accordance with Rule 88 (6) of the Rules of Procedure of Parliament applicable at the time, directed me to evict or remove the 25 Honourable Members that she had named.

15. That ... I know that when Parliament was suspended, I called the backup security into the House Chamber to assist me evict or remove the named and some violent Members from the House.

16. That ... I know that in the process of evicting or removing the named Members of Parliament, some of their colleagues obstructed and prevented security from evicting or removing the named Members from the House and this led to a scuffle between these Members and the security backup.

17. That I know that with the back-up of police under my command, the security forces used proportionate force commensurate to the force or resistance and violent conduct employed by the named and other rowdy Members of Parliament that had grossly misconducted themselves by refusing to leave Parliament or shielding those required to leave the Chamber of Parliament and damaging Parliament property.

18. That I know that in the process of removing the suspended Hon. Members from the House, some Honourable Members of Parliament tried to resist and defy the removal of the suspended Members of Parliament and as a result security officers were injured ...”

In analyzing this evidence, the Constitutional Court by majority found that the Members of Parliament had contributed to chaos and violence that occurred in Parliament. The Court however further found that the amount and manner of force used by the security forces that were

brought in to intervene was excessive and beyond that which was necessary. The majority Justices of the Court concluded that despite the said use of excessive force, calm was restored in the House and the legislative process proceeded and the Constitutional (Amendment) Act was validly passed.

OWINY-DOLLO, DCJ stated as follows:

> **"It is important to take note of the fact that the commencement and execution of the two incidents of violence by the Parliamentarians preceded any deliberations on the Magyezi Bill. Furthermore, it is quite unfortunate that all this happened in defiance of the Speaker who spent tireless efforts to restore order in and decorum of Parliament; constraining the Speaker to order for the ejection of 25 Members whom she considered were unruly and disruptive. It is against this backdrop that the members of the UPDF intervened. Admittedly, the UPDF can intervene in matters of violence that are civil. The question is when the UPDF can justifiably and thus lawfully intervene in a situation that requires intervention by someone who has the superior force to do so.**
>
> **The evidence adduced in Court shows that what was happening in Parliament was akin to the type of brawls and fracas one would expect to happen in a bar ... For this, the Sergeant at Arms did not consider it such a security threat as would require outside intervention. It was when certain members of the House had shown defiance to the orders of the Speaker that he sought Police reinforcement. There was absolutely no**

reason for the intervention of the UPDF. Proof of this is in the fact that the members of the UPDF who intervened went barehanded in civilian attire; something they would not have done had the situation been such as to warrant their intervention."

Musoke, JCC had this to say –

"**It is evident from the Hansard and the affidavit evidence that repeated calls were made by the Rt. Hon. Speaker of Parliament to maintain order and decorum and allow the debate process to proceed.**

The Speaker then proceeded under Rule 7(2) of the Rules of Procedure of Parliament which enjoins her to preserve order and decorum in the House, and Rules 77, 79(2) and 80 to name and order the immediate withdrawal from the House of any member whose conduct is grossly disorderly, and to suspend any misbehaving member. She named 25 Members of Parliament and invited them to exit the House. She invited the Sergeant at Arms to remove them and suspended the House for 30 minutes for the Sergeant at Arms to do his work.

... What I am able to discern from the affidavit evidence on record is that in the process of execution of the order of the Rt. Hon. Speaker, there was a scuffle arising out of failure by the named Members of Parliament to exit the House, which could have caused their forceful eviction by the staff of the Sergeant at Arms and security officers, who caused the Members of Parliament subsequent arrest and detention.

I am inclined to accept the Respondent's submissions that the Speaker is mandated and conferred with authority to maintain internal order and discipline in proceedings of Parliament by means which she considers appropriate for that purpose. This would ordinarily include the power to exclude any member from Parliament for temporary periods, where the conduct or actions of such a member continuously cause any disruption or obstruction of proceedings or adversary impact on the conduct of Parliamentary business. I find that the Speaker acted within the confines of Rule 77 and 80(6) of the Rules of Parliament when she ordered for the suspension in issue.

... my view is that the forces sent by the IGP could have been enough to contain the situation under the circumstances. There was no indication that the Members of Parliament causing the tumult were armed. Any fight without fire having been discharged could be contained by the Police alone. The deployment of the army, albeit from the permanent establishment at Parliament/President's office, was in my view not justified.

The fact that the UPDF came in did not in any way negate the justifiable nature of the back-up intervention in the first place, which was necessitated by the rowdiness and violence that engulfed the House that day; and the unruly conduct of the previous sittings of Parliament. I am more fortified in my finding that the process leading to the enactment of the impugned Act was not negatively impacted because from the

Hansard reports, business went back to normal after the eviction of the offending Members of Parliament."

Kasule, JCC and **Kakuru, JCC** were in agreement with the above reasoning and findings.

Cheborion, JCC partly agreed to the effect that the violence in the House was contributed to by the violent and disorderly conduct of the Members of Parliament and that it was condemnable. The learned justice however did not agree that there was no need to call in the UPDF given the charged and volatile environment that prevailed at the time. In his view, the involvement of the UPDF was justifiable in the circumstances. He however found that despite their involvement being justified, the members of the UPDF used excessive force in stopping the scuffle in Parliament. He concluded that it was not true that Parliament was thereby made to legislate under duress or that the result of the said violence affected the validity of the resultant Act since normalcy was restored in the House.

I agree with the analysis of the evidence by the majority Justices of the Constitutional Court. I am also in agreement with their findings on this point. I however do not agree with the justification of the involvement of the UPDF as per the finding of learned Justice Cheborion, JCC. I am in agreement with the majority learned Justices that much as the situation in the House was volatile, there was no evidence that the situation was beyond what the Police Force would handle.

I must emphasize that from the material that was laid before the Constitutional Court, there was sufficient evidence to satisfy the Court that security personnel did not invade Parliament out of the blue.

Neither was there an organized plot by the state to attack Parliament and/or overthrow the constitution. To the contrary, it was clear that there was a group of members who were determined to prevent debate of the bill at all costs. There was another camp that wanted the debate to proceed. Both camps incited their supporters leading to the tension. What happened, and which was highly regrettable, was therefore due to contribution of the Members of Parliament. Given the circumstances, it is easy to understand why and how the security forces got involved in the whole process. But evidence indicates, and the Constitutional Court accordingly found, that order was restored and debate of the bill continued normally until the impugned Act was passed.

The other question is in regard to the degree and manner of force that was used.

Evidence was adduced before the Constitutional Court that the security forces that were brought into Parliament were not merely from the Parliamentary Police Directorate but included forces from the UPDF. The forces from the UPDF were neither uniformed nor conspicuously armed. The Constitutional Court fully evaluated this evidence and came to the conclusion that forces from the UPDF were deployed and participated in this exercise.

In my view therefore, though I agree that there was need to use reasonable force to effect the orders of the Speaker, the evidence and circumstances did not warrant the involvement of UPDF personnel, which involvement led to the use of brutal and unnecessary force and violence, occasioning injury and degrading treatment to some Members of Parliament. This has to be condemned; the same way the behavior by

some Members of Parliament that occasioned these incidents should be condemned.

I also agree that the said incidents of violence and use of force did not make the entire process of enacting the impugned Act unconstitutional or that it vitiated the resultant Act. The episodes occurred at particular days and time. From evidence, order was restored and debate on the bill continued. The argument for the appellants that such conduct amounted to forceful amendment of the Constitution in contravention of article 3(4) of the Constitution is not borne out in those circumstances. The violence meted to some members in the House, though illegal, was not done because anyone wanted the members to be forcefully excluded; it was because the members had defied the code of conduct of Members of Parliament and the expected decorum in the House. I do not find it acceptable either that debate in the House would have been forcefully stopped on account of some members' defiance. According to the law and established practice, the acceptable and recognized medium of debate in the house is through speech and voting. When that fails and some members resort to thwarting further debate through chaos, the law empowers the Speaker to reign in, just as she did. When the orders of the Speaker are ignored or defied, it is only expected that force would be applied. The only test at this moment is that the force has to be reasonable.

In the instant case, the test of reasonableness failed. But, as I have pointed out above, the impact could not vitiate the entire process of enacting the Bill.

The other claim was that there was also interference and violence outside Parliament in the process of consultation by Members of Parliament which restricted public participation in the process of amending the Constitution. This matter has been adequately dealt with under issue 2 above.

I am therefore in agreement with the findings of the Constitutional Court that the violence in and out of Parliament did not vitiate the entire process of enacting the impugned Act. The third issue is therefore answered in the negative.

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

Mr. Mabirizi, appellant in Appeal No. 02 of 2018, submitted that under Article 137 of the constitution, the Constitutional Court has no jurisdiction to apply the 'substantiality' test. He further submitted that court has no powers to determine disputes and grant remedies outside its jurisdiction. He contended that Article 137 of the Constitution gives the Constitutional Court no jurisdiction and power to determine whether the contravention affected the resultant action in a substantial manner. He further contended that its work is to determine whether the actions complained against are inconsistent with and/or in contravention of the Constitution and when it finds in favour, to declare so, give redress or refer the matter to investigation.

He concluded that since this role is limited to only determining 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.

Counsel for the appellants in Appeal No. 03 of 2018 (the MPs) submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of Procedure of Parliament as well as the invasion of Parliament. Counsel contended that whereas its applicability is expressly provided for in electoral laws, in constitutional matters the test is totally different. The Constitution being the supreme law of the land provide for no room of any scintilla of violation.

Counsel further submitted that there cannot be room for certain individuals and agencies of government to violate the Constitution with impunity, more so the Parliament of Uganda which is charged with the duty of protecting the Constitution and promoting democratic governance in Uganda under Article 79 (3) of the Constitution. He relied on the decision of this honourable court in ***Paul K. Ssemogerere & 2 Ors versus Attorney-General SCCA. NO. 1 OF 2002;*** where it was held that the constitutional procedural requirements are mandatory.

Counsel for Uganda Law Society (Appeal No. 4 of 2018) submitted that in election matters, the substantiality test relates to standard and burden of proof whereas in constitutional matters, it is article 137(3) and (4) as well as the usual rules of evidence which apply. Counsel

argued that the application of the test to a constitutional petition was erroneous and led to a wrong decision.

In reply, the Attorney General submitted that the Constitutional Court correctly applied the substantiality test and, in so doing, reached a proper conclusion. He further submitted that the substantiality test is used as a tool of evaluation of evidence. He argued that to fault the Court for applying the substantiality test in a constitutional petition meant that a court in interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it and, in his view, such a proposition would be absurd.

The Attorney General contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether it is constitutional court, or an ordinary suit, it is trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

He cited the case of **Nanjibhai Prabhudas & Co. Ltd versus Standard Bank Ltd [1968] E.A 670** where it was held that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In the view of the Attorney General, the alleged non-compliance was a procedural irregularity, which was not of a most fundamental nature as to render a law null and void.

The learned Justices of the Constitutional Court variously applied the substantiality test while assessing whether an alleged wrong or breach of a particular law or procedure was fundamental enough as to vitiate the impugned law or thee process of enacting the same.

From my observation, I believe the appellants misconstrued the way in which the Constitutional Court used the term 'substantial manner'. It cannot be true, as the argument by the appellants appears to be, that the moment the electoral laws in Uganda incorporated a provision on substantiality, the term lost its other legal and natural meaning. Substantiality has meaning and context that is distinct and detachable from election matters. The Black's Law Dictionary, 9th Edition at page 1565 defines **substance** as the **"essence of something; the essential quality of something, as opposed to its mere form."** At page 943, the Black's Law Dictionary defines substantial justice as **"Justice fairly administered according to rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits."**

This context of substantive justice has since been imported into our law even before the electoral laws referred to by the appellants. The 1995 Constitution of the Republic of Uganda, in Article 126 (2) (e) provides

> *In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles —*
>
> *(a)…….*
>
> *(b)…….*
>
> *(c)…….*
>
> *(d)…….*
>
> *(e)* <u>*substantive justice*</u> *shall be administered without undue regard to technicalities.* (emphasis added).

Furthermore, under article 137 (5) (a) of the Constitution, there is another introduction of the word "substantial". It says:

"Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court –

(a) may, if it is of the opinion that the question involves a substantial question of law … refer the question to the constitutional court for decision in accordance with clause (1) of this article.

It is clear from this that the concept of substantiality either of justice or of law has been introduced into our jurisprudence by the Constitution itself. The court is required to consider whether substantive justice would be denied by undue regard to technicalities; or, if an issue is raised if an issue should be referred to the constitutional court for interpretation, the court must make a finding as to whether the issue involves a substantial question of law.

Whether one baptizes this 'substantiality test' or any other name, it does not take away the duty of the court to evaluate the evidence and the law before it so as to determine whether substantive justice has been served.

In my view therefore, it is acceptable for the Court to overlook matters of form and focus on the substance of the matter before it where the situation so warrants. Where, for instance, the Court finds that there was breach of some provision of the Rules of Procedure of Parliament but the breach did not affect the process of legislation in a substantial manner, the Court is not barred from applying the substantiality test in such circumstances. Clearly, it is not intended under the law that every breach should vitiate a court process. There are some breaches that only speak to form other than the substance of a particular matter.

Mr. Lukwago argued that in line with the decision of this honourable court in ***Paul K. Ssemogerere & 2 Ors versus Attorney-General SCCA. NO. 1 OF* 2002;** constitutional procedural requirements are mandatory. That is true. But let us look at and analyse the constitutional procedural requirements that are relevant to the impugned bill and Act herein as against those that were in issue in the **Ssemogerere case**.

Under article 91 (1) of the Constitution, **"the power of Parliament to make laws shall be exercised through bills passed by Parliament and assented to by the President."** Article 94 (1) thereof empowers Parliament to make rules to regulate its own procedure including the procedure of its committees. Article 94 (4) thereof provides –

The rules of procedure of Parliament shall include the following provisions

a. *the Speaker shall determine the order of business in Parliament and shall give priority to Government business;*

b. *a member of Parliament has the right to move a private member's bill;*

c. *the member moving the private member's bill shall be afforded reasonable assistance by the department of Government whose area of operation is affected by the bill; and*

d. *the office of the Attorney-General shall afford the member moving the private member's bill professional assistance in the drafting of the bill.*

All the above provisions were, in my view, observed and satisfied in the case of the original Bill as presented by Hon. Magyezi. I have already

discussed in detail the procedure for bringing and passing a bill into an Act of Parliament for amendment of the Constitution. I have indicated that in as far as the original Constitution (Amendment) Bill was concerned, all the procedures as required by the Constitution were complied with. The amendments to that original bill that were introduced at the stage of the Committee of the Whole House, debated and passed in a manner that did not comply with the procedures set out by the Constitution were simply not passed.

It is therefore clear in my opinion that the facts and circumstances of this case are distinguishable from those in **Dr. Paul K. Ssemogerere & Anor vs AG (Supra).** In the **Ssemogerere case,** there was no certificate of compliance from the Speaker at all. In this case there was a certificate of compliance; only that some provisions in the Act had not been certified by the Speaker. The fate of those provisions has been duly determined. Secondly, in the **Ssemogerere case**, Parliament had passed an Act of Parliament that had amended a number of other provisions of the Constitution either expressly, by implication or by infection without following the procedure set out by the Constitution in respect of those other articles. This cannot be said of the amendment bill and Act that have been saved by the Court.

In the instant case, it is my opinion that none of the requisite constitutional procedures were compromised by the Constitutional Court. The Constitutional Court also found that the Rules of Procedure of Parliament were substantively observed during the enactment of the impugned Constitution (amendment) Act. The Court further held that the breaches that occurred had no substantive effect on the process of

enactment of the said Act. I agree with the learned Justices of the Constitutional Court in that regard.

In my view therefore, the criticism towards the decision of the Constitutional Court on this point was out of context and was unjustified. This is with the exception of where the learned Justices based themselves on the substantiality test as used under the electoral laws. Such reliance was erroneous on the part of the learned Justices. Otherwise, as I have indicated above, in the context of substantive justice, the test was duly applicable. Issue 4 is therefore answered in the negative.

In the result, I would dismiss this appeal with an order that each party shall meet their own costs.

The final decision of the Court therefore is as follows:

1. **By unanimous decision of the Court, the preliminary objections fail.**

2. **By unanimous decision of the Court, issue 1 and 5 on the Basic Structure Doctrine and the Removal of the Age limit fail.**

3. **By majority decision of 4 to 3, issue 2 on the process of enactment of the Act fails.**

4. **By majority decision of 4 to 3, issue 3 on the violence/scuffle inside and outside Parliament fails.**

5. **By majority decision of 4 to 3, issue 4 on the substantiality test fails.**

6. **By unanimous decision of the Court, issue 6 on the vacation of office by the President after attaining the age of 75 years fails.**

7. **By unanimous decision of the Court, issue 7 on the procedural irregularities in the Constitutional Court fails.**

8. **By majority decision of 4 to 3, the decision of the Constitutional Court is upheld. This appeal therefore fails.**

9. **With regard to costs, it is the unanimous decision of this Court that each party shall bear their own costs in this Court.**

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

.....
BART M. KATUREEBE
CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

{Coram*: Katureebe CJ, Arach-Amoko, Mwangusya, Opio-Aweri, Tibatemwa-Ekirikubinza , Mugamba, JJSC; Tumwesigye, Ag. JSC}*

CONSTITUTIONAL APPEALS NO. 02, 03 and 04 0F 2018

BETWEEN

1.MALE H MABIRIZI K. KIWANUKA

2.HON.GERALD KARUHANGA & OTHERS } ::::::::::APPELLANTS

3.UGANDA LAW SOCIETY

AND

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

{ Appeal from the majority decision of the Constitutional Court at Mbale (Owiny-Dhollo, DEPUTY CHIEF JUSTICE, Kasule, Musoke, Barishaki, JJA/ JJCC, (Kakuru JA/JCC dissenting) in Consolidated Constitutional Petitions No. 49 of 2017; and No. 03, 05 , 10 and 13 of 2018, dated 26th July, 2018}

JUDGMENT OF ARACH-AMOKO, JSC

Introduction:

This consolidated Constitutional appeal arises from the decision of the Constitutional Court that sections **1, 3, 4, and 7 of the Constitution (Amendment) Act No. 1 of 2018** which removed the age limit for the President and the Chairmen Local Council V, to contest for election to those offices, and for the implementation of the recommendations of the Supreme Court in **Presidential Election Petition No.1 of 2016: Amama Mbabazi vs. Yoweri Kaguta**

Museveni, were passed in full compliance with the Constitution and are valid provisions of **Constitutional (Amendment)Act No.1 of 2018** (herein referred to as the "Act"). The decision was by majority of 4 to 1. The appeal raises very important Constitutional issues of great public importance Constitutionalism in Uganda particularly in respect of the amending power of Parliament.

Background:

Before considering the merits of the appeal, it is necessary to give a brief background to the appeal.

In September 2017, Hon. Raphael Magyezi, the Member of Parliament for Igara West Constituency, in Bushenyi District moved a motion in Parliament to introduce a private Member's Bill to amend the Constitution. He was granted leave and he introduced a Bill entitled the **(Constitutional Amendment) (No. 2) of 2017.**

The object of the said Bill was to amend the 1995 Constitution of the Republic of Uganda in accordance with **Articles 259 and 262** of the Constitution:

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

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

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

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

(v) For related matters.

During the second reading of the Bill, when the House was sitting as the Committee of the whole House, two separate motions were moved to amend the Bill. The first motion which sought to amend the Constitution by extending the tenure of Parliament and Local Government Councils from five to seven years was moved by Hon. Michael Tusiime, the Member of Parliament for Mbarara Municipality. The second motion which sought to reinstate the Presidential term limits was moved by Hon. Nandala Mafaabi, the Member of Parliament for Budadiri West Constituency. After the third reading, Parliament passed the Bill as amended. The Bill was thereafter sent to the President for his assent, and he assented to it on the 27th December, 2017. The Bill became the **Constitution (Amendment) Act (No.1) of 2018.**

Some factions of Ugandans including the appellants, were aggrieved by the passing of the Act and lodged petitions in the Constitutional

Court pursuant to Article 137(1) and (3) of the Constitution, challenging the validity of the Act on the ground that the process of enactment as well as its provisions had violated the Constitution and prayed for its nullification.

The appellants' petitions were supported by affidavits sworn by several people including Mr. Mabirizi; Hon.Gerald Karuhanga, Hon. Ssemujju Ibrahim, Hon. Winifred Kiza, Hon. Ssewanyana Allan, Hon. Odur Janathan, Hon. Mubarak Munyagwa and Hon. Betty Nambooze Bakireke for the 2nd appellants; Mr. Francis Gimara, Proffessor Fredrick Ssempebwa, Hon. Morris Wodamida ogenga Latigo and Mr. Fred Kakongoro for the 3rd appellant.

The respondent filed an answer to the petitions in which he stated that Act was enacted in accordance with the Constitution and its provisions were valid and constitutional. The answer to the petition was supported by affidavits sworn by General David Muhoozi, Mr. Ahmed Kagoye, Ms Jane Kibirige, Mr. Samuel Tusubira, Mr. Keith Muhakanizi, Mr. Asuman Mugenyi, Mr. Mwesiga Frank,Hon. James Kakooza,Mr. Moses Grace Balyeku, Mr. Twinomugisha Lemmy, Hon. Tumusiime Rosemary Bikaako, Hon. Ongalo Obote Clement Kenneth and Mr. Allan Mukama.

Since they raised similar issues, the petitions were consolidated and heard jointly by the Constitutional Court.

At hearing of the consolidated petition, the following issues were agreed upon for determination by the Constitutional Court:

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

2. ***And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.***

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

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

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

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

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

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

(c) Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members, is inconsistent with and/or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.

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

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

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

(g) Whether the Amendment 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.

(a) Whether the actions of Parliament preventing some Members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

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

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

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

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

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

(g) Whether the action of Parliament in:-

(i) waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded;

(ii) closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every Member of Parliament could debate on the said Bill;

(iii) failing to close all doors during voting;

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

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

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

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

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

12. ***Whether sections 3 and 7 of the Act, lifting the age limit without consulting the population are inconsistent with***

and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

13. Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 102 (c) of the Constitution of the Republic of Uganda.

14. What remedies are available to the parties?

After hearing the petition, the Constitutional Court, by a majority of 4 to 1, with one member of the Court, Kakuru JCC, dissenting, granted the petition in respect of the extension of the tenure of Parliament and Local Governments by two years and re-instatement of term limits. The Court however, dismissed the petition in respect of the removal of age limit and implementation of the recommendations of the Supreme Court in **Presidential Election Petition No. 1 of 2016; Amama Mbabazi vs. Yoweri Museveni.** As a result, the Constitutional Court made the following declarations:

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 remove age limits for the President, and Chairperson Local Council V, to contest for election to the respective offices, and for the implementation of the recommendations of the Supreme Court in Presidential Election Petition No. 1; Amama Mbabazi vs Yoweri Museveni, have, each, been passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

The Constitutional Court awarded professional fees of 20,000,000 shillings (Twenty million only) for each Petition. The Court clarified that this award did not apply to **Petition No. 3 of 2018** since the Petitioner had prayed for disbursements only, and **Petition No. 49 of 2017** by Mr. Mabirizi where the Petitioner had appeared in person.

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

As indicated earlier in this judgment, the appellants were aggrieved by the above decision, specifically the one in respect of the removal of term limits for Presidents and Local Council V Chairpersons and filed the instant appeals in this Court.

Grounds of Appeal

The grounds of appeal by Mr.Mabirizi were as follows:

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

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

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

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

4. ***All the learned Justices of the Constitutional Court erred in law and fact when they derogated the petitioner's right to fair hearing by preventing the petitioner from substantially responding to the respondent's submissions by way of rejoinder.***

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

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

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

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

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

9. ***All the learned Justices of the Constitutional Court erred in law and fact when they did not make a clear and specific determination of Issue 6(a) and all submissions***

made in that regard relating to restrictions on private members' Bills imposed by Article 93 of the Constitution.

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

11. ***All the learned Justices of the Constitutional Court erred in law and fact when they did not determine the point that the Speaker was stopped from presiding over actions and presenting them as lawful which she had earlier found and Ruled to be unlawful.***

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

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

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

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

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

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

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

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

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

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

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

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

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

24. ***The majority Justices of the Constitutional Court erred in law and fact when they upheld part of the Act in total***

departure from Constitutional Court decision(s) to the effect that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it.

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

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

26. ***All the learned Justices of the Constitutional Court erred in law and fact when they over-protected Mr. Keith Muhakanizi, The Secretary to The Treasury, a witness under cross-examination and prevented him from answering questions put to him as wells as preventing the petitioner from asking pertinent questions.***

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

28. ***The majority Justices of the Constitutional Court erred in law when they held that there was need for corroboration***

of the petitioner's evidence of being denied access to the gallery of Parliament.

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

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

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

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

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

33. ***Without prejudice to the above, all the learned Justices of the Constitutional Court erred in law and fact in holding***

that the Motion to introduce the private members Bill, the Bill itself and the entire process did not contravene Article 93 of The Constitution.

34. ***The majority Justices of the Constitutional Court erred in law and fact in holding that the initial motion and Bill by Hon. Rapheal Magyezi did not make provision for and/or had effect of a charge on the consolidated fund.***

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

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

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

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

38. ***The majority Justices of the Constitutional Court erred in law and fact in holding that preventing members of***

Parliament from debating on the Bill was not fatal in the constitutional amendment process.

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

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

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

41. ***All the learned Justices of the Constitutional Court erred in law and fact when they condoned violation of non derogable rights against torture, inhuman and degrading treatment and validated the resultant outcome which was tainted.***

42. ***All the learned Justices of the Constitutional Court erred in law and fact in holding that since the members of Parliament called violence for themselves, the torture, inhuman degrading treatment against them cannot be***

held to be unconstitutional and that the resultant Act cannot be invalidated on ground of violence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART I: GROUNDS RELATING TO MULTI-PARTY DEMOCRACY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART N: GROUNDS RELATING TO PRAYERS & PLEADINGS.

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

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

PART O: GROUNDS RELATING TO REMEDIES.

80. ***The majority Justices of the Constitutional Court erred in law in applying the principle of severance of some sections in a single Act in a situation where the constitutional amendment procedure was fatally unconstitutional and defective.***

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

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

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

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

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

WHEREFORE, the appellant prays for orders that:

a. ***The Appeal be allowed.***

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

c. ***The Constitutional petition be remitted back to the constitutional court for expeditious hearing, in compliance with fair hearing principles, before a different panel.***

d. The appellant be granted general damages for inconveniences.

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

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

IN THE ALTERNATIVE but without prejudice to the above, the appellant prays for orders that;

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

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

i. The appellant be granted general damages for inconveniences.

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

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

The Grounds of Appeal by the 2nd appellants were as follows:

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

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

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

4. ***The learned majority Justices of the Constitutional Court erred in law and fact in failing to pronounce***

themselves on the implied amendment of Article 21 of the Constitution by the impugned Act.

5. ***The learned majority Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill.***

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

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

8. ***The learned majority Justices of the Constitutional Court erred in law and fact in holding that the violence that ensued following the invasion of Parliament by Police and members of the UPDF and***

other security agencies did not vitiate the process leading to the enactment of the Constitutional (Amendment) Act.

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

10. ***The learned majority Justices of the Constitutional Court erred in law and fact in holding that the Ug. Shs. 29,000,000/= (Twenty Million Shillings) doled out to each Honourable Member of Parliament created no additional charge on the consolidated fund.***

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

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

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

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

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

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

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

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

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

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

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

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

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

24. The learned majority Justices of the Constitutional Court erred in law and fact in awarding UGX. 20,000,000/= (Twenty Million Shillings) as

professional fees for each petition including Constitutional Petition No. 05 of 2018 and two-thirds of the taxed disbursements to all the Petitioners.

WHEREFORE it is proposed to ask court for the following orders;

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

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

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

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

b) That section 7 of the Constitution (Amendment) Act, 2018 in as far as it purports to lift the minimum and maximum age qualification of a

person seeking to be elected as District Chairperson.

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

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

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

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

VII. That the arbitrary decision of the Inspector General of the Uganda Police Force of restricting several Members of Parliament to their respective constituencies in their bid to consult their electorates on the constitution (Amendment) Bill No. 2 of 2017 was inconsistent with and in contravention of Articles

1, 3, 8A, 20, 24, 29, 79, 208(2), 209, 211(3) and 259 of the Constitution.

VIII. That the process leading to the enactment of the Constitution (Amendment) Act, 2018 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National Objectives and Directive Principles of state policy and other constitutional provisions and as a result was inconsistent with and in contravention of Articles 1, 2, 3, 8A, 79, 91 and 259 of the Constitution of Uganda.

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

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

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

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

XIII. That the actions of the Speaker of Parliament to close the debate on the Constitution (Amendment) Bill No. 2 of 2017 before each and every Member of Parliament could debate and present the views of their constituents concerning the Constitutional (Amendment) Bill was a violation of Rule 133(3) (a) of the Rules of Procedure of Parliament therefore in

contravention of Articles 79, 91, 94 and 259 of the Constitution of Uganda.

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

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

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

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

3. ***That the Respondent pays costs of this Appeal and in the Court below.***

The Grounds of appeal by the 3rd Appellant were as follows:

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

2. ***The learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda.***

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

4. ***The learned majority Justices of Constitutional Court erred in law when they found that there were breaches of***

the Constitution and failed to make orders on the Appellant's prayers.

Wherefore it is proposed to ask the Court for the following orders;

1. That the appeal be allowed

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

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

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

iii. that the actions of the security forces in entering Parliament, assaulting and detaining members of Parliament is inconsistent with or in contravention of Articles 23,24 and 29 of the 1995 Constitution of the republic of Uganda.

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

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

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

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

Agreed Issues for determination:

The three appeals were consolidated by consent and heard together in this Court as well and the issues agreed upon for determination are the following:

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?***

7 (a) 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.

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

8. What remedies are available to the parties?

Representation

The 1st appellant Mr. Mabirizi himself, the 2nd appellants were represented by Mr. Lukwago Elias and Mr. Rwakafuzi assisted by Mr. Mpenge Nathan and Mr. Nalukora Elias and the 3rd appellant was represented by Mr. Wandera Ogalo assisted by Mr. Moses Kiyemba.

The learned Attorney General Mr. William Byaruhanga appeared in person together with Hon. Mwesigwa Rukutana the Hon. Deputy Attorney General, Mr. Francis Atoke the Solicitor General, Ms. Christine Kahwa the Ag. Director Civil Litigation, Mr. Martin Mwambutsya Commissioner Civil Litigation, Mr. Phillip Mwaka, Principal State Attorney Mr. George Karemera, Principle Senior State Attorney, Mr. Richard Adrole, Senior State Attorney Mr. Geoffrey Madete State Attorney, Ms. Imelda Adongo, State Attorney, Mr. Jonson Natuhwera, State Attorney, Ms. Jacky Amusugat, State Attorney, Mr. Sam Tusubira, State Attorney and Mr. Allan Mukama, State Attorney.

In their written submissions filed in Court, Mr. Mabirizi argued issues 7, 2, 3, 4, 5, 6 and 8 separately. Mr. Lukwago and Mr.

Rwakafuuzi argued issues 1, 2, 3, and issues 4 together, then issues 6, 7 and 8 separately. Mr. Ogalo argued issues 3, 5, 4, 2 and 8. The Attorney General responded to all the arguments on all the issues. Mr. Mabirizi and the Attorney General raised preliminary objections as well. They made oral highlights of their written submissions in Court on the 15th and 16th January, 2019. We reserved our judgment to be delivered on notice.

The Principles of Constitutional Interpretation

In determining this appeal, I shall be guided by the following established and well tested principles of Constitutional interpretation that have guided our courts:

1. The Constitution is the Supreme law of the land and forms the standard upon which all laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency.

2. The entire Constitution has to be read together as an integrated whole with no particular provision destroying the other but rather each sustaining the other. No one provision of the Constitution is to be considered alone but that all the provisions bearing upon a particular subject are brought into view and to be interpreted so as effectuate the greater purpose of the instrument.

3. Where words and phrases are clear and unambiguous, they must be given their primary, plain and natural meaning. The

language used must be construed in its natural and ordinary sense. Where the language of a statue sought to be interpreted is imprecise or ambiguous, a liberal, generous and purposeful interpretation should be given. The interpretation should not be narrow and legalistic, but should be broad and purposeful so as to give effect to the spirit of the Constitution.

4. In determining the constitutionality of legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, either of the unconstitutional purpose, or unconstitutional effect animated by the object the legislation intends to achieve.

5. A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio-economic and political cultural values so as to extend the benefit of the right to those it is intended for.

6. The history of the country and the legislative history of the Constitution is relevant and a useful guide in constitutional interpretation.

7. Judicial power is derived from the people and shall be exercised by the courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people and the courts shall

administer substantive justice without undue regard to technicalities.

[See**: P.K Ssemwogere vs. AG Constitutional Appeal No. 1 of 2002 (SC); Attorney General vs. David Tinyefunza, Constitutional Appeal No.1 of 1997(SC); Attorney vs. Salvatori Abuki, Constitutional Appeal No.1 of 1998, Attorney General vs Uganda Law Society, Constitutional Appeal No.1 of 2006 (SC); Livingstone Okello Okello vs. Attorney General; Constitutional Petition No. 4 of 2005 (CC) and Article 126 (1) and (2) (e) of the 1995 Constitution.**

Preliminary Objections

Before proceeding with the determination of the issues raised in the grounds of appeal, it is important to resolve the preliminary objections raised by Mr. Mabirizi and the Attorney General respectively to each other's appeal. I prefer to consider them first before going into the merits of the appeal just in case they dispose of the appeal without going into its merits.

Mr. Mabirizi raised an objection to the written submissions of the respondent on the ground that they had been filed outside the schedule that the Court had given the parties at the pre-hearing conference. That Court should strike them out on that account. We considered the objection and found that, although it was genuine, this Court had power to validate such a document under Rule 2(2) of the Supreme Court Rules in the interest of justice, and we did so.

The respondent on his part, objected to the entire Memorandum of Appeal filed by Mr. Mabirizi contending that it offended Rule 82 of the Supreme Court Rules in that grounds of appeal set out therein are speculative, argumentative, narrative, and insolent and an abuse of Court process.

The respondent submitted that the appeal was therefore incompetent and should be struck out with costs. He relied on the case of **Beatrice Kobusingye And Anor vs Nyakaana, Civil Appeal No. 5 of 2004(SC);** and **Hwang Sung Ltd vs M & D Timber Merchants and Transporters Ltd , Civil Appeal No. 2 of 2018(SC),** in support of this objection.

The second objection by the respondent to Mr Mabirizi's appeal is that the petition presented by Mr. Mabirizi in the Constitutional Court did not conform to Article 137 of the Constitution in that it was filed in December 2017, before the Bill had been passed into an Act. Mr. Mabirizi did not amend his petition after the enactment of the Bill. This failure renders his petition null and void. **Miria Matembe & 2Ors v Attorney General, Constitutional Petition No.02 of 2005(CC)** and **Cardinal Nsubuga vs Makula International Ltd(1982)** were relied on in support of this objection.

Mr. Mabirizi opposed the objection. He contended that the essence of the respondent's objections is that no appeal lies to this Court, since all the grounds of appeal offend Rule 82(1) and the petition was also not properly before the Constitutional Court. This cannot be done informally because Court may end up by striking out the appeal

without any evidence brought before it. This would defeat the ends of justice. If the respondent was serious, he would have moved such objections through an application under **Rule 78 & 42(1)** of the Supreme Court Rules. He contended that, the situation would have been different if the respondent was challenging one or two grounds of appeal, but he was challenging the entire memorandum and the entire appeal. According to Mr. Mabirizi, therefore, the objections are incompetent and should be rejected by Court on that account.

Mr. Mabirizi submitted that, without prejudice to the above, the claim by the respondent that the grounds of appeal are speculative, argumentative narrative, insolent an abuse of the court process was unfounded since **Rule 82(1)** is clear; it only prohibits grounds that are **"argument"**, or **"narrative"** not "**speculative, insolent and abuse of the court process",** as argued by counsel for the respondent. According to him, what the Rule requires is that at the end of stating the grounds of appeal, the appellant must state the nature and order which it is proposed to ask the court to make, as he had done in his grounds of appeal. He argued that as long as a ground of appeal points out a specific complaint which is clear to the extent that the respondent is aware of a specific complaint so as to be able to contemplate what will be argued, such ground is compliant with the Rule. He then went through the grounds of appeal and contended that he was cautious with the requirements of the law and ensured that all the grounds were concise and fitted squarely within the ambit of Rule 82(1). Counsel for the respondent had thus misinterpreted **Rule 82 (1)** and Court should reject this limb of his

objection as well. He relied on the ruling by Mugamba JSC in **Rachobhau Shivabhai Patel & Anor vs. Henry Wambuga and Anor, Civil Appeal No. 06 of 2017(SC)** in support of this submission on this point.

Mr. Mabirizi submitted that in the alternative and in the unlikely event that this Court is convinced by the respondent's objection, the Court should find that the respondent has suffered no prejudice, since he was able to understand the complaints in the appeal and adequately respond to them.

Regarding the claim that the petition did not conform to Article 137, Mr. Mabirizi contended that this claim is not only unfounded, but it is belated and illegally presented as well, since the objection was neither raised nor argued before the lower court, hence it cannot be raised and determined at this level: [See: **Bitamisi v Rwabuganda, SCCA No. 16 of 2014.**]

He further contended, the objection is barred by **Rule 98(a)** of the Rules of this Court which prohibits a party to an appeal from arguing against the decision of the Court of Appeal without the leave of court, except on grounds that are specified in the memorandum of appeal or a cross-appeal or specified in a notice under Rule 88 of the Rules of this Court. He submitted that when the respondent was served with the memorandum of appeal, he had the option to file a cross-appeal or a notice of grounds for affirmation of the decision of the Constitutional Court under Rule 88 of the Supreme Court Rules wherein he would have raised this objection, so he cannot raise it

now. See: **Hamid vs. Roko Construction, Civil Appeal No. 01 of 2013.**

He argued that even if the objection was competent, it lacks merit and should be rejected since his *locus* arose the moment Parliament prevented him from accessing Parliament because in that, there was an act done by the authority of Parliament under the Parliament Rules of Procedure and all the actions throughout up to the purported voting were, in his opinion, inconsistent with or in contravention of the Constitution. That his petition clearly challenged the actions of the persons stated in the petition and hence passed the test under Article 137(3). He said that the consequent processes of assent and gazette had built on already challenged actions, but even then, he argued the pleadings had captured them. He emphasised that he had actually filed **Constitutional Applications No. 45 and 46** to halt the assent and gazette but they were overtaken by events.

Ruling on the Preliminary Objection

I have considered the arguments of both parties on the preliminary point of law and also considered the relevant laws and authorities referred to by both sides.

Regarding the first limb, **Rule 82** provides that:

> **"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."

This Court has had occasion to comment on this Rule in similar situations in a good number of cases including the ones cited above. The Court stated in the case of **Rachhobhau Shivabhai Patel Led & anor vs. Henry Wambuga & Anor(supra)** that:

"The purpose of this Rule is to ensure that the court adjudicates on specific issues complained of in the appeal and to prevent the abuse of the court process."

In **HwanSung Ltd v M&D Timber Merchants and Transporters Ltd (supra) this Court** observed that:

"It is not enough for counsel to simply complain and state that the Justices erred in law. He has to specify the error committed."

In **Beatrice Kobusingye & Anor vs Nyakana (supra)** this court observed that:

"The grounds of appeal may ordinarily be rejected if all or any of them offend the Rules of the contents of a memorandum of appeal and an objection to any grounds of appeal can be based on these provisions".

It is therefore clear from the above Rule that a ground of appeal must be precise in challenging a holding or reasoning of the court and specify the points wrongly decided. Failure to comply with the Rules renders the ground incompetent and may be struck out.

I have examined the grounds of appeal by Mr. Mabirizi and I find them outside the ambit of Rule 82. They are argumentative and inconcise.

A perusal of the memorandum of appeal shows that Mr. Mabirizi raised 84 grounds of appeal some of which were too general, repetitive and argumentative which offended Rule 82 and ordinarily were liable to be struck out.

Mr. Mabirizi rightly argued that the objection by the respondent was irregularly raised contrary to Rule 98(b) and 78.

Rule 98 reads:

> **"At the hearing of an appeal—**
> **(a) no party shall, without the leave of the court, argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under Rule 88 of these Rules;**

(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;

Rule 78 provides that:

"A person on whom a notice of appeal has been served may at any 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."

In my opinion, the respondent should have brought an application under Rule 78 to strike out the entire appeal on grounds that it is incompetent and therefore no appeal lies but he did not do so and neither did he give any sufficient reason nor did he seek leave of this court as per Rule 98(b) of the Rules of this court.

Further, the respondent was not prejudiced in any way since all the petitions were consolidated and the same issues were raised by all the parties to which he clearly responded.

Regarding the issue whether the petition conformed to Article 137, Article 137(3) reads as follows:

"A person who alleges that—

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

(b) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional court for a declaration to that effect, and for redress where appropriate."

This Article has been interpreted by this court in the case of **Ismail Serugo vs. Kampala City Council & Anor, SCCA No.2 of 1998** where Justice Mulenga JSC (RIP) held that**:**

" ***A petition brought under this provision in my opinion, sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent or which is alleged to have been contravened by the act or omission and prays for a declaration to that effect."***

In Baku Raphael and Anor v Attorney General, SCCA No.1 of 2003 following the above decision, Odoki, CJ (as he then was) further held that:

" A liberal and broader interpretation should be given to a Constitutional petition when determining whether a cause of action has been established."

A perusal of Mr. Mabirizi's petition in the Constitutional Court shows that it describes the acts or omissions complained of and shows the provision of the Constitution alleged to have been contravened. It also prays for a declaration that the acts in Parliament were inconsistent with the Constitution.

It is clear that he was challenging the actions during the passing of the Constitutional (amendment) Bill No.02 of 2017 into an Act as being inconsistent with the Constitution and prayed for a declaration to that effect. The petition therefore conformed to Article 137. That notwithstanding, he also filed supplementary affidavits in support of his petition as and when the Bill was passed and later assented to. This in my view did not render the petition null and void. The Constitutional Court interpreted some of these actions as contravening the Constitution, he therefore had a right to appeal against the decision.

The case of **Miria Matembe vs Attorney General** (supra) is distinguishable in the circumstances. Whereas that case challenged the proposed amendments of the (Amendment) Bill No.2 of 2005 and this clearly falls under Article 137 (a), in Mr. Mabirizi's petition, he challenged the actions/omissions of Parliament in passing of Constitutional (Amendment) Bill No.2 of 2017. This falls under Article 137(b).

In Miria Matembe's case the petitioners challenged the Constitutionality of the Constitutional (Amendment) Bill No.2 of 2005 which was tabled before Parliament by the Attorney General/Minister of Justice and Constitutional Affairs.

They mainly alleged that:

The act of the Minister in tabling before Parliament and of Parliament debating the Constitutional (Amendment) Bill No. 2 of 2005 which combines proposed amendments to articles specified in articles 259 (2), 260 (2) and 261 is inconsistent with and contravenes articles 91 258, 259, 260, 261 and 262 of the Constitution in as much as:

a) ***The proposed amendments to some of the articles referred to in article 260 and 261 will unduly be subjected to the procedure in article 259 of the Constitution.***

b) ***The proposed amendments to some of the articles referred to in article 259 (2) of the Constitution will be unduly subjected to article 260 of the Constitution.***

c) ***The proposed amendments to some of the articles referred to in article 261 of the Constitution will***

be unduly subjected to article 262 of the Constitution.

That the said Bill in as far as it proposes to amend in an omnibus manner several articles of the Constitution without a specific two thirds vote in Parliament and where necessary in district councils and/or referenda on each specific article and by subjecting the entire Bill to an omnibus district council vote and national referenda contravenes and is inconsistent with article 1 of the Constitution."

They prayed for a declaration that the said Bill is inconsistent with the Constitution and is null and void, an order that Parliament and all its Committees should be restrained from further consideration of the Bill and costs for the petition.

This is why the Court held inter alia that:-

"*It is clear to us that in the first limb of Article 137 (3) (a), the Constitution provides for the challenging by any person who satisfies the relevant parts of the rest of Article 137, the Constitutionality of an Act of Parliament and not a mere draft proposal for an Act of Parliament. If the framers of the Constitution intended that the Constitutionality of a Bill for an Act of Parliament can be challenged, they would have clearly stated so."*

It should be noted that at the time of hearing and completion of Hon. Matembe's petition, the Committee had also not yet submitted its report for consideration and debate by Parliament. The Bill was therefore still premature. Court then held that the petition was therefore speculative, premature and misconceived. Court also found that it did not raise any matters for Constitutional interpretation.

In the instant case, the record shows that Parliament passed the **Constitutional (Amendment) Bill No.02 of 2017** on the 20th December, 2017 and the President assented to it on the 27th December, 2017. On the 22nd December, 2017, Mr. Mabirizi filed his petition in the Constitutional Court challenging the Constitutionality of the actions of Parliament in relation to the Bill as well as the Constitutionality of the term of the office of the President. In his petition in para 1, he alleged that **:**

> **"*the action of the respondent that the term of office of the current President expires in 2021, after the expiration of 5 years is inconsistent with Articles 102(b) and 102(c) of the Constitution.***
>
> *In para 2* he alleged that: ***the actions of Parliament to prevent Members of the public to access Parliament's gallery during the presentation of the Bill was inconsistent with Articles 1, 8A and 79 of the Constitution."***

He then prayed for:

> ***"a declaration that the actions of Parliament were inconsistent with the Constitution and for orders that Presidential elections are carried out once the President attained 75 years of age. He also prayed for an award of general damages and costs with interest of 25%."***

On 27th December, 2017 when the Bill was assented to, he filed a supplementary affidavit updating and supplementing his averments in the affidavits in support of the petition and on 4th January, 2018 he filed another supplementary affidavit in further support of his petition. In paragraph 12 of his 2nd supplementary affidavit at page 95 of his Record of Appeal A, he averred that:

> ***"12.That the assent which is null and void, coupled with the unconstitutional actions complained against in my petition, the affidavit in support thereof, my 1st supplementary affidavit and this affidavit render the ACT a mere nullity only awaiting to be declared so by Court."***

At the time of the hearing of the Petition, the Bill had already become law. In my view therefore, Mr. Mabirizi's petition was not premature since it challenged the Constitutionality of the actions of Parliament in passing the Bill (and was further supplemented in challenging the Constitutionality of the Constitutional (amendment) Act. No.1 of 2018) which was not the case in the case of **Miria Matembe v Attorney General** (supra). The petition therefore conformed to Article 137 and raised matters of Constitutional interpretation.

Further, and without prejudice to the foregoing, I agree with Mr Mabirizi that this issue was not raised in the lower court even when the matter was being consolidated and issues framed, neither did the respondent cross appeal in this Court as per Rule 87 and 98(a) of the Rules of this Court. The respondent cannot therefore ambush the appellant at this stage without being given an opportunity to be heard. See: **Hamid v Roko Construction, SCCA No.1 of 2013.**

Similarly, I would also re-echo the case of **Bitamisi v Rwabuganda**, (supra) where a new issue was raised. The court held that those were new matters that were not part of the parties' pleadings and could not, therefore, be considered at that stage. In **Tororo Cement Co. Ltd v Frokina International Ltd, SCCA No.2 of 2001**, it was elaborated that it is proper and good practice to aver in the opposite party's pleadings that the pleadings of the other side are defective and that at the trial, a preliminary objection will be raised. This puts the opposite party on notice and may save Court a lot of time. Otherwise the best practice is to raise a preliminary objection at the earliest opportunity as the determination of the same might dispose of the matter.

In the premises, I do not find any merit in the preliminary objection raised by counsel for the respondent and it is accordingly overruled.

Let me now revert to the issues framed:

Issue 7 (a): ***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.

This complaint was raised by Mr. Mabirizi in grounds 1,2,3,4,5,6,7,8,11,17,18,19,25,26,78,80,81,82,83 and 84 of his appeal. The 2nd appellant raised it in grounds 18, 19, 20,21,22,23 and 24 of their appeal. The third appellant did not raise this complaint.

Mr. Mabirizi complained in ground 1 that the Constitutional Court failed to hear and determine his petition expeditiously and to render judgment within 60 days from the 19th April, 2018. This allegedly derogated from his right to fair hearing and invalidated the decision.

The respondent contended that the Constitutional Court duly expeditiously heard and determined the consolidated petitions as required by the standard established by Article 137 (7) of the Constitution. Mr. Mabirizi suffered no prejudice or derogation of the right to a fair hearing on account of the manner in which the hearing and determination of the petitions was conducted.

He complained in ground 2 that he was evicted from the court's seats occupied by representatives of the other petitioners and put in the dock throughout the hearing and that was a derogation to his right to a fair hearing and the Rules of natural justice.

The respondent denies this allegation and contends that the appellant was courteously treated like other litigants and the record clearly shows that he was accorded every opportunity to present his

case including: conferencing, making applications, cross-examination of witnesses, submissions and receiving the judgment, and no prejudice was occasioned to him.

In grounds 3 and 4, Mr. Mabirizi complains that a miscarriage of justice was allegedly caused to him by the Constitutional Court when the court did not give him ample time to present his case. He further alleged extreme and unnecessary interference with his submissions by court and this allegedly derogated his right to a fair hearing and allegedly prevented him from substantially responding to the Respondent's submissions by way of a rejoinder.

He generally accused the Justices of the Constitutional Court of proposing answers to witnesses and for turning into defence counsel through excessive interruptions, citing remarks by the DEPUTY CHIEF JUSTICE and Kakuru JCC.

He alleged that he did not have ample time to present his case. He also complained that he was denied the right to make a rejoinder, and throughout the proceedings, the Justices of the Constitutional Court were in a hurry, derogating his right to a fair hearing and contravened international Conventions.

The respondent denied this allegation and contended that they were in stark contradiction and undermined his complaint that the court did not hear and determine the petitions expeditiously.

The respondent reiterated its earlier submissions that the learned Justices of the Constitutional Court duly heard and determined the

petitions according all parties an equal chance to present their respective cases and the record of appeal fully demonstrated that all parties to the petitions fully participated in the proceedings and had ample time to present their cases.

The respondent further contended that the record of appeal demonstrated that the Justices of the Constitutional Court were deliberate and methodical as required in accordance with the Rules cited.

With regard to the right to make a rejoinder, the respondent contended that the appellants could only submit in rejoinder in regard to new matters raised during the course of the respondent's submissions. That contrary to Mr. Mabirizi's submissions, his right to a rejoinder is not *"outright and absolute"*

The respondent refered to the record of proceedings at pages 2226 - 2231 and contended that the learned Justices of the Constitutional Court actually gave the appellants an opportunity to make rejoinders before closing their cases. That Mr. Mabirizi was accorded an opportunity to rejoin at pages 2230 – 2231. I shall reproduce the excerpts later in this judgment during the determination of this specific complaint.

The respondent denied the allegation that the Constitutional Court contravened international Conventions. He further contended that the court is entitled and duty bound to inquire into submissions and by seeking clarification where necessary. That the court has the discretionary power to grant leave to allow cross-examination of

deponents of affidavits under **Rule 12 of the Constitutional Court (Petitions and Reference) Rules.** The respondent relied on the decision of this Court **in Hon. Ssekikubo & others vs. Attorney General, Constitutional Appeal No. 1 of 2015 (SC), and Mbogo & Others vs. Shah, [1968] EA 93** in support of his submissions on this point.

In grounds 17, 18, 19 and 20 Mr. Mabirizi complained that the learned Justices of the Constitutional Court did not refer to his evidence and submissions, did not consider the authorities he had presented in his submissions; that the majority of the Justices failed to properly evaluate the evidence, pleadings and submissions and authorities hence reaching a wrong conclusion. Mr. Mabirizi contended that this was contrary to Order 21 of the Civil Procedure Rules.

The respondent denied this allegation and contended that each and every Justice of the Constitutional Court acknowledged the pleadings, submissions and authorities in their respective judgments. The respondent referred this Court to the judgments on record.

Mr. Mabirizi's other contention was that the Constitutional Court was bound to determine all the matters in controversy between the parties, but failed to do so.

The respondent submitted that the Justices of the Constitutional Court duly determined and resolved all the issues in controversy as presented in the pleadings, framed issues and submitted by the

respective litigants. The respondent further submitted that the core subject matter referred to the Constitutional Court were issues for Constitutional Interpretation regarding **Constitutional Amendment Act No. 1 of 2018**, under **Article 137 (1)** of the Constitution, and the respective Justices of the Constitutional Court faithfully interpreted the provisions of the **Constitutional Amendment Act No. 1 of 2018**, *vis a vis* the Constitution and granted redress. The respondent submitted that it is a question of style and one can only determine this by reading the judgment. The respondent relied on the decision of this Court in **British American Tobacco (U) Ltd vs Shadrach Mwijiikubi & 4 others , Civil Appeal No. 1 of 2012 (SC),** in support of his submission on this point.

In grounds 6 , 7 and 8, Mr Mabirizi complains that the Justices of the Constitutional Court did not mention or even rely on his two supplementary affidavits , affidavit in rejoinder to the Answer to the Petition and supporting affidavits as well as the affidavits in rejoinder to the affidavits of Mrs Jane Kibirige, Mr Keith Muhakanizi, and General Muhoozi.

Mr Mabirizi further complained that the majority of the Justices of the Constitutional Court did not determine the legality of the substantial contents of the affidavits of Mr Keith Muhakanizi, the Secretary to the Treasury that of General Muhoozi, the Chief of Defence Forces, which were allegedly put in issue as hearsay. He contended that the Constitutional Court was bound to make a

decision on his application to strike out the said affidavits, but did not do so.

The respondent opposed this allegation, and contended that during cross-examination, General Muhoozi testified that as the Chief of Defence Forces, he was the best person to swear the affidavit in question since the operation was under his command and he passed the instructions down the chain of command.

The respondent further contended that Mr Muhakanizi was cross-examined and re-examined and testified that the Certificate of Financial Implications was prepared under his authority as the Permanent Secretary/Secretary to the Treasury and duly explained the circumstances under which the Certificate was prepared. Sources of information were duly disclosed. No hearsay therefore arose in the circumstances.

In grounds 25 and 26, Mr Mabirizi accused the Justices of the Constitutional Court of proposing answers to witnesses and preventing him from cross-examining witnesses. He alleged that the Court over protected Mr Muhakanizi and prevented him from answering questions put to him.

The respondent submitted that the Court has discretion to regulate cross-examination and guide litigants to cross-examine witnesses on pertinent matters related to the litigation and surrounding circumstances. The Court has the authority to limit cross-examination including on matters that are speculative, irrelevant and otherwise inconsistent with the **Evidence Act.** The court may further

make an inquiry of the witness even beyond the inquiry made by the lawyer cross examining the witnesses for the purpose of clarification and obtaining wholesome testimony depending on the circumstance of the case.

The respondent prayed that this court finds the Justices of the Constitutional Court were fully justified in making their inquiry. They set the ground Rules for cross examination to guide all the parties and counsel, and cautioned them to keep within the Rules or lose the opportunity to cross-examine. The respondent pointed out that the DEPUTY CHIEF JUSTICE actually guided Mr Mabirizi on his cross examination since he was deviating from the ground Rules established and required him to abide by the set Rules.

Another allegation by Mr Mabirizi is that the DEPUTY CHIEF JUSTICE's interference was to cover up the truth that General Muhoozi's affidavit was never sworn. Mr Mabirizi also alleges the omission to Rule on the admissibility of substantial paragraphs of General Muhoozi and Mr Muhakanizi's affidavits could have been a deliberate effort to leave hearsay evidence on record.

The respondent objected to these allegations on the basis that it was not only speculative and offended Rule 82 of the Supreme Court Rules but it is without merit, and should be struck out.

In grounds 79 and 80, Mr Mabirizi complained that the majority of the Justices of the Constitutional Court erred when they allegedly originated the prayer and pleading of the appellant and granted the remedy of severance which was not pleaded by the respondent. He

further submitted that the majority of the Justices erred in applying the principle of severance of some sections in a single Act, allegedly in a situation where the Constitutional Amendment procedure was fatally Constitutionally defective. Mr Mabirizi contended that the Court had no power to frame sub-issues of whether severance can be applied and whether non-compliance affected the Act in a substantial manner which did not arise from the pleadings and that it was contrary to his right to a fair hearing.

The respondent submitted that the core role of the Constitutional Court under **Article 137 (1)** of the Constitution is to interpret its provisions, while **Article 137(3) (b) and 137(4)** provide for the grant of redress within the discretion of the Court based on the circumstances pertaining. Accordingly, while declarations are the primary duty, the Court may grant redress including the remedy of severance either at the pleading or prayer of counsel or a litigant or by exercising its own discretion.

The respondent further submitted that the Court has discretion to require counsel or litigants to address it even on non-pleaded issues and remedies and to accordingly frame issues for counsel and litigants to address. The respondent contended that severance is a well-established legal remedy and there is no bar to the Justices of the Constitutional Court exercising their discretion to grant the remedy of severance. The respondent contended that he addressed Court on the remedy of severance at the hearing. Mr Mabirizi had

every opportunity to address the Justices on the issue of severance, and did not suffer any prejudice.

Mr Mabirizi also accused the Court of making a decision on its own and inventing points, which is contrary to the principles of fair hearing, Rules of procedure and decided cases.

The respondent submitted that in the course of conducting its inquiry, the court has a wide discretion to draw on existing Constitutional and legal principles both pleaded and unpleaded depending on the circumstances of the case, and it is the duty of the court to apply the relevant principles for the ends of justice. The Justices of the Constitutional Court in applying the remedy of severance relied on **Article 2(2)** of the Constitution as well as the established authorities. Mr Mabirizi had opportunity to address court on the said principles and authorities. No prejudice was occasioned to him. Additionally, the authorities cited by Mr Mabirizi are related to litigants being bound by facts and matters pleaded. They do not preclude a litigant from relying on the abundant legal principles to advance their cases.

Mr Mabirizi also alleged that the Court initiated and granted the unpleaded defence that once there is no quorum, absence of opposition is immaterial. He submitted that it was erroneous for the court to raise the point of quorum which was not in issue.

The respondent submited and reiterated that in any adjudication, especially Constitutional interpretation, the Court is at liberty and had the duty to inquire into the entire factual and evidentiary

circumstances of the case and review the entire breadth and depth of statutes, authorities and literature in coming to its determination. The respondent contended that in the Constitutional Court specifically, the Court is not fettered in its consideration of the case by limitations of litigants. That notwithstanding, the respondent submited that the parties had equal opportunity to address court on the issue and thus no party suffered any prejudice as they were duly and fairly heard.

In grounds 5 and 82, Mr Mabirizi complained that the Justices of the Constitutional Court erred and *"unjudiciusly"* exercised their discretion when they did not give reasons for their decision in dismissing his application to summon the Speaker of Parliament for questioning on her role in the process leading to the enactment of the impugned Act. This was allegedly an abuse of discretion and in contravention of basic legal principles, and the effect caught up with the Justices and the respondent at the hearing. Without summoning her, the Court erred in commenting and deciding in favour or against her in their judgment.

In grounds 21 and 22, Mr Mabirizi alleged that the Justices of the Constitutional Court erred in allegedly failing to exercise their discretion to call for the evidence of the Speaker, the Deputy Speaker, the Minister of Justice and Constitutional Affairs , the Deputy Chairperson of the Parliamentary Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi and the majority

misdirected themselves for allegedly failing to take into consideration the respondent's failure to adduce this evidence.

The respondent referred to the ruling of the Court on record and contended that the Court duly considered the arguments of the respective counsel and pronounced itself on the matter of examination of the Rt. Hon. Speaker before declining to grant the order sought. The respondent contended that the Court ruling contained the abridged reasons for declining to grant the application and as such, Mr Mabirizi had due notice of the reasons for refusal.

The respondent further submitted that the decision to summon the Speaker for examination was overtaken by events after Mr Mabirizi's application **No. 7 of 2018** seeking to cross examine the Speaker was dismissed by the Supreme Court on the 14th December 2018. Grounds 5 and 82 were accordingly rendered moot.

The respondent submited that notwithstanding the foregoing, this Court should uphold the decision of the Constitutional Court not to summon the Speaker who had not sworn any affidavit for examination since the Clerk to Parliament who is the designated custodian of the records of Parliament had availed to court the verbatim record of the Hansard and the Certificate of Compliance and the counsel including Mr Mabirizi had the opportunity to cross-examine her at length. The Hansard and the Certificate of Compliance are recognised as public documents under **Section 73 and 75 of the Evidence Act, Cap. 8.** Section **76 of the Evidence Act** provides that certified copies may be produced as proof of the

contents of public documents. Therefore, the admittance of the said documents in evidence was sufficient to enable the parties to litigate the petitions and the court to determine matters in issue. The Speaker cannot add or vary the contents of the Hansard since it speaks for itself as a true, faithful, accurate, complete and impartial account of the deliberations and decisions of Parliament.

The respondent further submited that neither Mr Mabirizi, nor counsel for the 2nd appellants, sought to cross examine the Deputy Speaker, the Minister of Justice and Constitutional Affairs , the Deputy Chairperson of the Parliamentary Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi. The grounds of appeal and submissions on this allegation are afterthoughts which this Court should ignore.

In grounds 81, 83 and 84, Mr Mabirizi complained that the Justices of the Constitutional Court erred when they denied him general damages on the ground that he did not prove them; that the learned Justices allegedly exercised their discretion "*unjudiciusly*" and without any sound reason, held that he was not entitled to professional indemnification and further held that each petition should receive professional fees of 20 million Uganda shillings. He contended that the 20 million shillings awarded as professional fees was without basis, inadequate and below the standard set by Court and that there was no need to prove general damages.

Mr Mabirizi further alleged that he was denied professional compensation on account of appearing in person whereas he is

allegedly a professional. He contends that the alleged denial of professional compensation contravenes Articles **21, 28(1), 44(c), 126(1) and (2) of the Constitution,** Common law jurisprudence against denying self-represented litigants costs and compensation for time and resources spent on litigation.

The respondent contended that the awards by the Justices of the Constitutional Court were purely discretionary under **Article 137(3) of the Constitution** and pays that the Court finds that in the circumstances, the redress ordered by the Constitutional Court was appropriate

Complaints by the 2nd Appellants

The specific complaints by the 2nd appellants on issue 7 are set out grounds 18, 19, 20,21,22,23 and 24 of their appeal.

In grounds 18, 19 and 20, the 2nd appellants complained that the Justices of the Constitutional Court misdirected themselves in ordering Counsel to proceed with submissions before cross examination of the respective witnesses; that the Justices erred in denying the petitioners the right to rejoin after the respondent's case and that the Justices acted throughout the proceedings with material procedural irregularities.

The 2nd appellants complained in grounds 21 and 22 that the Justices of the Constitutional Court erred in failing to exercise their discretion to call evidence of key government officials and individuals who played a key role in the process leading to the enactment of the

impugned Act including: the Speaker, the Deputy Speaker, the Minister of Finance, Hon. Raphael Magyezi, H.E the President and the Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee and that the Justices misdirected themselves by failing to take into consideration the respondent's failure to adduce their evidence.

The 2nd appellants cited **Rule 12(3) of the Constitutional Court (Petitions and References) Rules** and contended that the Justices of the Constructional Court acted ***"injudiously"*** when they declined to summon the Speaker, moreover without assigning any reason.

The 2nd appellants complained about alleged procedural irregularities and submited that the Justices of the Constitutional Court erred:

i. When they restricted their cross examination of the witnesses to the averments in the affidavits of the respective witnesses, allegedly in contravention of **Section 137(2) of the Evidence Act;**

ii. In directing the appellants to submit before cross examination of the witnesses; and

iii. In denying the appellants the right to make a rejoinder after the respondent's reply.

Counsel for the 2nd appellants further submitted that the Constitutional Court erred in law and fact and injudiciously exercised their discretion in awarding 20 million shillings as professional fees plus 2/3rds disbursement. This sum is, according

to counsel, manifestly meagre, considering the nature and significance of the subject matter.

The respondent submitted that the 2nd appellants' submissions were preposterous and without any basis whatsoever. The respondent submitted that the 2nd appellants neither applied to Court for leave to examine the Speaker nor did they apply or urge the Court to exercise its discretion to summon the listed witnesses under **Rule 12(2) of the of the Constitutional Court (Petitions and References) Rules**. The Respondent therefore reiterated its earlier submissions in reply similar to complaints raised by Mr Mabirizi and prayed that the Court rejects the 2nd appellants' complaints in these grounds as well.

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

Mr. Mabirizi submitted that the alleged failure of fair hearing and procedural irregularities rendered all the proceedings and judgment void.

Counsel for the 2nd appellants submitted that the said irregularities limited the scope of the investigation by the Constitutional Court, and it thereby failed in its duty under **Article 137(1) of the Constitution** and came to a wrong decision.

The respondent reiterated his submissions in issue 7(a) above that the appellants participated at each and every stage of the proceedings in the Constitutional Court and duly received a fair hearing in accordance with **Article 28 of the Constitution.** The respondent

further submitted that the procedure adopted by the Constitutional Court were entirely within their discretion and did not in any way prejudice the appellant or occasion derogation of such right.

In conclusion, the respondent submits that the appellants have not proved any of their respective grounds of appeal and prays that the consolidated appeals be dismissed with costs.

Consideration of issue 7:

The complaint in issue 7 concerns (i) alleged derogation of petitioners' right to a fair hearing under **Article 28 and 44 (c) of the Constitution;** (ii) Alleged "injudicious" exercise of discretion , and (iii) alleged procedural irregularities by the Constitutional Court in hearing and determining consolidated petitions. I have perused the transcript of the entire record of proceedings before the Constitutional Court, I have also considered the grounds of appeal as well as the submissions and authorities cited by counsel and Mr Mabirizi.

Regarding the allegation of failure to determine the petitions expeditiously, Mr Mabirizi submitted that he filed his petition in December, 2017 and the Constitutional Court only heard it in April, 2018 and "in a relaxed manner where it could break for weekends starting from Friday up to Tuesday. Then the Court adjourned from 12th to 17th April for four days which was illegal.

My view is that this allegation is not only unfair to the Constitutional Court, but it cannot be determined fairly without establishing from

the Constitutional Court itself the reason why they scheduled the hearing of petitions that way. Besides, as the respondent rightly pointed out, court is guided by Article 137 (7) of the Constitution which provides that:

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

In my view, ***"as soon as possible***" depends on the Court's workload and schedule and I take judicial notice of the fact that the Constitutional Court is among the courts in this country with a huge case backlog due to inadequate resource allocation by government. The backlog comprises Constitutional petitions as well. In such a situation, Mr Mabirizi would be expecting too much from the courts to determine his petition immediately it was filed regardless of other Constitutional petitions that would be pending before the court. That is why the framers of the Constitution used the expression ***"as soon as possible".*** It is noteworthy that Mr Mabirizi equates his petition to Presidential election petitions which are given specific timelines under the Presidential Elections Act. The authorities cited are for this reason inapplicable to his petition.

Most importantly I take note of the fact that the Court was faced with a very complex matter involving at least eight petitions with voluminous documents and pleadings that required the court to peruse in order to prepare for the hearing. This included authorities

cited by the petitioners specifically Mr. Mabirizi who stated in this court that he filed a total of 60 authorities before the constitutional court. This would inevitably necessitate a lot of reading and research by the learned Justices of the court which could not be accomplished within a short time.

The same reason applies to the failure to deliver the judgment within 60 days. Most importantly, it should be noted that the 60 days requirement is not mandatory. The Uganda Code of Judicial Conduct is simply a set of principles and Rules that were adopted by judicial officers to provide guidance in judicial conduct. Failure to comply with it is not fatal to the judgement. It says:

"…***Where judgment is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so."***

Mr Mabirizi never inquired from the Constitutional Court whether it had no good reason why the judgment was delivered outside the 60 days. There is no law cited by Mr. Mabirizi that had been violated by the court. The period must be in context. In most jurisdictions cases take more than six months. For this reason, I find that his complaint has no basis.

Mr Mabirizi's complaint that he was evicted from the seat of the court also lacks merit. It is a notorious fact that Mr Mabirizi is a law graduate who has not yet been called to the bar since he has not yet acquired the Post Graduate Diploma in Legal Practice that is required for his enrolment. He cannot therefore practice law from the bar alongside other counsel with the requisite qualifications. That is why

the Constitutional Court rightly advised him to sit where the rest of the petitioners were seated. It should be noted that Mr Mabirizi was given a separate desk and seat away from the bar even in the Supreme Court. What is most important is that he was able to present his petition without suffering any prejudice as a result the seating arrangement.

The allegation that he was not given ample time to present his case is unsubstantiated. He did not elaborate on how much time he needed to present his case, and how much of his case, if any, was left out. It also not on record that he asked for more time and the Court refused to grant his request.

The allegations that the court turned into defence counsel and even suggested answers were not substantiated by Mr Mabirizi. Regarding the denial to make a rejoinder, I find that all parties were given equal opportunity to present their respective cases. This was after the court had from the outset, set out the ground Rules on how the consolidated petitions would be heard. This is the accepted practice in modern case management. I also find that all appellants were given an opportunity to make rejoinders before closing their cases and Mr Mabirizi actually did so at page 2230 to 31 of the record of proceedings. The Deputy Chief Justice used the wrong term he called it “closing remarks” but they were in essence rejoinders.

The Constitutional Court did not contravene any of the international conventions as alleged. The court had the discretion to deal with the

petitions in accordance with the Rules of procedure, and it did precisely that.

I have perused the judgments of the five Justices of the Constitutional Court, and it is crystal clear that the judgments were based on the pleadings, the affidavit evidence as well as the submissions including the authorities relied on by the parties. The fact that the Justices did not specifically mention all of them does not mean that they never took them into account in arriving at their decision. It is a question of style.

I also find that the Justices determined all the issues that had been framed and agreed upon by the parties for determination by court. The legality of the affidavits of Mr Muhakanizi and General Muhoozi were not in issue. Even so, both officials had sworn the said affidavits in their capacities as the highest technical officers in the UPDF and the Ministry of Finance respectively. The allegations were against the UPDF and Ministry of Finance. Musoke JCC rightly found that the affidavits in question did not contain any hearsay and declined to strike them out.

I also find that the allegation that the Deputy Chief Justice was covering up the affidavit by General Muhoozi is baseless. I have checked the record and I find that the affidavit was sworn on 29th March, 2018 before one Annet Okwera as commissioner for oaths.

Regarding the issue of cross examination, I note that the witnesses were cross examined with the leave of court. I note that the Court gave leave on condition that counsel should confine the cross

examination to areas that were covered in the affidavits of the respective witnesses. I am aware of the requirement of section 137 Evidence Act but it does not apply in such circumstances. Section 137 applies where the evidence is given orally in court.

As for the remedy of severance, I agree with counsel for the respondent that it need not have been pleaded. Article 137(4) empowers the Constitutional Court to **"(a) grant an order of redress."**

Regarding the failure to give reasons for dismissing his application to summon the Speaker for examination, I find from the record that Kakuru JCC who delivered the ruling on that said application actually gave a reason for dismissal to the effect that the Court had not found any reason to do so. He however added that the Court would give a detailed reason later on in the judgment. Unfortunately, the court, most likely through an oversight, did not do so. This was an error on the part of the court. The issue is however moot now since the Supreme Court dismissed application **No. 7 of 2018** for a similar request on the 14th December, 2018.

The request for the other officials were not made by both Mabirizi and counsel for the 2nd appellants. The Constitutional Court cannot be blamed for failure to summon them. Perhaps, as argued by the respondent, the Court was satisfied that the evidence availed particularly, the Hansard together with the Certificate of Financial Implication as well as the Certificate of Compliance by the Speaker would suffice in the circumstances.

Regarding the alleged injudicious exercise of discretion particularly with regard to the professional fees, and denial of professional compensation to Mr. Mabirizi, it is well settled that an appellate Court can only interfere with the exercise of discretion by a court of original jurisdiction where:

i. ***where the judge misdirects himself with regard to the principles governing the exercise of his discretion;***

ii. ***Where the judge takes into account matters that he ought not to consider; or fails to take into account matters that he ought to consider;***

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

(See: **American Express International Banking Ltd vs Atul [1990-94] EA 10 (SCU)**

These awards were purely discretionary and the appellants have not proved that the Justices misdirected themselves on the principles regarding the award. This Court will not interfere with it. The same reasons apply to the complaints by the 2nd appellants.

In conclusion I agree with the respondent that the procedure adopted by the Constitutional Court was entirely within its discretion and did not in any way prejudice the appellant or occasion any derogation of his rights to a fair hearing.

All the appellants participated at each and every stage of the proceedings and received a fair hearing in accordance to **Article 28 of the Constitution.**

The appellants have not proved their respective grounds set out herein, and they accordingly fail.

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

In light of my findings on issue 7 (a), this issue does not arise.

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

Issue 5: ***Whether the learned majority Justices 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 1995 Constitution.***

The issues before the Constitutional Court were:

"6(g). Whether the Act was against the Spirit and structure of the Constitution.

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

Issue 6(g) was answered in the affirmative in respect to sections 2,5,6,8,10 of the Act and in the negative in respect of sections 1, 3, 4 and 7.

Issue 12 was unanimously answered in the negative.

Submissions by counsel:

Counsel for the 2nd appellants argued these two grounds together

It is the contention of the appellants that the constitutional court misconstrued the application of the basic structure doctrine when they limited it to the extension of the term of Parliament and not to the age limit.

Counsel for the appellants argued that the framers of the 1995 constitution deemed it necessary to enshrine within the text of the constitution such provision of Presidential term limit and age limit 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 provisions were intended to guarantee orderly succession to power and political stability. Therefore by amending Article 102 (b) after scrapping term limits, Parliament not only emasculated the preamble to the constitution but also destroyed the basic features of the constitution there by rendering it hollow and a mere paper.

Counsel also argued that the Article was also intended to place the destiny of the country in the hands of a mature and not very old

President given the risks and dangers of political upheavals, coup detats and rigged or sham elections.

Counsel for the respondent on the other hand argued that the constitutional court rightly unanimously identified the features that form the basic structure of the constitution and that the framers carefully entrenched such provisions by various safe guards for protection against the risk of abuse of the constitution by irresponsible amendment of those provisions. Only people can amend these provisions pursuant to Article 1(4). The Constituent Assembly was alive to the fact that our society is not static but dynamic and over the years there would arise a need to amend the constitution to reflect the changing times. It was within the general power of Parliament under Article 79 and 259 to amend the Article 102(b) and it did not in any way contravene the basic structure of the Constitution.

Consideration

The learned Justices of the Constitutional Court gave a detailed history of the Basic structure doctrine in their judgment. I do not intend to repeat them. Let me briefly summarise the essence of the basic structure doctrine in this Judgment.

The basic structure doctrine is a judicial principle that the Constitution has certain basic features that cannot be altered or destroyed through amendments by the Parliament in exercise of its

legislative powers. These features are considered to be fundamental principles that give identity to the constitution. They are intended to subsist forever to enable the continued existence and legitimacy of a country and therefore cannot be amended in a way which would destroy the indestructible character of a constitution.

This doctrine was introduced by the Supreme Court of India as a limitation on the power of Parliament and as a measure against arbitrary exercise of Parliament so that it would not be able to freely amend the Constitution.

This doctrine became more pronounced in India following the case of **Kesavananda Bharati v State of Kerala, AIR 1973 SC** which imposed limitations upon the amendment power of Parliament in amending the constitution in as far as certain features of the constitution were concerned. The court held that:

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

This doctrine was affirmed by Professor Conrad Dietrich a German jurist. It has since influenced the Constitutional jurisprudence in several other jurisdictions across the world including, Taiwan; India in the case of **Minerva Mills v Union of India, AIR 1980 SC 1789;** Bangladesh in the case of **Anwar Hossain Chowdhury v Bangladesh**

10 41 DLR 1989, App Div 169; South Africa in the case of **Executive Council of Western Cape Legislature v the President of South Africa & Ors (CCT27/95) [1995] ZACC 8;** and Kenya in **Njoya v Attorney General & Ors (2004) LLR 4788 HCK.** In all these cases, it is generally established that there are certain features of the constitutional order that are so fundamental and form the foundation of the constitution and therefore cannot be changed by Parliament even if it followed the necessary amendment process.

In other countries however such as Tanzania, this doctrine was not accepted because the Tanzanian Constitution does not contain any provisions that cannot be amended. See: ***Attorney General vs Rev. Christopher Mtikila, Civil Appeal No.45 of 2009 in 2010 (EA) 13***.

There is no hard and fast rule for determining the basic structure of a given Constitution. This is determined by Court on a case-by-case basis. However, according to the cases referred to above, the Courts have taken into account the historical background, the preamble and the entire scheme of the Constitution in determining the basic structure of a given Constitution.

Various courts have identified certain constitutional core or set of basic constitutional principles that form the constitutional identity which cannot be abrogated through the constitutional amendment process. It is widely believed that the supremacy of the constitution, democracy, federalism, independence of the judiciary, secularism, human dignity, sovereignty of the people, separation of powers and

the Rule of law among others are part of the basic features of a constitution.

In the Constitutional Court, the learned Justices rightly recognized the fact that this doctrine is embedded in our Constitution and while determining the basic structure of this country, the learned Justices were guided by our constitutional history, constitutional structure, political changes, preamble and national vision of the country.

The learned Deputy Chief Justice observed as follows:

> ***"Admittedly, the Constitution is liable to amendment or alteration; but, owing to its special character as the sovereign legal instrument, for any amendment or alteration thereto to be justified, there has to be compelling reason for doing so; and the amendment must be done in strict compliance with the manner expressly provided for in Chapter Eighteen of the Constitution itself..... The principal character of the 1995 Constitution, which constitute its structural pillars, includes such constitutional principles as the sovereignty of the people, the Constitution as the supreme legal instrument, democratic governance and practices, a unitary state, separation of powers between the Executive, Parliament, and the Judiciary, Bill of Rights ensuring respect for and observance of fundamental rights, and judicial independence. In the fullness of their wisdom, the framers***

of the 1995 Constitution went a step further in clearly identifying provisions of the Constitution, which it considers are fundamental features of the Constitution. They carefully entrenched these provisions by various safeguards and protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions. The safeguards contained in the provisions entrenched in the Constitution either put the respective provisions completely and safely beyond the reach of Parliament to amend them, or fetter Parliament's powers to do so and thereby deny it the freedom to treat the Constitution with reckless abandon."

Kasule, JCC observed that:

"....The Odoki Constitutional Commission in a way addressed this issue of basic structure of the Constitution.... The Constituent Assembly too accepted these recommendations and reflected them in the 1995 Constitution. Therefore, the doctrine of basic structure is embedded in the 1995 Constitution. Our history of tyranny, violence and Constitutional instability is different from that of Tanzania that has had Constitutional stability since her becoming an Independent State, and it is fitting that Uganda adopted the doctrine of basic structure. Accordingly by application of the doctrine of basic structure, the Parliament of

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

Cheborion, JCC observed that:

"...faithful interpretation of our Constitution given its historical background as earlier detailed and in light of its preamble favour the position that the basic structure doctrine, to a restricted extent, be upheld as applicable in our legal system to govern amendments to the Constitution. We must also take into account our shared values as a country which are alluded to in the Directive Principles of State Policy. I am not convinced that Parliament, in exercise of its powers under Article 79(1) is free to effect amendments that would in effect replace the Constitution resulting from the consensus of the

Constituent Assembly with a new one. Consequently, I hold that the Ugandan Constitution is designed to recognise, to a certain extent, the basic structure doctrine in its preamble, national objectives and Directive Principles of State Policy read together with Article 8(A). In my view, in the Ugandan context the basic structure doctrine operates to preserve the people's sovereignty under Article 1 of the Constitution. Amendments to the Constitution should not be introduced or passed in a manner that defeats our country's national objectives and Directive Principles of State Policy without the input of the people in a referendum."

Musoke, JCC observed that:

"...Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. Importantly, in answering this important question, Courts will consider factors such as the Preamble to the Constitution, National Objectives and Directive Principles of State Policy (in countries which have them in their constitutions, such as Uganda), the Bill of rights, the history of the Constitution that led to the given provision, and the likely consequences of the amendment. I find that in Uganda the Preamble to the Constitution captures the spirit behind the

Constitution. The Constitution was made to address a history characterized by political and constitutional instability. The new Constitution is for ourselves and our posterity, and the Preamble is meant to emphasize the popularity and durability of the Constitution. Further still, a critical aspect of the basic structure of our Constitution is the empowerment and encouragement of active participation of all citizens at all levels of governance. This is the hallmark of the Democratic Principle No. II (i) of the National Objectives and Directive Principles of State Policy. All the people of Uganda are assured of access to leadership positions at all levels. [See Directive Principle II (i)].The goal of ensuring stability is echoed in Directive Principle No. III. And pursuant to Article 8A, the Objective Principles are now justiciable. Another of the basic pillars of our Constitution is Article 1(1), which guarantees the sovereignty of the people by providing that all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution. The Bill of Rights to be found in Chapter Four of the Constitution contains fundamental human rights which are inherent and not granted by the State. The ones in Article 44 are non-derogable and are part of the basic structure which if removed or amended would be replacing the Constitution altogether."

In summary, the learned Justices in the majority judgment observed the basic features of our Constitution to include the following:

The national objectives and directive principles of state policy, 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, judicial independence and the preamble.

Kakuru, JCC in his dissent also highlighted the basic structure of the 1995 Constitution as follows:

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

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

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

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

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

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

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

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

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

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

He concluded that:

"Parliament, in my view, has no power to amend alter or in any way abridge or remove any of the above pillars or

structures of the Constitution, as doing so would amount to its abrogation as stipulated under Article 3 (4). This is so, even if Parliament was to follow all the set procedures for amendment of the Constitution as provided.

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves. My view expressed above is fortified by the following provisions of the Constitution. Articles 1 and 2 : These Articles establish the foundation of the Constitution upon which all other Articles are archived therefore in my view cannot be amended, not even by a referendum. Doing so would offend Article 3(4). Article 3. This article is really unique, and I have not seen or known of any other Constitution with a similar Article, which effectively renders inapplicable to Uganda the Kelsen Theory of pure law. Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been enacted through a flawless procedure. I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the constitutionality test."

I have quoted extensively from the judgments of the Justices of the Constitutional Court to demonstrate how each of them resolved the issue of the basic structure. I find that they have brought out clearly

what constitutes the basic structure of the 1995 Constitution of Uganda.

In my view, the owners of a Constitution are the people under Article 1 (1) of the Constitution. It states that:

> **"all power belongs to the people who shall exercise their sovereignty in accordance with this Constitution."**

While Constitutions are intended to be both foundational and enduring, they are not intended to be immutable. If they are to endure, they must respond to the changing needs and circumstances of a country. To evolve and change with all changes in the society and environment is a necessity for every Constitution.

The 1995 Constitution was as a result of an elaborate and highly detailed constitution making process that involved all citizens. The framers of the Constitution did not in my view perceive the constitution as an eternal document that could not be amended in any way. They were alive to the fact that the law was dynamic and could change with the changing society. It is for this reason that they provided for a methodology which is either rigid or flexible for amending the constitution in two folds:

a. Amending the Constitution through the participation of the people of Uganda (referendum).

b. Amending the Constitution through the people's representative (Parliament).

The rationale for the foregoing was to put checks and balances and ensure that the will of the people is not interfered with at will by their elected leaders. It is for this reason that the Constitution to an extent has a basic structure to act as a check on Parliamentary power so that the Constitution does not become a play thing in the hands of Parliament which is a delegate of the real sovereign, namely the people.

Parliament cannot treat on its sweet will and pleasure the constitution as a play thing as its power to amend itself is limited in nature. Its power to amend can be exercised only without disturbing the balance between the rights conferred on the people and the legislative power of the state. ***See. Minerva Mills (Supra)***

Although the basic structure doctrine envisages that certain basic features cannot be changed, our Constitution is unique. It expressly provides under Article 255 and 260 for how our basic features can be amended/ altered. This is amended through the participation of the citizens by way of a referendum and the support by not less than two thirds of members of Parliament. Parliament on its own does not possess the mandate to make any amendments to such provisions without the will of the people through a referendum.

This is in line with the recommendations by the Odoki Commission in its report in respect of amendments of the core features which were adopted in the 1995 Constitution that:

> ***"28.104. We accept in principle that the procedure for amending the new Constitution should be rigid in order to promote a culture of constitutionalism, to protect the supremacy of the Constitution, and to safeguard the sovereignty of the people and the stability of the country.***
>
> ***28.105. Amendment by referendum would satisfy the above objectives and it would provide one of the highest forms of rigidity or entrenchment. It would ensure that amendments receive the popular approval of the population. However, we think that submitting every proposed amendment to a referendum may be too cumbersome and expensive and it may even be too difficult to obtain popular approval of desired constitutional changes. This procedure, therefore, should be restricted to a few most fundamental or controversial provisions of which the people should have the final say. These include provisions on the supremacy of the Constitution and the political system. <u>The provisions declaring the supremacy of the Constitution are the foundation of constitutionalism and the entire constitutional order. They are basic to the character and status of the Constitution and should not be altered without the consent of the people."</u>***

I would therefore adopt the above observations by the learned Justices as to what constitutes the basic structure of our Constitution including the ones in the judgment of Kakuru JCC as these all stem from Articles 1 and 2 of the Constitution. The basic structure having been enshrined by the people themselves, then it is the people themselves to alter the identity of the Constitution and this is by way of a referendum.

The issue therefore is whether Article 102(b) forms the basic structure and Parliament did not have the mandate to amend it in the manner they did.

All the learned Justices held that Article 102(b) does not form part of the basic structure and therefore Parliament can amend it using its powers and the procedure set out in chapter eighteen of the Constitution.

The Deputy Chief Justice held that:

> ***"It is noteworthy that this provision of the Constitution was not secured by any provision therein requiring holding of a referendum, or subject to any of the safeguards that characterize the other provisions of the Constitution, which we have recognised as basic or fundamental features of the 1995 Constitution. Thus, the framers of the 1995 Constitution never treated the provisions of Articles 102 on age limit for President, and Article 183 on age limit***

for LCV Chairperson, as a fundamental feature of the Constitution; which would have necessitated its entrenchment. This contrasts with the institution of the Presidency, which is enshrined as a fundamental feature of the Constitution; by the requirement that the President be elected directly by universal adult suffrage; and further that before the five–year Presidential tenure provision can be altered by Parliament, it must first be approved by the people in a referendum. It follows therefore that for the amendment of Articles 102 and 183, which provided for age limit for qualifications of the President and LCV Chairperson respectively, Parliament was obliged to comply with the provision of Article 262 of the Constitution; under the general power of legislation conferred on it by the people"

Kasule JCC observed that;

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

those Articles that Parliament, on its own, can amend from time to time under Article 259 by passing an Act of Parliament, the sole purpose of which is to amend the Constitution and the amendment is supported in Parliament at the second and third readings by not less than two thirds of all Members of Parliament. The Odoki Constitutional Commission itself did not consider age limits on the President and other local government leaders as one of the structural pillars to be entrenched in the Constitution. The Constituent Assembly also adopted the same attitude, which has been shown above. I therefore come to the conclusion that age limits on the President and on the District local government leaders as enacted in Articles 102(b) and 183(2)(b) do not constitute a fundamental structure of the Constitution. Accordingly the amendment of Articles 102(b) and 183(2)(b) does not by implication and/or infection amend Article 1 of the Constitution so as to require a referendum by the people to approve such an amendment. Parliament thus proceeded within its powers to amend Articles 102(b) and 183(2)(b) by removing the age limits as qualifications for the office of the President or District Chairperson."

Cheborion, JCC held that:

"The provisions on amendment of the Constitution were enacted by the people's representatives in the Constituent

Assembly. Chapter 18 of the Constitution exists for that sole purpose. The argument by the Petitioners that the original Constituent Assembly did not make a mistake in enacting the age restrictions is misleading and not tenable as it would logically be applied to prohibit all possible amendments to the Constitution. I am therefore unable to agree with the contention that Sections 3 and 7 of the Act indirectly infect Article 1 of the Constitution. Further, I am not convinced that minimum and maximum age restrictions on eligibility for the offices of President and district Chairperson in the Constitution amount to such fundamental pillars of the Constitution that doing away with them leaves us with a different instrument altogether. That would be a gross misunderstanding of the basic structure doctrine. Age restrictions cannot be described as part of the values which are enshrined in our Constitution alongside a sacrosanct principle such as democratic governance if it were, then they would have been entrenched just like other core values were entrenched in Articles 260 and 74(1) of the Constitution.

Musoke, JCC held that*;*

"The removal of age limits for the President and local government councils does not, in my view, derogate from the basic structure. Article 102 is not an entrenched provision. The amendment does not infect Article 1 or any

of the mentioned Articles that form the basic structure. True the removal of age limit may encourage an incumbent President to wish to keep himself in office perpetually, but the citizens still remain with the power to either return the same President or elect a different one. Citizens are even more encouraged to aspire to elect a leader of their choice; and for those who have hitherto been dormant, to actively participate in politics and elections.

The people's power to elect a President or district Chairperson of their choice is not taken away, by lifting the respective age limits. I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 181 are not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution."

Kakuru, JCC held that*;*

"I have found nothing to suggest, let alone prove that Parliament cannot, through the established constitutional process, vary the qualifications of the President or that of the District Chairperson. The qualifications of the President and those of Chairpersons District local governments do not in my view form part of the basic structure of the Constitution which I set out earlier in this Judgment. I, therefore, accept the submissions of the Hon.

Learned Deputy Attorney General that Sections 3 and 7 of the impugned Act are not inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. The people of Uganda, through their Constitution, should be able to freely, whenever it is absolutely necessary to do so, vary the qualification of their leaders. These qualifications include but are not limited to citizenship, age, and academic qualifications. The same ought to apply to the disqualifications of the same leaders. It may be, for example, found necessary in future to require every Presidential candidate to be computer literate, fluent in both English and Swahili and at least two local languages the list is endless. The framers of the Constitution did not and for good reason, find it necessary to entrench the provisions that relate to qualifications and disqualifications of the President and /or members of Parliament. I have read the Odoki report excerpts. Nowhere in the report did the people of Uganda, suggest, propose or debate, the age limit of the President. This issue appears for strange reasons to have sprung up during the Constituent Assembly debate. Be that as it may, it eventually found its way into the Constitution. For that reason alone I would not regard it one of the basic structures of our Constitution."

I am in agreement with their Lordships that the qualifications of the President do not form part of the basic structure that amending them

would change the identity or destroy the basic features of the Constitution and therefore cannot be amended by Parliament following the constitutional process. In my opinion, in interpreting the Constitution, I find that Article 102(b) is not among the entrenched provisions that amending it would be contrary to the provisions of the Constitution or that the identity of the Constitution would be destroyed.

The Presidency flows from the people. As provided under Article 1 of the Constitution, power belongs to the people who may freely vote the President of their choice to govern them. If there are sham elections, the Constitution has still provided mechanisms to redress such issues. The removal of the age limit does not in any way take away the sovereignty of the people entrenched in Article 1 of the Constitution.

It is not the age that matters in governance but the state of mind and the conduct of the person. In any case, there are other safe guards in the Constitution such as Article 105(1) which gives a 5 years tenure to the President and Article 107 which provides for the removal of the President from office for abuse of office, misconduct or physical or mental incapacity, among others.

Age therefore is no guarantee for good judgment neither does it guard against undemocratic governance to safeguard the ideals of the Preamble and the Constitution in general as alleged by counsel. Orderly succession to power and political stability in my opinion is

not guaranteed by age but by term limits which help to legitimize democratically elected leadership.

Transfer of power after the term of the Presidency gives citizens hope for new policies and approaches in the new leadership. A person may be 30 or 76 but productive with greater political ideologies than a person who is 70 or 35. The report of the Committee on Legal and Parliamentary affairs indicated countries such as Kenya, South Africa, India, Rwanda, Ghana, Germany, UK, USA and Australia which do not have the upper restriction on age limit in their Constitutions. The international practice appears to shun the upper age limit restrictions in modern Constitutions. Most of them have term limits instead.

In conclusion, I share the opinion of the learned Justices of the Constitutional Court that amending Article 102(b) does not emasculate the preamble or destroy the basic features of the Constitution since the people still retain the sovereignty to democratic governance and freely choose who they want to lead them for a specified period in this case one term limit or more if they still want the incumbent to rule them.

Accordingly, Issue 1 and 5 fail.

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.

Submissions of Counsel

It is contended by the appellants that the entire process of conceptualizing, consulting, debating and enactment of the **Constitutional Amendment Act No. 1 of 2018** contravened and was inconsistent with a number of articles of the 1995 Constitution.

Mr. Mabirizi listed several reasons including:

1. Violation of Article 93 of the Constitution;

2. Non-compliance with Parliamentary Rules of Procedures which included:

i. Denying him access to Parliament;
ii. Absence of the Leader of Opposition, Opposition Chief Whip and other opposition Members of Parliament;
iii. Allowing Members of Parliament from the ruling party to cross and sit on the side of the opposition Members of Parliament;
iv. Violence, torture, inhuman and degrading treatment of the opposition Members of Parliament
v. High level of intolerance and partiality which necessitated the opposition Members of Parliament to move out of Parliament;
vi. The Hon. Speaker condemned the standing up on top of chairs by Members of Parliament from the ruling party;

vii. Suspension of opposition Members of Parliament for several sittings by the Speaker even after stating that the Bill was dealing with the sovereignty of the people;

viii. Evicting Members of Parliament from the same sitting

ix. Insufficient public participation;

x. Crossing the floor;

xi. Power of the Speaker;

xii. Signing the report of the Legal and Parliamentary Affairs Committee by Hon. Members of Parliament who never participated in the debate;

xiii. Signing of the report of the Legal and Parliamentary Affairs Committee by strangers after expiry of 45 days;

xiv. The finding by the Constitutional Court that the motion to suspend Rule 201(2) by Hon. Rukutana was at the stage of the Committee of the whole House;

xv. Failure to second the motion by Hon. Rukutana;

xvi. Lack of evidentiary basis for the finding by the Constitutional Court that the Members of Parliament had got the report of the Legal and Parliamentary Affairs Committee 3 to 4 days prior to the 18/9/17;

xvii. Preventing Members of Parliament from debating the Bill;

xviii. Failure to close the door during roll call and tally voting;

xix. Failure to separate the 14 sitting days;

xx. Defect in Presidential assent;

xxi. Invalid Speaker's Certificate of Compliance;

xxii. Lack of a Certificate from the Election Commission;

The 2nd appellants' list included the following:

i. Violation of Article 93;
ii. Inadequate consultation/public participation;
iii. Smuggling the motion on the Order Paper by the Speaker;
iv. Denying Members of Parliament adequate time to debate and consider the Bill;
v. Closing the debate before each and every Member of Parliament had debated;
vi. Giving each Member of Parliament only 3 minutes to debate;
vii. Suspension of some Members of Parliament and other illegalities committed by the Speaker during the sitting of 18/12/17;
viii. Suspension of Rule 201(2) requiring a minimum of 3 sittings from the date of tabling the Committee Report;
ix. Failure to close doors of the chambers during voting;
x. Discrepancies in the Speakers Certificate of Compliance and;
xi. Illegal assent to the Bill by the President;

The 3rd appellant's list by included the following:

i. Violation of Article 93;
ii. Violation of article 97 by deployment of the UPDF;
iii. Violation of Articles 1, 8A, 29(a) and (d), and 38;
iv. Violation of the sovereignty of the people under articles 1 and 38 due to inadequate consultation and public participation;
v. Violation of article 38 on the orderly and peaceful transfer of power and;

vi. Violation of articles 260, 262 and 263 by failure to give 14 days between the 2nd and 3rd reading before passing the Bill.

The respondent supported the decision of the majority of the Justices of the Constitutional Court arguing that the appellants had not proved their alleged unconstitutionality in the process of enactment of the Act.

Consideration of issue 2:

Since the impugned Act was initiated by a Private Members Bill, I find it instructive to briefly explain the legislative process that a Private Members Bill must go through before it is enacted into law, in order to appreciate the complaints raised under this issue.

1. Article 94(4) of the Constitution provides that a Bill may be initiated by private Members of Parliament. It reads as follows:

> **" (4)The Rules of procedure of Parliament shall include the following provisions:-**
> **(a)...**
> **(b) a Member of Parliament has the right to move a private Member's Bill.**
> **(c) the Member moving a private Member's Bill shall be afforded reasonable assistance by the department of Government whose area of operation is affected by the Bill; and**
> **(d) the office of the Attorney General shall afford the Member moving the private Member's Bill ..."**

Pursuant to the above article, Parliament made Rules of Procedure of the Parliament replicating the same words in Rule 12O thereof. The have been amended from time to time. The 2012 Rules were amended in November 2017, which are the Rules obtaining now. Rule 121 of the Rules provides the following procedure in respect of a Private Member's Bill:

> "**(1) A Private Member's Bill shall be introduced first by way of motion to which shall be attached the proposed draft of the Bill.**
>
> **(2) If the motion is carried, the printing and publication of the Bill in the Gazette shall be the responsibility of the Clerk.**
>
> **(3) Following the publication of the Bill in the Gazette, the process of the Bill shall be the same as that followed in respect of a Government Bill."**

2. A Private Member's Bill also requires a Certificate of Financial Implication signed by the Minister of Finance, Planning and Economic Development in accordance with section 10 of the Budget Act and **Rule 107 now 123** of the Rules of Procedure of Parliament, stating in respect of the Bill in question, the financial implications if any, on revenue and expenditure over the period of not less than two years after its coming into force.

3. After publication in the Gazette, the Bill then goes through the processes necessary for Parliament for passing a Bill. Rule 124

provides that every Bill shall be read three times prior to its being passed. The processes are described by Rules from Parts XIX to XX11 as follows:

(a) **First reading:** this is a formality which marks the formal introduction of the Bill in Parliament and the Bill is then committed to the relevant Sessional Committee of Parliament for consideration. At this stage, the Committee will formally invite the private Member initiating the Bill to introduce the Bill and may invite other stakeholders to state their views on the provisions of the Bill. The Committee may even sometimes hold hearings for that purpose.

(b) **Submissions of Report of the Sessional Committee and the Second Reading:** The Committee must submit a report on the Bill to the plenary of Parliament and at the same time, Parliament will consider the Bill on the Second Reading which is a debate on the **principles** and **policies** of the Bill, not its details.

According to **Rule 129,** the Second Reading of the Bill shall not be taken earlier than the **fourteenth day** after the publication of the Bill in the Gazette, unless the sub Rule is formally suspended for that purpose.

(c) **The Committee of the Whole House Stage:** The Committee stage is regulated by Rules 130-124 of PART XX1 of the Rules.

This is the stage of the Bill at which Parliament deals with the provisions of the Bill clause by clause and all proposed amendments to the Bill.

At the Committee stage, the Speaker sits in the well of the House as the Chairperson of the Committee of the Whole House. **(Rule 132).**

According to Rule **133(4),** the Committee of the Whole House shall consider proposed amendments by the Committee to which the Bill was referred and may consider proposed amendments, **on notice,** where the amendments were presented but rejected by the relevant Committee or where, for **reasonable cause,** the amendments were not presented before the relevant Committee.

(d) **Report of the Committee after Committee Stage:** This is the stage where the Committee of the Whole House reports to the Plenary on the Bill which has been committed and amendments are considered. **(Rule 135).**

(e) **Re-committal:** This is a stage which comes at the end of the Committee stage, where it is felt that there are still certain amendments which have to be considered or reconsidered **(See PART XX11 Rule 137)**

(f) **Third Reading and Passing of the Bill:** At this stage, the Bill is not debated and it is passed as a formality upon a motion *"that the Bill be now read a Third Time and do pass."* **(See Rule 136).**

In the case of any Bill for an Act of Parliament seeking to amend the provisions of the Constitution, such as the instant one, such amendments are governed by the procedure laid down in chapter 18 of the Constitution.

I shall now proceed to determine the complaints raised by the appellants under issue 2.

1. **Non –compliance with Article 93 of the Constitution.**

The issues before the Constitutional Court was framed as follows:

6(a). *Whether the introduction of a Private Members Bill was inconsistent with and or in contravention of Article 93 of the Constitution;*

6(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;

In addressing both issues the learned Justices held as follows:

Musoke JCC Ruled thus:

> ***" I have perused the Bill as introduces by Magyezi. The proposed Private Members Bill in its original form with its four amendments was not likely to impose a charge on the Consolidated Fund and was budget neutral as certified by the Certificate of Financial Implications that accompanied the Bill. However, I would not say the same of the Constitution Amendment Bill (No 2) which reintroduced term limits and re-entrenchment of the same as well as increasing the life of Parliament and local government councils, which would in my view, impose a charge on the Consolidated Fund.***

On whether the payment of Uganda shillings twenty nine million only (29,000,000) to every Member of Parliament as facilitation for consultation contravened Article 93 (a) (i) and (ii) of the Constitution, I agree with the respondent that since the money paid to the Members of Parliament for consultation had been appropriated for use by the Parliamentary Commission, it is not a fresh charge on the Consolidated Fund.

Accordingly, I find that the introduction of a private Members Bill that led to the Constitution Amendment Bill was not inconsistent with the and/or in contravention of Article 93 of the Constitution, except for the introduction of sections 2,5,6,8 and 10."

Kasule JCC Ruled in respect of the 29 million shilling as follows:

"(ii) Facilitation of 29,000,000/=

I find, on the basis of the evidence adduced before Court, that the petitioners adduced no evidence to rebut the assertion of the respondent that the facilitation of UGX 29 (million) to each Member of Parliament was not an additional charge on the Consolidated Fund and that the same was within what had already been appropriated to Parliament within the approved budget.

This Court therefore finds that the said facilitation to Members of Parliament did not make the enactment of the

Constitution (Amendment Act no. 1 of 2018 to be contrary to Article 93 of the Constitution".

Cheborion JJC held as follows:

"ii. Facilitating

Use of Private Members Bill to amend the Constitution and facilitation of Members of Parliament to consult on the same

I have carefully considered Article 93 which deals with restrictions on financial matters and Article 94 which provides for private Members Bills as well as section 76 of the Public Finance Management Act, 2005 which deals with Cost estimates for Bills.

The petitioners seem to have misconstrued the import of Article 93. I do not accept that a Private Member's Bill should not receive any form of support or facilitation from Government or Parliament. Article 93 does not prohibit that support or facilitation.

Article 93 is specifically concerned with Bills which contain clauses that have the effect of causing a charge on the Consolidated Fund or increasing taxation. It is concerned with the content of the Bill and not the manner in which it is processed in Parliament.

Evidently, a Private Member's Bill is not barred by Article 94(4)(b) of the Constitution. Clauses (c) and (b) envisage help towards the mover of the private member's Bill by the affected Government department and the Attorney General's Chambers. It is silent on financial help though it mentions "reasonable assistance". The wording of Article 94(4) made it mandatory for the above provisions to be included in the Rules of procedure of Parliament when they were eventually enacted.

There is no dispute that the Bill did not make any express provisions contrary to Article 93(a).

Regarding the source of the money for consultation, Ms. Kibirige testified during cross examination that it was appropriated from the Parliamentary Commission, not the Consolidated Fund. The said position was corroborated by Mr. Muhakanizi during cross-examination. I am therefore satisfied that the UGX 29,000,000 for consultation did not occasion any charge on the Consolidated Fund.

I therefore find that the Private Members Bill did not contravene Article 93 of the Constitution since it did not impose an illegal charge on the consolidated fund. However, the additional amendments of Article 77, 105 and 260 of the Constitution clearly offended Article 93 because they required a referendum which has a charge on the Consolidated Fund.

I therefore answer issue 6(a) in the negative and 6(b) in the negative."

Submissions of Counsel

The appellants contended that that although the Constitutional Court made a finding that the impugned Act violated the provisions of Article 93, it declined to nullify the entire Act on the basis that non-compliance only affected sections 2, 6, 8 and 10 of the impugned Act. They contended that the whole Act ought to have been struck out since the Article prohibits Parliament from proceeding on a Bill or a motion including amendments which have an effect of creating a charge. Parliament therefore violated the impugned Act entirely. It was therefore erroneous to apply the doctrine of severance in a Bill passed as an integral legislation.

Furthermore, the appellants submitted that the 29 million given to the Members of Parliament as facilitation to carry out consultations created a charge on the Consolidated Fund and therefore violated Article 93 as well.

Counsel for the respondent on the other hand contended that Article 93 and 94 had to be construed harmoniously. That Parliament only proceeded to determine the Bill presented by Hon. Magyezi upon satisfaction that it did not have financial implications. That the Justices of the Constitutional Court were therefore justified to strike out the provisions of the impugned Act that did not comply with

Article 93 by applying the principle of severance. He invited this Court to hold the same.

Regarding the 29,000,000/= counsel submitted that this money was appropriated for use by the Parliamentary Commission and not drawn from the Consolidated Fund. He argued that Article 93 only prohibited Parliament from proceeding with a Bill that made provisions which had financial implications unless introduced on behalf of Government. That the Article did not concern itself with the money used in processing the Bill such as allowances or facilitations that was paid to the Members of Parliament to process the Bills. He prayed that we uphold the decision of the learned Justices on this issue.

Consideration

Article 93 reads: **"Restriction on financial matters.**

> **Parliament shall not, unless the Bill or the motion is introduced on behalf of the Government—**
>
> **(a) proceed upon a Bill, including an amendment Bill, that makes provision for any of the following—**
>
> **(i) the imposition of taxation or the alteration of taxation otherwise than by reduction;**
>
> **(ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;**

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

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

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

It is clear that Article 93 of the Constitution bars Parliament from proceeding on either a Bill or a motion unless that Bill or motion is introduced on behalf of Government in specific cases which include (a) (ii) the imposition of a charge on the Consolidated Fund or any other public fund of Uganda or the alteration of such fund other than by reduction.

This means that although a Member of Parliament has the right to move a Private Member's Bill under Article 94(4)(b), Parliament is barred from proceeding on a Private Member's Bill under Article 93 if the Bill has a provision or provisions that would lead to the imposition of a charge on the Consolidated Fund or any other public fund of Uganda or the alteration of such fund other than by reduction. For instance, a Bill for the construction of a University or a hospital. My opinion is that in determining whether or not the

provisions of a Bill would lead to an imposition of a charge on the consolidated fund, one should consider the content and not the process of a Bill.

How does Parliament determine that a Bill complies with Article 93? Although Rule 123 of the Rules of Parliament provide that it is the Speaker who should give an opinion regarding financial matters in respect of private member's Bills, in practice, this is the responsibility of the Minister of Finance who is expected to be the expert in this area. It is determined by looking at the provisions of the Bill right from the inception.

Rule 107 of the Parliamentary Rules of Procedure (2012) under which the impugned Bill was introduced by Hon. Magyezi in Parliament provided that:

> **" (1) All Bills shall be accompanied by a Certificate of financial implications setting out-**
>
> **(a) The specific outputs and outcomes of the Bill;**
> **(b) How those outputs and outcomes fit within the overall policies and programmes of government;**
> **(c) The costs involved and their impact on the budget;**
> **(d) The proposed or existing method of financing the costs related to the Bill and its feasibility;**
>
> **(2) The Certificate of financial implications shall be signed by the Minister Responsible for Finance."**

In the case before Court, the record shows that on the 27th of September, 2017, Hon. Magyezi sought leave to introduce a Private Members Bill and Parliament gave him permission to do so. The record further shows that the Bill that Hon. Magyezi introduced was accompanied by a Certificate of Financial Implication dated 28th September, 2017. It certified that the Bill entitled **"THE CONSTITUTION (AMENDMENT) BILL, 2017,"** has been examined as required under section 76 of the Public Finance Management Act of 2015(as amended).It is reported in the relevant part that:

> ***"(e) Funding and budgetary implications:***
>
> ***There are no additional financial obligations beyond what is in the Medium Term expenditure Framework and thus the Bill is budget neutral."***

The Certificate was signed by Hon. Mattia Kasaijja, Minister of Finance, Planning and Economic Development.

On the 3rd October, 2017, the Bill was tabled for the First Reading after which it was sent to the Legal and Parliamentary Affairs Committee for scrutiny. The Committee scrutinized the Bill in detail and interacted with and received memoranda from a number of stakeholders. On the 18th December, 2017, the Committee submitted its Report to Parliament and the Constitutional (Amendment) (No.2), 2017 Bill was given the Second Reading where its merits and principles were debated. During the presentation of the Report the

Chairperson of the Legal and Parliamentary Committee pointed out in the Report that some members expressed the wish to introduce some amendments to re-introduce term limits and to extend the term of the President to 7 years. The Committee reflected it in in its report. Notably, the Report indicated that:

> ***"The Committee is agreeable to the proposed amendment but note that it is a requirement in the Constitution for such decision expanding the term of office of the President beyond five years to be subjected to a referendum of the people. The Committee, therefore recommends that the term of office of the President be extended to seven years but the legal processes prescribed by the Constitution pursuant to which such amendment can be legally made may be complied with."***

A vote was taken on the Second Reading. There were two abstentions; 97 against and 317 in favour.

The Bill was then committed to the Committee of the whole House for consideration clause by clause. It was during this stage that Hon Tusiime and Hon Nandala Mafabi introduced the two amendments extending the term of Parliament to 7 years and reinstating the term limits for the President. These amendments were in Articles 77, 181, 29, 291,105 and 260 of the Constitution. They were later contained in sections 2,5,6,8,9, and 10 of the Act. These amendments called for a referendum and therefore posed a charge on the Consolidated Fund.

In the premises, I share the opinion of the learned Justices of the Constitutional Court that the introduction of the new clauses, given that they required a referendum which in essence would increase and strain the government expenditure, had an effect of creating a charge on the Consolidated Fund and therefore Parliament ought not to have proceeded on these amendments. In my opinion, the amendments were null and void *ab inito* and had no consequence. As the majority Justices of the Constitutional Court rightly found, in my view, these amendments contravened Article 93 of the Constitution and rightly applied Article 2 (2) of the Constitution and severed them from the Magyezi Bill.

Regarding the issue of the 29,000,000/= given as facilitation to the Members of Parliament, in my opinion this did not create a charge on the Consolidated Fund since the evidence showed that this money had been appropriated by the Parliamentary Commission.

For this reason, I find that Issue 6(a) was rightly answered in the negative by the learned Justices of the Constitutional Court.

Likewise, with respect to issue 6(b), I find that the passing of sections 2,5,6,8 and 10 of the Act was inconsistent and in contravention of Article 93.This issue was also rightly answered in the affirmative.

In the circumstances I find that the learned Justices were right to apply the doctrine of severance to expunge the invalid sections from the Act.

Article 2(2) governs the principle of severance and once the new clauses are severed as was done by the Constitutional Court, The original Magyezi Bill stands alone.

Article 2(2) reads:

> **"If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void."**

In the case of **Attorney General v Salvatori. SCCA No.1 of 1998.** This court in declaring S.7 of the witchcraft Act unconstitutional on the basis of an exclusion order which had an effect of denying a person means of livelihood stated that:

> ***"since under Article 2(1) of the Constitution, the Constitution is the supreme law of Uganda, then pursuant to clause 2 of Article 2, that other law which is inconsistent shall to the extent of the inconsistency, be void."***

I am also fortified by the principles of severance stated in **Halsbury's Laws of England volume 1(4th edition) para. 26** now in **volume 1(1) (2001 reissue) para. 25** that:

> **"25. Severance of partly invalid instruments or actions.**
>
> ***An order or other instrument or an action may be partly valid and partly invalid. Unless the invalid part is***

inextricably interconnected with the valid, such that to sever it would be to alter the substance of the valid part, a court is entitled to set aside or disregard the invalid part, leaving the rest intact. The courts' approach to severance is that it is generally appropriate to sever what is invalid if what remains after severance is essentially unchanged in purpose, operation and effect."

This was re-affirmed in the case of **Thames Water Authority v Elmbridge Borough Council [1983]1 ALLER 836 at 847 per Stephenson LJ.**

"...this exercise can be carried out only where the good and bad parts are clearly identifiable and the bad part can be separated from the good and rejected without affecting the validity of the remaining part..."

In South Africa the Courts recognize that severability in the context of Constitutional law often requires special treatment**.** In the case of **Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others (CCT19/94 , CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631,** the Constitutional Court stated that:

"Although severability in the context of Constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one

gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?"

The conventional test for severance has been laid down in **Johannesburg City Council v Chesterfield House (Pty) Ltd, 1952 (3) SA 809 (AD), 822** and followed in other cases. In that case, it was stated that:

"Where it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute. Where however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole statute must be declared ultra vires."

In my view, since the process of enacting Hon.Magyezi's Bill into law was passed in accordance with the law, left to stand alone, it is not substantially altered. It still reflects the intention of the maker in its purpose, operation and effect. The principle of severance in my opinion therefore applies in the circumstances. Since the new clauses introduced in the Bill during the Committee stage were not passed in accordance with the Constitution they are invalid and the Justices were right to apply the principle to sever the clauses from the Bill.

2. Non-compliance with Parliamentary Rules of Procedure

These include:

i. Smuggling the Magyezi Motion on the Order Paper.

The appellants' contention is that the motion to introduce the Magyezi Bill was smuggled onto the Order Paper and was presented in contravention of Article 94 and Rules 8,17,25,27,29 and 174 of the Rules of procedure. That Members were taken by surprise when the Speaker on 26th September, 2017 amended the Order Paper to include Hon. Magyezi's motion yet there were other motions before his. The appellants further contended that the Speaker was enjoined to give the Members of Parliament the Order Paper at least two days or three hours before the sitting.

The respondent on the other hand argued that the motion was not smuggled. That according to Article 94(4) the Speaker has powers to determine the order of business in Parliament and that a Member of Parliament has a right to move a Private Member's Bill. That Rule 24 and 7 of the 2012 Rules which was applicable then give the Speaker discretion to amend the Order Paper and set the order of business. That the Magyezi had Bill met the test in Rule 121. It was a motion with a Bill attached yet the motions brought by Hon. Nsamba and Hon. Lyomoki had nothing attached and one was a mere resolution. He also submitted that the Speaker had given 3 days prior notice of this motion.

Consideration

According to the Hansard, on 26th September, 2017 the Speaker decided to amend Order Paper and include motions on amendment of the Constitution due to failure by the government to present to the House comprehensive amendments. She highlighted notices of motions for leave to introduce private Members Bills that had met the criteria in Rule 47 for inclusion on the day's Order Paper. These included the motion brought by Hon. Magyezi with a Bill attached another by Dr.Sam Lyomoki with a Bill attached and the other by Hon. Nsamba with nothing attached. The Speaker informed the House that the reason why she had considered Magyezi's motion first was that under the Rules Bills take priority over motions.

In my view, Article 94(4) together with Rule 24 and 165 of the 2012 Rules (25 and 174 respectively of the 2017 Rules) are clear that the Speaker shall determine the order of business in the House. Further Rule 7 (2) and 7(3) give the Speaker general authority to decide questions of order and practice stating reasons for her decision. Rule 8 is to the effect that in case of any doubt and for any questions of procedure not provided in the Rules, the Speaker shall decide.

In my opinion, in the above laws the Speaker has discretion to amend the Order Paper and determine the order of business of Parliament. Further the Speaker's reasoning for allowing the Magyezi motion before the Nsamba's motion was not unconstitutional. First she had the authority to determine the order of business. Secondly, Nsamba's motion was not a Bill but a resolution of Parliament urging government to constitute a Constitutional Review Commission.

Magyezi's motion had a Bill attached and according to the order of business of Parliament although they both met the criteria in Rule 47 of the 2012 Rules, Bills take priority which is reflected in Rule 24(now 25) and Rule 111(now 121). The Hansard further shows that at the time of moving the motions for leave, neither Hon. Nsamba nor his seconder was available.

However, having amended the Order Paper the Speaker should have sent the same to the Members at least three hours before the sitting as required under Rule 26(1)(b).

Rule 26 reads:

"**Order Paper to be sent in advance to Members.**

(1) The Clerk shall send to each Member a copy of the Order Paper for each sitting.

(a) In the case of the first sitting of a meeting, at least two days before the sitting.

(b) In the case of any other sitting, at least three hours before the sitting without fail."

Failure to comply with this Rule was an irregularity in my view but not a violation of the Constitution that would lead to the nullification of the Act.

In conclusion, I find that the Speaker had the power to amend the Order Paper. The constitution provides that the Speaker is in charge of Parliament. The Rules were made by Parliament, and the Business

Committee is a creature of the Rules. In my view therefore, it would be unduly interfering with the internal workings of Parliament which would also be unconstitutional in view of the doctrine of separation of powers.

This issue fails.

ii. Denial of Access to Parliament to Members of the Public

Mr. Mabirizi alleged that he was denied access to the gallery and this evidence was not rebutted. Therefore the learned Justices' holding was erroneous. He relied on S.57 of the evidence Act, Order 8 Rule 3 of the Civil Procedure Rules and the case of **Amama Mbabazi v Museveni & 2 Ors,** to support his submission on this point.

The respondent on his part refuted the appellant's contention that the proceedings were not public and that the Justices of the Constitutional Court had misapplied Rule 230 of the Rules of Procedure of Parliament. Counsel submitted that Rule 230 empowers the Speaker to control the admission of the public to Parliament premises in order to have order at Parliament. The Constitutional Court therefore properly found that the Speaker acted within the Constitution in making the orders as regarding admission of the public to the gallery.

Consideration

Rule 22(1) now 23(1) provides that:

"22: sittings of the House to be public

"(1) Subject to these Rules, the sittings of the House or its Committees shall be public."

However, under **Rule 219 now 230 of the Rules of Parliament**, the authority to admit the public vests in the Speaker.

Rule 219 now 230 reads as follows:

"(1) Members of the Public and the press may be admitted to debates in the House under Rules that the Speaker may make from time to time.

(2) the Clerk and the Sergeant-at-arms shall ensure that all Rules made under this Rule are complied with.

(3) Subject to such Rules made under sub-Rule (2), the authority to admit strangers shall be with the Clerk acting on behalf of the Speaker."

It is common ground that there was a lot of tension in Parliament during that period. This necessitated extra precaution on the part of the Speaker and the Parliamentary staff. Therefore, the Speaker acted within the Constitution and the Rules in directing that the members of the public were screened to ensure security of Parliament during the enactment of the controversial Bill. It is of course not entirely true that Members of the public were denied access to Parliament on the day Magyezi moved the motion to introduce the Bill. The Hansard indicates that on the 26th September, 2017, the Speaker acknowledged the presence of Members of the public including a delegation from the Parliament of Sierra Leone.

On the 27 the September, 2017, the Hansard reports the presence of a number of people in the VIP gallery including former Members of Parliament Alaso, Fred Ebil, Ibi Ekwau, Paul Mwiru, and EALA Members of Parliament Ovonji Irene and Denis Namara, among others.

In my judgment therefore, I find that although Mr. Mabirizi has proved that he was denied access to the gallery on the day Magyezi applied for leave to introduce the motion for his Private Members Bill, I was within the Speaker's powers under Rule 230. I also find no proof of the allegation that members of the public were denied access to the gallery of Parliament during the enactment of the Act and thereby contravened Articles **1, 8A, 79,208(2), 209, 211(3) and 212** of the Constitution.

This issue fails.

iii)Tabling Constitutional Bill No.2 of 2017 in Parliament in the absence of the LOP, the Opposition Chief Whip and Other Opposition Members of Parliament.

Mr. Mabirizi contended that in the absence of the Leader of Opposition, Opposition Chief Whip and other opposition Members, Parliament was not properly constituted and the reasons given by the Constitutional Court has no basis.

On this issue, the respondent submitted that Rule 24 made pursuant to Article 88 of the Constitution provides that the quorum for the business of Parliament shall be one third of all Members entitled to

vote. Therefore the business of Parliament can continue in the absence of the Leader of Opposition as long as there is requisite quorum in Parliament and this is permitted under Article 94 of the Constitution.

Consideration

The learned Justices were unanimous on this issue.

The learned Deputy Chief Justice had this to say:

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

Kasule JCC held that:

> **"*It follows therefore, that the business of Parliament can go on in the absence of the leader of the opposition, opposition chief whip and opposition Members of Parliament as long as there is the requisite quorum in Parliament. Indeed under***

Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its Membership. There was no evidence received by Court as to why the Leader of the Opposition, Opposition Chief Whip and other opposition Members were not in Parliament, when the Constitution Bill No. 2 of 2017 was tabled for debate. It is not also asserted by the petitioners that there was no requisite quorum of Members of Parliament entitled to vote at that material time. There is therefore no basis for holding that any Constitutional provision was contravened. At any rate in the course of debating the Bill, the Leader of Opposition and the other Honourable Members returned to Parliament and participated in the debate of the Bill."

As pointed out by Kasule, JCC, Article 94(2) is clear. It provides that:

"Parliament may act notwithstanding a vacancy in its Membership."

Further, **Rule 24(1)** provides that the quorum of Parliament shall be one third of all Members of Parliament who are entitled to vote. Sub Rule 2 provides that the quorum is required only when Parliament is voting on any question.

Not only does the Constitution allow business of Parliament to continue in the absence of some Members but still the appellant did not adduce evidence that Parliament lacked quorum in voting on a question. No reason was given for the absence of the Leader of

Opposition, the Opposition Chief Whip and Other Opposition Members of Parliament from Parliament on day when the Bill was tabled. They actually walked out of Parliament voluntarily. There is also no complaint that there was no quorum on that day. According to the Hansard, they later on returned to the House and participated in the debate of the Bill. The allegation of violation of the Constitution is accordingly not made out. I therefore agree with the learned Justices of the Constitutional Court that the act of tabling the said Bill in their absence was not unconstitutional and did not breach the Rules of procedure.

In the premises, I find no merit on this issue.

iv) The Speaker permitting Members of Parliament from the Ruling Party to sit on the opposition side

Mr. Mabirizi submitted that the Speaker breached the Rules of Procedure of Parliament by allowing Members to cross the floor. He submitted that Rule 9 provides for the sitting arrangements and Rule 82 provides that a Member shall not cross the floor of the House or move around unnecessarily. The learned Justices therefore erred to find that there was no evidence adduced that crossing prejudiced any Members and affected the process of enactment of the Bill.

He further contended that the learned Justices Musoke, JCC and Cheborion, JCC had erred when they assumed that crossing the floor was actual switching of political sides yet it was not the case.

The respondent on the other hand contended that Rule 9(1) obligates the Speaker to as far as possible, reserve seats for each Member and Rule 9(4) further obligates her to ensure that each Member has a comfortable seat in the House. Therefore, since the Members of the opposition had walked out leaving empty seats, the Speaker was justified in permitting other Members to take up the available sits. This did not amount to them changing parties neither did it contravene the Rules of Procedure.

Consideration

Rule 9 of the Rules of Parliament sets out the sitting arrangement in Parliament. Rule 9 (3) provides that:

> **"(3) The seats to the left hand of the Speaker shall be reserved to the Leader of Opposition and Members of the Opposition party or parties in the House."**

Rule 7 and 9 of the Rules of Procedure give power to the Speaker depending on the circumstances to allow Members of Parliament to sit in particular seats reserved for them in Parliament. There was no evidence that the Hon. Members of Parliament were prejudiced in any way when she permitted them to sit. There is evidence that the order was temporary and thereafter, when the opposition Members of Parliament returned to the House, they were able to occupy their seats. There is no evidence on record that this order of the Speaker had any impact on the process of enacting the Act.

I find that the allegation that the act of the Speaker complained about violated the Constitution was not proved by the appellant. This issue fails.

v) Signing of the Committee Report by non-Members of the Committee

Mr. Mabirizi's general contention on this issue is that some Members who did not participate in the Committee proceedings signed the report and therefore it was not valid.

The respondent on the other hand relied on Rule 183(1), 184(1), 201(1) and Articles 90 and 94(3) and contended that the Members who constituted the Committee were 26 and therefore it was valid as per the law.

Consideration

It was established that some Members who joined the Committee at a later stage signed the Report although they did not participate in the proceedings before the Committee. This was irregular but not unconstitutional because **Article 94(3)** of the Constitution provides that:

> **"(3) The presence and participation of a person not entitled to be present or to participate in the proceedings of Parliament, shall not, by itself invalidate those proceedings."**

The signature of the Members in question could not invalidate the report of the Committee.

Parliament operates through Committees which are established as per Article 90 and Rules 153 of the Rules of Procedure for efficient discharge of its functions. Articles 94(1) empowers Parliament to make Rules to regulate the procedure of its Committees. Article 94(3) is to the effect that the presence of persons not entitled to be present or to participate in Parliamentary proceedings shall not in itself invalidate those proceedings. Rule 184(1) provides for the quorum of Members on the Legal and Parliamentary Affairs Committee to be not less than 15 Members or more than 30 Members. Similarly, under the general provisions for the operation of Committees, Rule 201 provides that a report of the Committee shall be signed by at least one third of all the Members of the Committee.

The report of the Legal and Parliamentary Affairs Committee, indicates that 17 Members signed, two of whom were the newly appointed Members on the Committee by virtue of the decision made on 29.11.17 by the House. It is not clear though from the evidence on record whether they did or did not participate in the meetings of the Committee. If they did not participate but merely signed after the conclusion of the proceedings, in my view this act would be irregular as it was found by the Constitutional Court. However, the report would still have enough quorum to validate it as per Rule 184. In any case, the signatures of the two Members per se would not invalidate the proceedings since Article 94(3) covers this situation as rightly

pointed out by the learned Deputy Chief Justice in his Judgment. In my opinion therefore this irregularity if any, did not affect the enactment process.

This issue fails.

vi) Speaker's action of suspending six Members of Parliament

Counsel for the 2nd appellants contended that on 18th December, 2017, the Speaker arbitrarily suspended the 2nd appellants and other Members of Parliament without giving any reason or stating the offence committed, neither did she give them a fair hearing before the suspension. That at the time of suspension, she was also functus officio. She therefore grossly violated the Rules of procedure and due to this action, the appellants were denied the right to effectively represent their constituencies in the law making process. The Speaker's action of suspending the Members was therefore contrary to Article 1, 28(1), 42, 44(c) and 94 of the Constitution and this vitiated the entire process.

Similarly Mr. Mabirizi submitted that the act of the Speaker was unconstitutional and in a way disenfranchised not only the Members but also the voters. He submitted that the justification of the suspension by learned Justices' was based on morals, emotions and not on Constitutional principles. Therefore, they erred when they relied on Rules 77 & 80(6) of 2012 Rules (Rules 85 & 88(6) of the 2017-Rules of 10th Parliament in isolation of Rule 80(4) of 2012 Rules 88(4) of 2017 Rules yet legislation must be interpreted as a

whole. He contended that suspension of Members is not an event but a process. They were therefore robbed of their right to request for a reversal. He relied on the case of **Uganda Law Society & Anor v Attorney General, CCCPs No.2 and 8 of 2002** in support of his submissions.

The respondent on the other hand submitted that the Speaker has general powers under Rule 7. She had an obligation to preserve order and decorum of the House. Under Rule 77, 79, 80 and 82, she had the power to suspend the said Members therefore the Constitutional court cannot be faulted on their findings in this issue.

He contended that a person suspended had to immediately withdraw from the House until the end of the suspension period as per Rule 87. He also argued that Rule 88(4) requires that a Member is suspended for 3 sittings. This Rule was therefore misconstrued by Mr. Mabirizi.

In relation to fair hearing, Counsel for the respondent relied on Rule 86(2) and argued that the Speaker's decision is not open to appeal and cannot be reviewed by the House except on a substantive motion and in this case there was non made by the suspended Members.

He further contended that at the time of suspension of the Members, the Speaker was not functus officio. In suspending the proceedings up to 2 o'clock, she also suspended the Members. As per Rule 20 the Speaker can at any time suspend a sitting or adjourn a House. She

therefore suspended the sitting to 2 o'clock and did not adjourn the House.

Consideration

The Constitutional Court found that the suspended Members had defied the Speaker and disrupted the proceedings in the House. Her action to suspend them was therefore justified. There was no evidence that she acted ultra vires the Rules permitting her to take disciplinary action to maintain the Honour of the House. There was further no evidence of a substantive motion to question her decision. There was necessary coram for debate in the second and third reading and therefore the suspension did not make the enactment of the Act unconstitutional.

I note that the Speaker suspended the Members of Parliament twice during the process of enactment of the Act. The first suspension was on the 27.9.17 where she suspended 25 Members. After addressing the unruly conduct of the Members the Speaker invoked her powers under Rule 7(2), 77, 79 (2) and 80 of the 2012 Parliamentary Rules of Procedure and suspended them.

The Speaker exercised her powers under **PART XIII** of the Rules

Rule 77 provides that:

"77. The Speaker shall be heard in silence

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

Rule 78(2) provides that:

"**The Speaker or Chairperson, shall order any person whose conduct is grossly disorderly to withdraw immediately from the House or Committee for the remainder of that day's sitting; and the Clerk or Sergeant at Arms shall act on such orders as he or she may receive from the Speaker or Chairperson to ensure compliance with this Rule."**

Rule 80 is entitled **"Naming and suspension of Members".**

It reads:

"(1) <u>If the Speaker or Chairperson of any Committee considers that the conduct of a Member cannot be adequately dealt with, under sub Rule (2) of Rule 79, he or she may name the Member.</u>

<u>(20) Where a Member has been named, then-</u>

<u>(a) in case of the House, the Speaker shall suspend the Member named from the House;"</u>

It is clear that in line with these Rules, the Speaker is mandated to ensure that there is order and decorum in the House, and is to decide on the questions of order and practice to ensure orderly proceedings in the House. In preserving order, she is therefore permitted to

suspend the Members who disrupt the proceedings. I cannot fault the learned Justices on this issue. They considered the Rules on suspension non in isolation of the other and I agree with them on this point.

Suspension in my opinion did not disenfranchise the Members or the voters in any way since it was justified. **Part XII of the 2012 Rules** similar to **Part XIII of the 2017 Rules** clearly lays down the behaviour of Members during debate. In addition the **code of conduct for Members of Parliament in appendix F particularly Rule 5** requires that **"Members shall at all times conduct themselves in a manner which will maintain and strengthen the public's trust and confidence in the integrity of Parliament. Unruly behaviour does not strengthen public trust."**

I am further fortified by the case of **Twinobusingye Severino v Attorney General. Constnl Petition No.47 of 2011** Court observed that**:**

> ***"although Members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives Honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen, to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature,***

Parliament is the fountain of Constitutionalism and therefore the Honourable Members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

The 2nd appellant's contention seems to be mainly on the second suspension of Members which was done on the 18th December, 2017 during the second reading and presentation of the Committee report. A perusal of the Hansard for that day shows that the Speaker reminded the Members who were suspended that if they do misconducted themselves again, they would be suspended again for seven sittings that time beyond Christmas and therefore they should not endanger their right to speak and vote. She urged them to tolerate and listen to one another. However during the presentation, she kept on asking the Hon. Members to take their seats and maintain order in the House as is the practice of Parliament. She further reminded them of Rule 88 of the Rules that regulates their conduct in the House. Even after having done so, there was still no order in the House. She therefore suspended the six Members and the proceedings up to 2 o'clock. She ordered them not to come back to the house in the afternoon. I find that some of the suspended Members were earlier suspended during the first suspension and they were warned in during this sitting. Therefore it is not true that the Speaker merely suspended the six Members for no reason. It all stemmed from the first suspension and after several warnings. The Speaker therefore rightly suspended them as per Rules 87(2) and 88.

That notwithstanding, even if there was no reason given as alleged by the appellants, Rule 86(1) states that:

> **"(1)The Speaker shall be responsible for the observance of the Rules or order in the House."**
>
> **(2) The decision of the Speaker shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice."**

In the present case there was no substantive motion to question her decision as rightly held by the learned Justices.

In addition the evidence is clear that at the time of suspension she was not functus officio as alleged by the appellants. She just suspended the proceedings up to 2 o'clock and in the process of suspending the proceedings, she suspended the Members. At 2.16pm the House resumed and was adjourned at 6.30pm.

In my view therefore, from the forgoing, the Speaker's action of suspending the six Members was therefore not contrary to Article 1, 28(1), 42, 44(c) and 94 of the Constitution neither did it vitiate the enactment of the Act.

This issue fails.

vii) Non -compliance with the Requirement of 3 sittings days

The appellants submitted that the report of the Legal and Parliamentary Committee was never tabled as per the Rule 201 and neither was the three days Rule observed as required under Rule

201(2). Counsel submitted that a resolution was hastily passed suspending the Rules so that the debate could proceed immediately.

Mr. Mabirizi also faulted the learned Justices for finding that the motion to suspend Rule 201(2) by the Deputy Attorney General was at the Committee stage yet it was at the plenary. He also submitted that the motion was not seconded therefore making the subsequent proceedings invalid. He relied on the case of **Makula International Ltd v Cadinal Nsubuga & Anor (1982)** in support of his submissions.

The respondent on the other hand refuted the appellants' assertions and submitted that the Speaker had directed the Clerk to upload the report on the ipads four days prior therefore Rule 201 did not apply. Counsel submitted that even if it did, a motion to suspend the said Rules was moved and supported by Hon. Janepher Egunyu and other Members. He refered to the decision of the Hon. Deputy Chief Justice and Cheborion, JCC and submitted that the Members had adequate notice as to the contents of the report and therefore the purpose of Rule 201(2) was achieved. There was no prejudice to the Members.

He argued further that regarding secondment, counsel submitted that the motion did not require secondment since it was raised at the Committee of the whole House as found by the learned Justices. Counsel however submitted that without prejudice to that holding, the motion still satisfied Rule 59 since it was supported by Members. Counsel submitted that since the Rules do not clearly define

secondment, Rule 8 should be adopted to find that the motion was seconded.

Consideration

Rule 201 provides that:

> **" Debate on a report of a Committee on a Bill, shall take place at least three days after it has been laid on the table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or by the Speaker."**

Rule 2(1) defines "***table"***

> **"to mean the Clerk's table and tabling means laying of an official document on the Table and laying before Parliament shall be construed accordingly."**

The Hansard shows that on the 18th December 2017 during the second reading, the Chairperson of the Legal and Parliamentary Affairs tabled the report of the Committee before Parliament. He informed the Speaker that the report had been uploaded on the ipads of the MPs by the Clerk four days earlier. A point of procedure was raised that Rule 201 requires that the debate shall take place three days after tabling the report. The Speaker Ruled that the Rule did not apply because the 9th Parliament had agreed to use less paper and she had directed the Clerk to upload the report onto the Members Ipads four days prior to that date. The point was raised again that tabling means tabling on the Clerk's table not the Ipad. The Attorney General moved under Rule 16 to suspend Rule 201 arguing that the

Rule was no longer useful with the establishment of the e-communication. The motion was supported by Hon. Janepher Eguyu and Mr. Gaster Mugoya and the Rule was suspended.

It is therefore not true as found by the learned Justices that this Rule was suspended at the stage of the Committee of the whole House. It therefore required secondment under Rule 59 read together with Rule 16.

> **"<u>Suspension of the Rules</u>**
>
> **(1)Any Member may, with the consent of the Speaker, move that any Rule be suspended in its application to a particular motion before the House and if the motion is carried, the Rule in question shall be suspended.**
>
> **(2)This Rule shall not apply in respect to Rule 5, 6, 11, 12, 13(1), 16 and 97."**

Rule 59 provides that,

> "**<u>Seconding of motions</u>**
>
> **"(1)In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.**
>
> **(2)In Committee of the Whole House or before a Committee, a seconder of a motion shall not be required."**

Although the Rules do not define secondment, According to the Oxford Advanced learner's dictionary, 7th edition, seconding means ***" to state officially at a meeting that you support another person's idea, suggestion, etc. so that it can be discussed and/or voted on."***

As stated above, the evidence shows that it was supported by Ms. Janepher Eguyu and Mr. Gaster Mugoya. So it was validly suspended.

The requirement of the three days after tabling did not apply in the circumstances. This issue fails as well.

viii) Violation of the Requirement of 14 sitting days between the 2nd and 3rd readings

The appellants' main contention was that although the learned Justices found that non observance of 14 days between the second and third reading contravened the Constitution, they did not find this fatal to the process of enactment of the Act. The appellants contended that the new clauses became part of the Bill and therefore required 14days separation and Article 260(1) states that such a Bill shall not be passed. That the Presidential assent was therefore in vain. In support of this submission they relied on the case of **Sekikubo v Attorney General, Chowdhary v UEB, No.27/10 and Kasirye v Bazigattirawo, No.03/16.**

The respondent submitted that the learned Justices rightly found that the non-observance of the 14 days was not fatal. Counsel argued

that the contents in the original Bill did not contain any provision that required separation of 14 days. He submitted that the learned Justices rightly found that it was only the new clauses introduced at the Committee stage that had an infectious effect on Articles 1, 8A and 260 and required 14 days separation between the 2nd and 3rd reading. They were therefore null and void and the Justices rightly severed them.

Consideration

The 14 days is a requirement in respect of amendments under Articles 260 and 261. The Magyezi Bill was initiated under Articles 259 and 262 of the Constitution. As such and as the majority of the Justices of The Constitutional Court rightly found, in my view, the amendments in sections 1,3,4 and 7 of the Act were not covered by Article 260 and 261. And therefore did not require a 14 days sitting between the second and third reading.

As was established by the majority of the Justices of the Constitutional Court, the amendments that required a referendum were contained in sections 2, 5, 8, 9 and 10 and those should have complied with the 14 days requirement under Article 263(1) of the Constitution. Each of those sections are thus unconstitutional. This issue lacks merit.

ix) Closing the debate before each and every Member of Parliament could debate the Bill

The appellants' main contention on this issue was that the Members of Parliament were denied adequate time to debate and consider the Bill yet this was a matter of great national importance. They contended that 3minutes to make submissions on the Committee report was insufficient. In addition the Speaker closed the debate before every MP could debate and only 28% debated which violated Rule 133(3).

In relation to closing the debate before each Member could debate, Counsel for the respondent submitted that Rule 80(2) provides for closure of the debate and if the majority agree then the debate is closed. In this case majority agreed to the closure of the debate when the question was put. He further submitted that there is no requirement that every Member has to debate before closure.

Consideration

Rule 62(2) provides that

> "**The Speaker may at the beginning of any debate specify the period that each Member contributing to a debate may be given.**"

Part XII of the Rules provides for the Rules of debate and Rule 69(11) provides that**,**

> **"the Speaker may, on the commencement of the proceedings of the day or on any motion, announce the time limit he or she is to allow each Member contributing**

to debate and may direct a Member to take his or her seat who has spoken for the period given"

In this case the Speaker gave each Member 3 minutes and 124 Members contributed to the debate. She has the discretion according to Rule 62(2) and 69(11) to allocate time to debate and therefore cannot be faulted.

Further there is no requirement that every Member has to debate. At the close of the debate, when a question was put to close the debate no Member objected. The question was put and agreed to. I do not find that the Rules were breached and that they affected the enactment process. I agree with Cheborion, JCC in his Judgment where he held that;

"I have perused Article 79 (1) (2) which empowers Parliament to make laws in Uganda. I have also considered Article 262 that allows Parliament to amend provisions of the Constitution, as well as the Rules of Procedure of Parliament that regulate debate and proceedings in Parliament. I have not come across any specific provision, and none was cited to us as making it a mandatory requirement that for any Constitutional amendment Bill to be enacted into law, deliberations must be received from each and every Member or majority of the Members of Parliament. In my view, the only condition precedent set under Article 262 is the requirement for the

Bill to be supported by 2/3 of all the Members of Parliament.

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

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

According to the Hansard, a number of Members of Parliament debated the Bill at its second reading. The time of 3 minutes allotted to them by the Speaker appears too short though, for any meaningful debate to have taken place on this very important Bill. However, there is no record on the Hansard that Members complained that they had been prevented from debating the Bill. In any case, there is no Rule that before a Bill is passed by Parliament, each and every Member of Parliament must debate it. What is most important is for Members to be present and closely follow the debate and understand a Bill so that they can in turn explain the Bill to their electorates who sent them to represent their view in Parliament. With the over 400 Members of Parliament, it would be inconceivable for each one had to debate a Bill before passing it.

I therefore find no merit on this issue.

x) Failing to close the doors of Parliament during debate

Counsel for the 2nd appellants contended that failure to close the doors at the time of voting contravened Rule 98(4). That the rationale for the Rule is to bar Members who had not participated in the debate from decision making. He submitted that the Speaker however left the doors open and called Members who were outside the chambers to enter and vote. Counsel therefore faulted the learned Justices for in holding that no evidence was availed as to how failure to close the door was unconstitutional.

Mr. Mabirizi contended that failure to close the doors was not at the Speaker's discretion. Article 89 requires that voting in a manner prescribed by the Rules of procedure made under Article 94.

The respondent on the other hand contended that the Speaker gave reasons for failure to close the door. This was because all Members did not have seats and therefore it was not possible to lock out some Members. He submitted that Rule 8 validated the Speaker's action. She therefore acted within the ambit of these powers and court made a correct finding on this issue.

Consideration

This was a violation of **Rule 98 (4)** of the Rules of Parliament which reads:

" (4) The Speaker shall then direct the doors to be locked and the bar drawn and no Member shall thereafter enter or leave the House until after the roll call vote has been taken."

However, according to the Hansard, the voting was done in an orderly and transparent manner. There is no evidence that those Members who were absent Parliament on that day also voted. Voting was done in accordance with **Rule 98(6)** Members voted one by one by all Members present. Theoretically Parliament could sit in an open place with no door as long as it is gazzetted for that purpose. The Speaker explained the reason why she could not close the door due to the large number of Members of Parliament. This did not violate the Constitution since there was a requisite quorum to pass the Act.

For that reason this issue also fails.

xi) Consultation and Public Participation

This was issue 6(d) and (e) before the Constitutional Court and it was framed as follows:

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

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

The majority Justices answered 6(d) in the negative and 6(e) in the affirmative.

The Appellants' general contention was that the learned Justices erred in law and fact when they held that there was proper consultation of the people on the Bill. Counsel submitted that there was no consultation yet it is a fundamental value of the Constitution.

Counsel submitted that this being a matter that touched the foundation of the Constitution consultation was paramount since the rationale is to ensure that people retain their sovereignty. Counsel submitted that there was overwhelming evidence that there was no consultation. Such evidence included the fact that the process of enactment was not preceded by a consultative Constitutional Review exercise as was the case in the 2005 Constitutional amendments. There was no evidence on record that Hon. Magyezi in presenting his Bill consulted the public before tabling in Parliament. There was no structural framework for public participation. Public gatherings for the Members of the Opposition were blocked and violently dispersed by Police and other security agencies. Despite the fact that the Members were given 29 million as facilitation the purported consultation was illusory and ineffective.

Counsel further submitted that the test to ensure participation of the people in legislation was not passed since Parliament was not reasonable in closing out the people's participation but rushed to amend Articles that rotated around the sovereignty of the people. Counsel submitted that since Parliament was obliged to consult the

public on the amendments, failure to do so vitiated the entire process hence rendering the resultant law null and void. Counsel relied on the cases of **Law Society of Kenya v Attoney General, Constitutional Petition No.03 of 2016; Robert N. Gakuru & Ors vs The Governor of Kiambu County & Ors; Doctors for Life International vs The Speaker of the National Assembly & Ors. South Africa Constitutional Court Case No. CCT 12/05** in support of their submission.

The respondent's counsel refuted this allegation and submitted that the learned Justices made a proper finding that there was public participation and consultation in the process of enactment of the impugned Act. Counsel argued that unlike the Constitutions of South Africa and Kenya among others, our Constitution does not provide standard measures for consultative Constitutional Review rather it recognises various roles of people and bodies in the Constitutional amendment process thereby permitting amendment of the Constitution in various ways as provided under Article 259, 260,261 and 262. Counsel submitted that Parliament has never enacted a law to set a yardstick or guide consultation or set parameters upon which effective consultation can be measured. The cases cited by the appellant's are therefore distinguishable in the circumstances since they were decided on the basis of the Constitution which strictly provided for public participation in the law making process and also provided yardsticks for the same.

Counsel further argued that there is no requirement that all persons must express their views concerning the law, rather, what is required is that reasonable steps were taken to facilitate public participation and reasonable opportunity afforded to the public to participate in the legislative process.

Counsel further argued that notices inviting all persons who wished to be part of the process were published upon which 54 groups of persons responded to the invitation including the President of Uganda and registered political parties. That the Hansard clearly showed that the reports of the Members of Parliament through debating and voting was a representative of consultations carried out in their various constituencies. Counsel therefore invited this Court to find that there was public participation.

Consideration

Public participation is a political principle enshrined in the Constitution under The National Objectives and Directive Principles of State Policy. The Democratic Principles (i) stipulate that:-

> **"the state shall be based on the democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance."**

In **Doctors for Life International vs. Speaker of the National Assembly and Others**. (supra) Court observed that:-

> ***"If legislation is infused with a degree of openness and participation, this will minimize dangers of arbitrariness***

and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."

Although our Constitution provides for active participation of all citizens, it is couched in general terms. It does not provide a mode of consultation and participation neither does it provide a yard stick for setting standard measures for consultation. I therefore agree with the finding of the Hon. Deputy Chief justice that there is no law that lays down a structural modus operandi for public consultation.

The question therefore is whether or not there was consultation in the circumstances.

I am guided by the South African case of the **Minister of Health vs. New Clicks South Africa (Pty) Ltd, {2005} ZACC:- Sachs, J.** observed:-

"……. <u>What matters is that at the end of the day a reasonable opportunity is offered to Members of the public and all interested parties to know about the issue and to</u>

***have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*"**

Further, in the **Doctors for life case** (supra) court held that:

"what is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making."

The court further held that:-

"in determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include Rules, if any, adopted by Parliament to facilitate

public participation, the nature of the legislation under consideration, and whether the legislation needed to be enacted urgently. Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect Parliamentary institutional autonomy, and on the other, the right of the public to participate in public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable."

In the case of **Law society of Kenya v Attorney General**, (Supra)Court observed that:-

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

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

Although the above cases are from another jurisdiction, I find them persuasive in principle.

I agree with the majority learned Justices that the directive by the Inspector General of Police, Mr. Asuman Mugenyi to the District Police Commanders to curtail and restrict the conduct of consultative meetings was arbitrary and contrary to Article 29(2) since it was intended to prohibit Members from holding joint rallies or getting support from outside constituencies. This directive on the face of it would limit public participation. However evidence shows that the police did not unduly restrict consultative meetings countrywide. Although in some places police interfered with consultations which was unconstitutional, in other places rallies took place and people were consulted.

The evidence on record shows that after the Bill by Hon Magyezi was sent to the Committee on Legal and Parliamentary Affairs, the

Committee met and even received comments and views from the public and institutions such as inclusion of term limits to the Bill and adjusting tenure of the President among other views concerning the Bill.

There is evidence on record, however, that although the Committee had planned to conduct countrywide consultations, it was not facilitated by Parliament for very unclear reasons. This was a set back because it would have gone a long way in raising the level of public participation required.

Further, according to the Hansard, during the presentation of the Committee report on the Legal and Parliamentary Committee, its Chairperson stated that the Committee had extended invitations to identified stake holders and other interested parties to appear before it and submit their views on the Bill. It is also not in dispute that the Speaker cautioned the Members to comply with Article 1 and 2 of the Constitution.

The evidence further shows that Parliament facilitated each Member of Parliament with shs. 29 million to carry out consolations before debating the Bill. There is also evidence on record in the Hansard that some Members of Parliament reported that they had indeed consulted the public.

In the premises I agree with the majority Justices of the Constitutional Court that the consultative process of the enactment of the impugned Act was not adversely affected by restrictions or

violence. I therefore find that there was consultation in respect of sections 1,3,4 and 7 of the Act but there was no consultation of sections 2,5,6,8 and 10.

In the premises this issue fails.

3.Discrepancy In the Speaker's Certificate of Compliance and illegal consent.

The appellants' contention was that the learned Justices erred in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies of the Speaker's Certificate of compliance. Counsel submitted that the Certificate was materially defective in content and form which rendered the assent a nullity as per Article 263(2). Counsel submitted that the Certificate only indicated the clauses in the original Bill yet the Members also agreed to introduce new clauses to the Bill. The Certificate therefore contravened Article 263(2) and S.16 of the Acts of Parliament Act. Counsel further contended that not only did the Certificate have discrepancies, there was also no Certificate of the Electoral Commission which invalidated the Act. Counsel submitted that in the circumstances, the Court therefore erred and misdirected itself on the legality of the Speaker's Certificate when it found that the Certificate only affected the newly introduced provisions and not the entire Act. Counsel relied on the case of **Semwogerere & Anor vs Attorney General. No. 1/02 (SC)** in support of their submission.

Regarding the illegal assent Counsel contended that the Presidential assent is an integral part of a law making process and any defect therein renders the law a nullity as per Article 91, 263 and s. 9(1) of the Acts of Parliament Act. Counsel submitted that the President's act of assenting to the Bill without scrutinizing it to ascertain its propriety contravened the law.

The respondent on this issue submitted that the validity of the entire Act was not fatally affected by the variances in the Speaker's Certificate. Counsel submitted that it was not materially defective to render the Presidential assent a nullity. The original Bill did not contain any provision that required its ratification through amendment and therefore the Certificate of Electoral Commission was not necessary. The decision of the learned Justices in upholding the validity of the Certificate was a recognition that it complied with the form prescribed in section 16(2) and Part VI of the second Schedule of the Acts of Parliament Act. The Constitutional Court rightly used the severance principle as espoused in Article 2(2) to find that the Articles not included in the Speaker's Certificate were unconstitutional.

Counsel invited court to uphold the findings of the majority that the discrepancies in the Speaker's Certificate and the Bill at the time of Presidential assent was not fatal to the Bill.

Consideration

Under Article **263 (2) (a)** of the Constitution:

"(2) A Bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be accented to by the Present only if:

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

It is not in dispute that the Bill that was sent to the President for assent, that is, **Constitution (Amendment) (No. 2) Bill 2007**, was accompanied by a Certificate of Compliance of the Speaker dated 22nd December, 2018 as required by **Article 263(2)(a)** of the Constitution above. The Certificate however indicated that only 4 Articles of the Constitution, namely, **Articles 61, 102,104 and 183,** were being amended. It excluded **Articles 77, 105, 181, 289 and 291** that had been amended by Parliament and had been included in the Bill as well.

It is also not disputed that the Bill that the President assented to contained all the 10 Articles of the Constitution that were amended by Parliament. It is thus true that there was indeed a discrepancy between the Speaker's Certificate of Compliance and the Bill that the President assented to.

My view is that the President ought not to have assented to a Bill that was at variance with the Speaker's Certificate of Compliance. He could have avoided this irregularity by refusing to assent to the Bill for non-compliance with the Constitution under Article 263.

However, I find that the Certificate of Compliance did not lie as alleged by counsel for the appellants. It stated the truth; that the provisions of **articles 259 and 262** of chapter 18 of the Constitution had been complied with in respect of amendments to:

" (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"

It did not cover those articles that were not amended in compliance with the Constitution, namely Articles 77, 181, 29, 291,105 and 260 of the Constitution and the Justices of the Constitutional Court rightly found so. Had the Certificate stated otherwise, it would have told a lie. The Certificate covered only a part of the Bill that had complied with the Constitution, namely Sections 1, 3,4 and 7.

Assent cannot bring into law what is a nullity by the Constitution. Parts of the Bill were unconstitutional and therefore null and void. The Speaker was required to certify that the Bill was passed in accordance with the constitution. The Speaker realized that some of the provisions were unconstitutional and that is why in her Certificate, she listed only those provisions that had complied with the Constitution. In my opinion this is a valid certificate as far as the amendments that were passed in accordance with the Constitution were concerned.

The decision of **Ssemwogerere**(supra) relied on by the appellants is distinguishable in that in that case, the Bill was not accompanied by a Certificate of Compliance issued by the Speaker unlike in the instant case.

This issue also fails for the reasons given.

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

This issue was framed in the Constitutional Court as follows:

"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."

Submissions of Counsel

The contention on this issue was that the Learned Justices of the Constitutional Court erred in law and in 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 submitted that the Bill was passed amidst violence within Parliament, outside Parliament and across the entire Country

thereby vitiating the entire process and thus making it unconstitutional. Counsel submitted that there was heavy deployment and unprecedented violence against the Members of Parliament and this led the Speaker to inquire into the existence of the armed persons in the precincts of Parliament, which fact was rightly established by the learned Justices. Further the Constitutional court observed that the directive issued by Assistant Inspector General of Police Asuman Mugenyi on consultative meetings was unconstitutional. However the Constitutional Court held that these acts were not sufficient to vitiate the enactment process.

Counsel submitted that the violence had a chilling effect on other Members of the public as well as other Members of Parliament that wished to participate to oppose the amendment. This had an adverse effect of curtailing several persons from participating. Counsel therefore submitted that it was imperative for the learned Justices to find that the process of amendment was filled with violence and was therefore contrary to Article 3(2) of the Constitution. Counsel relied on the case of **Doctors for life International & Ors v The Speaker of National Assembly & Ors** (supra)

Counsel further submitted that the violence inside Parliament included arrest, assault detention of Members of Parliament and their forceful exclusion from representing the Constituents. The actions violated Article 23, 24 and 29 of the Constitution. The

Constitutional Court however, did not make any declarations to that effect neither did it grant redress as required under Article 137.

Counsel therefore invited this Court to find that violence vitiated the enactment process.

Counsel for the respondent in reply submitted that the learned Justices rightly found that violence inside and outside Parliament did not amount to breach of the Constitution to vitiate the process of enactment.

Counsel submitted that the unprecedented violence inside Parliament was occasioned by the Members of Parliament misconduct which led to their suspension. However since the suspension was not heeded to, this led to their forceful eviction by Members of the security forces under the command of the Sergeant-at-arms.

Counsel relied on Article 79(1), 94(1), Part XIV of the Rules of Procedure and Rule 88(6) and submitted that the Speaker had the right to suspend the Members and was mandated to ensure order and decorum in the House was maintained. Counsel relied on the case of **Twinobusingye Severino v Attorney General. Constnl Petition No. 47 of 2011** in support of this submission.

Counsel submitted that the scuffles from the events that transpired on the 26th and 27th September, 2017 necessitated the limitations of the enjoyment of the Members of Parliament rights and their eventual arrest and detention by the security forces. Counsel submitted that

the enjoyment of these rights is valid only if it is done in a manner that is acceptable and demonstrably justifiable in a free and democratic society as illustrated in Article 43(1).

Counsel also relied on the case of **Hon. Lt (Rtd) Kamba Saleh & Another v Attorney General & 4 Ors. No. 16/13** on Constitutional interpretation and submitted that the entire Constitution should be read as a whole. Counsel therefore submitted that the Members of Parliament should not confuse their right to legislate to mean that it also extends to the disruption of other people's representatives right to debate as well as the disruption of the conduct of Parliamentary business.

In relation to the violence throughout the country, Counsel submitted that there was evidence that an overwhelming number of Members of Parliament carried out their consultation meetings uninterrupted and were able to vote on the Constitutional amendment Bill.

Counsel argued that regarding Article 3(2) of the Constitution, this is a new argument that force was used to amend the Constitution. This issue can therefore not be raised at this point. Counsel submitted that this notwithstanding, evidence shows that the amendment was done with full participation of the Members of Parliament and therefore the application of Article 3(2) was misconstrued.

Counsel therefore invited this court to uphold the decision of the Constitutional court on this issue.

Consideration of issue 3:

Violence inside Parliament

According to the evidence on record there were events that occurred during the proceedings of 21st, 26th and 27th which necessitated the Speaker to use her discretion and maintain order and decorum in the House as required under Rule 7(2) of the Parliament Rules of Procedure. In so doing, under Rules 77, 79(2) and 80, she suspended 25 Members who had adamantly refused to exit the House despite her orders.

Rule 81 provides that:

> **"a Member who is ordered to withdraw under sub Rule (2) of Rule 79 or who is suspended from the service of the House by virtue of sub Rule (2) or (3) of Rule 80 shall immediately withdraw from the precincts of the House until the end of the suspension period."**

According to the affidavit of Jane Kibirige the Clerk to Parliament and Mr. Ahmed Kagoye the Sergeant at arms and the Hansard, the Speaker had made calls to Members of Parliament to maintain order and decorum in the House so that the debate could proceed. When the Members defied the Speaker's order, she was therefore forced to ask the Sergeant- at -arm to evict them from the house. She suspended the House for 30minutes to enable them to be evicted. The Hon. Speaker justified her action under Rule 80(6) which states that:

"Where a Member who has been suspended under this Rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force is necessary in order to compel obedience to his or her direction and the Sergeant At Arms shall be called upon to eject the Member from the House."

I note however, that in the process of evicting the said Members from the House, some unknown persons brutally beat up some of the Members including those who were not suspended, thus causing chaos in Parliament. Some Members were also arrested and confined in Police stations. This led the Speaker to inquire from the President in a letter dated 23rd October, 2017 about the invasion of Parliament precincts by Security Agencies on the 27th September, 2017.

From the foregoing, in my opinion, I agree with the Justices of the Constitutional Court that the violence was caused by the Members of Parliament themselves as a result of lack of decorum on their part. In the case of **Twinobusingye Severino v Attorney General. Constitutional Petition No.47 of 2011** the Constitutional Court observed that**:**

"...although Members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in

a manner that gives Honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen, to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable Members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

This had been further emphasised by the Deputy Speaker in his address to the House in the proceedings of 21st September, 2017 when he emphasised that:

"...the hallmark of a Parliament is courtesy among and between Members. So please let us not do things that will cause unnecessary anxiety in the House."

That notwithstanding, I note that in bringing calmness to the House, there was also violence caused by the invasion of the security agencies as indicated in the Speaker's letter. The Affidavits of Hons. Betty Nambooze, Munyagwa, Karuhanga, Odur Jonathan and Sewanyana Allan show that they were brutally tortured and treated inhumanly causing injury to the victims which acts were unconstitutional.

The respondent relied on the affidavit evidence of Gen. David Muhoozi where he stated that under Article 209(b) the UPDF can

ensure civil public compliance and in that regard, the UPDF supported the Parliamentary Police in ensuring harmony during the proceedings.

Article 209(b) states that:

"functions of the defence forces

(b) to cooperate with the civilian authority in emergency situations and in cases of natural disaster."

Even if the presence of the UPDF was justified, excessive and unwarranted force was not required in the circumstances. I find that these acts were therefore contrary to Article 23 and 24. In such circumstances, the appropriate court, if the affected Members wished to seek redress for enforcement of their rights would be the High Court which is mandated to investigate and determine the appropriate redress as per Article 50 and 137(4)(b) of the Constitution.

In conclusion, I agree with the learned Justices that even if there was violence inside Parliament on the said date, it did not vitiate the enactment process. The scuffle took place before Hon. Magyezi had moved his motion for leave to introduce the Bill under Article 94(4)(b) and thereafter, there is no evidence adduced by the appellants that the subsequent proceedings were interfered with by the security agencies in order to vitiate the process or that there was a chilling effect in Members debating. The Bill was debated and supported at the second and third reading by the votes of not less than two-thirds

of all Members of Parliament. Article 262 was observed and subsequently the Bill was passed accordingly as per Article 259 of the Constitution.

Violence outside

There is evidence that in the process of carrying out the directive by the Assistant Inspector General of Police, Mr. Asuman Mugenyi restricting the Members of Parliament within their constituencies and in some places rallies were disrupted, this contravened Article 29. However there is evidence that in other places rallies took place as rightly found by the Constitutional Court. This did not vitiate the enactment process since the Members reported during the debate that they had consulted and were therefore reporting the views of the public.

Article 3(2) is misconstrued, the Act was not amended violently. It was amended through the vote of the majority of the Members of Parliament who freely voted in favour of the amendments.

I therefore find no merit on this issue.

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

Submissions of Counsel:

The appellants faulted the majority Justices of the Constitutional Court for applying the substantiality test in determining the consolidated petition. They contend that whereas the applicability of

the substantiality/quantitative principles to election petitions is expressly provided for in electoral laws, the test is totally different in Constitutional matters. Therefore, the Constitutional Court acted outside the jurisdiction conferred on it by Article 137 of the Constitution when it applied the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and or violated the Rules of Procedure of Parliament as well as the invasion of Parliament.

The respondent contended that the Constitutional Court was right to inquire into the extent of the alleged massive irregularities and in doing so applying the qualitative and quantitative test, the Court considered whether the errors and irregularities identified sufficiently challenged the entire legislative process and lead to a legal conclusion that that the Bill was not passed in compliance with the requirements of the Constitution.

The respondent invited Court to uphold the findings of the Constitutional Court that certain irregularities /errors were mere technicalities and were not fatal to sufficiently invalidate the entire process of enactment of the **Constitution Amendment Act, No. 1 of 2018.**

Consideration of issue 4:

The Constitutional Court derives its power to determine disputes and grant remedies under Article 137 of the Constitution. Article 137(1) reads:

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

(2)...

(3) Any person who alleges that-

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

(b) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for a redress where appropriate." (the underlining is for emphasis)

The words of Article 137 are clear and unambiguous. The article gives the Constitutional Court the power to interpret the Constitution in order to determine whether any Act or actions complained of are inconsistent with or in contravention of the Constitution and where it finds in favor of the petitioner, to declare so and give redress or refer the matter to the High Court for investigation and appropriate redress.

The Constitutional Court is not mandated, after finding that there was contravention of or inconsistency with the Constitution, to investigate the degree of contravention or inconsistency. It just has to make a declaration to that effect.

The Constitutional Court has made declarations in the several petitions including the examples given by Mr. Mabirizi such as **Paul K Ssemwogere & 2 Others vs Attorney General, SCCA NO. 1 of 2002.**

The test applies to Presidential and Parliamentary election petitions under two specific laws, namely, **Section 59(6)(a) of the Presidential Elections Act, 2005** and **section 61(1)(a) of the Parliamentary Elections Act, 2005 .**

Section 59(6)(a) of the Presidential Elections Act, for example, provides that:

> **"(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved by to the satisfaction of the court-**
>
> **(a)noncompliance with the provisions of the Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the noncompliance affected the result of the election in a substantial manner."**

(The underlining is added for emphasis)

There is no similar law or Act of Parliament made under Article 137 of the Constitution that gives the Constitutional Court the legal basis to apply the substantiality test to Constitutional petitions. An Act or act is either Constitutional or unconstitutional. Although this is a tool of evaluation of evidence, the learned Justices of the

Constitutional Court erred when they relied on the Election Petition Rules and jurisprudence in determining a Constitutional matter.

For this reason I answer this 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.***

This issue was resolved together with issue 1.

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.***

The issue before the Constitutional Court was whether continuing in office by the incumbent President elected in 2016 upon attaining 75 years contravenes **Articles 83(1) (b)** and **102 (c)** the Constitution. It was issue 13. All the Justices answered this issue in the negative.

Submissions of counsel

Mr. Mabirizi's main contention on this issue was that the President elected in 2016 ceases to hold office on attaining 75 years of age as per Article 102(b) and Article 83(1)(b) . He submitted that Article 102(b) prescribes the nature of a person to appear for nomination

and this has nothing to do with what happens after the nomination and elections.

He submitted that the answer to the question as to when a leader ceases to hold such qualifications is found under Article 83 (1) (b). He argued that since the President's qualifications are pegged on those of a Member of Parliament, Article 83(1) (b) therefore applies in the circumstances. According to him, when a Member of Parliament ceases to be a Ugandan citizen, a registered voter or does not possess the required academic qualifications, he/she does not wait for the five year term to elapse in order to step down. This equally applies to the President.

Mr. Mabirizi therefore faulted the learned Justices for failing to harmonise Article 83(1) (b) with 102(b) of the Constitution. He submitted that had they harmonised the said Articles, they would have found that the President elected in 2016 ceases to hold office at 75 years of age. He relied on the case of **Semwogerere v Attorney General** (supra) in support of his submissions.

Counsel for the respondent on the other hand submitted that the Constitutional Court rightly interpreted the law when it found that Article 102 (b) purely relates to the qualifications prior to nomination for election and not during the person's term in office. Counsel submitted that Article 102 (b) is clear and unambiguous and therefore the learned Justices' finding on this issue cannot not be faulted. Counsel therefore invited this Court to uphold the decision of the Constitutional Court.

Consideration of issue 6:

Article 102 provides:

> **"102. Qualification of the President**
>
> **<u>A person is not qualified for election as President</u> unless that person is-**
>
> **(a) a citizen of Uganda**
>
> **(b) not less than 35 years and not more than seventy-five years of age; and**
>
> **(c) a person qualified to be a Member of Parliament."**

83 (1) (c) reads:

> **"83. Tenure of Office of Members of Parliament**
>
> **(a)…**
>
> **(b)…if such circumstances arise that if one was not a Member of Parliament would cause that person to be disqualified for election as Member of Parliament under Article 80 of this Constitution;**
>
> **(c)…"**

The words used in Articles 83(1) (b) and 102 (b) are plain and ought to be given their natural meaning. Article 83 applies to the tenure of Members of Parliament, not the President. The requirement of age as a qualification for being elected President is at the point of election,

and not during the incumbency. The framers of the Constitution would have expressly stated so, had they intended that the President should vacate office upon attaining the age of 75.

I therefore find no merit in the submissions of the appellants on this issue.

Issue 8: What *remedies are available to the parties?*

For the reasons I have given herein, I would dismiss the appeal and the parties shall bear their costs in this Court. I would confirm the decision of the Constitutional Court.

I wish to express my gratitude to Mr. Mabirizi and Counsel for all the parties for the industry and skill they put in the preparation and presentation of this case.

Delivered at Kampala this……day of April, 2019.

……

M.S.Arach-Amoko.

JUSTICE OF THE SUPREME COURT

5

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

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

CONSTITUTIONAL APPEAL NO 02 OF 2018

BETWEEN

MALE H. MABIRIZI KIWANUKA :: APPELLANT

AND

THE ATTORNEY GENERAL ::RESPONDENT

CONSOLIDATED WITH

CONSTITUTIONAL APPEAL NO. 03 OF 2018

BETWEEN

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

AND

ATTORNEY GENERAL:: RESPONDENT

AND

CONSTITUTIONAL APPEAL NO. 04 OF 2018

BETWEEN

UGANDA LAW SOCIETY:: APPELLANT

AND

THE ATTORNEY GENERAL:: RESPONDENT

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

JUDGMENT OF MWANGUSYA, JSC

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

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

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

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

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

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

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

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

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

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

3. Whether Sections 6 and 10 of the Act extending the current life of local government councils from five to seven years is inconsistent with and/or in contravention of Articles 1,2, 8A, 176(3), 181(4) and 259(2) (a) of the Constitution.

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

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

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

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

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

(c) Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members of Parliament in the Parliamentary Chambers, arresting and allegedly detaining the said members, is inconsistent with and/or in contravention of Articles 24, 97, 208(2) and 211(3) of the Constitution.

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

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

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

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

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

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

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

iii) Whether the alleged actions of the Speaker of Parliament in permitting the ruling party members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A, 83(1)(g), 83(3) and 108A of the Constitution.

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

v) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee on 18th December, 2017 to submit to Parliament the said Committee's Report in the absence of the Leader of Opposition, Opposition Chief whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69(1), 69(2)(b), 71, 74, 75, 79, 82A and 108A of the Constitution.

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

vii) Whether the action of Parliament in:

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

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

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

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

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

10. Whether Section 5 of the Act, which re-introduces term limits and entrenches them as being subject to a referendum is inconsistent with and/or in contravention of Article 260(2)(a) of the Constitution.

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

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

13. Whether the continuance in office of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution.

14. What remedies are available to the parties?

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

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

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

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

Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

The Constitutional Court awarded professional fees of Ug. Shs. 20,000,000/= (Twenty million only) for each Petition (and not Petitioner). The Court however noted that this award did not apply to Petition No. 3 of 2018 since the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART I: GROUNDS RELATING TO MULTI-PARTY DEMOCRACY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART N: GROUNDS RELATING TO PRAYERS & PLEADINGS.

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

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

PART O: GROUNDS RELATING TO REMEDIES.

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

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

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

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

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

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

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

On these grounds, the appellant prayed for orders that:

a. The Appeal be allowed.

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

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

d. The appellant be granted general damages for inconveniences.

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

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

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

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

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

c. The appellant be granted general damages for inconveniences.

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

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

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

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

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

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

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

5. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *The learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda.*

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

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

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

1. *That the appeal be allowed*

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

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

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

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

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

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

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

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

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

Representation

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

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

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

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

Attorney General's Submission

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

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

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

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

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

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

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

Appellant's Reply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court's Determination of the Preliminary Objection

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

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

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

"A person who alleges that—

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

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect and for redress where appropriate."

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

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

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

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

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

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

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

Principles of constitutional interpretation relevant in this Appeal.

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

Interpreting the Constitution, requires Court to look at the Constitution as a whole. All the provisions of the Constitution touching on the issue have to be considered together. The Court must give effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so leads to an apparent conflict within the Constitution. Where a Constitutional provision is in conflict or

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

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

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

"We the People of Uganda:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. What remedies are available to the parties?

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

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

Issue 7: PROCEDURAL IREEGULARITIES

This issue was framed as follows:

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

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

Appellants' Submissions

MPs submissions on Issue No.7

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

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

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

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

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

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

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

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

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

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

According to counsel the learned justices of the Constitutional court misdirected themselves when they unjudiciously exercised their discretion by declining to invoke their powers under the law to summon key government officials and individuals who played a key role in the process leading to the enactment of the impugned Act to appear and testify on the same.

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

"**The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision."**

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

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

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

a) The Speaker and the Deputy speaker to testify on their lead role in the enactment of the impugned Act, the discrepancies in the certificate of

compliance, procedural irregularities, arbitrary suspension of the Honourable Members of Parliament from Parliament, the unprecedented mayhem and violence that ensued in the precincts and chambers of Parliament, etc.

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

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

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

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

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

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

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

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

That all these procedural irregularities occasioned a miscarriage of justice.

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

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

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

The Appellants also contended that the Learned Justices of the Constitutional Court erred in law and fact and injudiciously exercised their discretion in awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which is manifestly meagre considering the nature and significance of the matter.

<u>Submissions of Mabirizi</u>

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

interrupted by unnecessary lengthy adjournments. He cited the case of **M/S Mfmy Industries Ltd-Pakistan (supra)**, where it was held that **"justice delayed is justice denied. The courts must... prevent any delays which are being caused at any level by any person whosoever..."**

Mr. Mabirizi contended that failure to render judgment within 60 days from 19th April 2018 derogated the right to fair hearing, invalidating the decision. He cited **Rule 33(2) of the Court of Appeal Rules** and the **Uganda Judicial Code of Ethics, Paragraph 6.2** which provides that"…**Where a judgment is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so."**

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

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

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

On the evicting the appellant from court seats he submitted there was a derogation of his right to a fair hearing & rules of natural justice

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

He cited the case of **Peter Michel V.The Queen [2009] UKPC 41**- the Privy Council declared the proceedings and judgment a nullity due to incessant interruptions by court. It was inter alia held that the core principle, that under the adversarial system the judge remains aloof from

the fray and neutral applies no less to civil litigation than to criminal trial…He must not be sarcastic or snide…he must not make obvious to all his own profound disbelief in the defence being advanced….this conviction cannot stand.

That failure to grant him ample time to present his case was a failure of fair hearing since ample time is one of the facilities required in fair hearing, as already pointed out in the Kenyan Juma case. That despite his warning as to the speed, the Justices were sarcastic in their reply and never bothered.

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

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

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

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

Mr. Mabirizi submitted that the Justices of the Constitutional Court did not refer to appellant's pleadings, evidence, authorities & decided cases which was contrary to the rules relating to judgments.

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

noted that "**Courts should at least as a matter of courtesy acknowledge the effort of advocates who produce relevant and useful or binding decided cases...In the Court below the majority decision did not allude to any of those cases and no reasons were given why."**

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

That the constitutional court was bound to determine all matters in controversy between the parties before it. He relied on Section 33 of the Judicature Act and referred to the case of **Ebenezer & Ors V.Onuma & Anor, Nigeria Supreme Court Case No.213/88,** where ESO,JSC, he held that It is the primary obligation of every court to hear and determine issues in controversy before it, and as presented to it by litigants.

Mr. Mabirizi submitted that court was duty bound to determine issue 6(a) in relation to article 93 of the constitution which was pleaded & argued, that instead, the DCJ dealt with issue No. 6 but did not resolve issue 6(a).

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

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

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

He complained that lower court over-protected Mr. Keith Muhakanizi and made it so impossible for him to give the answers which he wanted. That the DCJ, with threats to evict him prevented Gen. Muhoozi from answering questions to point out that his affidavit was not commissioned.

That the DCJ's interference defeated his intention to strike out the affidavit hence irregular as it derogated his right to cross-examine which is part of the right to fair hearing.

That this court in **Mbabazi V. Museveni & 2 Ors, PEP No.1/16,** prohibited affidavits of third parties but insisted that an affidavit must be by a person who perceived the actions.

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

Mr. Mabirizi contended that there is no reason why Patrick Ochailap who Mr. Keith Muhakanizi says is the one who processed the certificates of Financial implications or the commander who commanded the UPDF military operation at parliament did not make their respective affidavits.

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

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

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

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

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

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

The Attorney General's submissions

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

The Attorney General cited the case of **Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo& 4 Others Vs. The Attorney General & 4 Others**, while considering the power (discretion) of the

Constitutional Court to grant leave to allow cross examination of deponents of affidavits under Rule 12 of the Constitutional Court (Petitions and Reference) Rules SI No. 91/2005 at pages 18 – 19 of the decision, the Supreme Court made reference to **Mbogo& Others Vs. Shah [1968] E.A.**

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

The Attorney General submitted that the Hon. Justices of the Constitutional Court duly heard and determined the Consolidated Petition according all parties an equal chance to present their respective cases and the record of proceedings demonstrates that the 2ndAppellants – and all the parties in the Consolidated Petitions - fully participated in the proceedings and had ample time to present their case.

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

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

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

ii. Where the Judge takes into account matters which he ought not to consider; or fails to take into account matters which he ought to consider;
iii. Where the exercise of his discretion is plainly wrong - see: **The Abidin Daver [1984] All ER 470**.

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

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

Accordingly, that the standard established by the Constitution for the Constitutional Court to hear and determine Constitutional Petitions is "**as soon as possible".** The Attorney General submitted that he five (5) Petitions were lodged respectively in December, 2017 and January 2018.The 1st Appellant specifically lodged his petition in December 2017.On 9th April 2018 several petitions were called for hearing in Mbale and thereafter consolidated for purposes of being heard together with others due to the similarity of the issues raised by the different petitioners in the lower court. The timetable adopted by the Court was implemented.

The Attorney General submitted that the record of proceedings demonstrates that the Constitutional Court considered and determined the Five (5) Consolidated Petitions with due diligence and expedience in

the circumstances considering the multiple claims and multiple litigants and Counsel participating in the Court proceedings.

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

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

The Attorney General prayed that the Honorable Court finds that the 1st Appellant was courteously treated like other litigants and that the record of appeal clearly demonstrates that the 1st Appellant enjoyed and was accorded every opportunity to present his case.

On the excessive interruption, the Attorney General submitted that Court was seeking clarification on the proper construction of the contents of documents and enquiring into the legality of the passage of the Constitutional Amendment Bill, No. 1/2018 as part of its duty under Article 137(1) of the Constitution.

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

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

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

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

On the determination all matters in controversy between the parties as required by Section 33 of the Judicature Act, Cap. 13. The Attorney General submitted that the Hon. Justices of the Constitutional Court duly determined and resolved all the issues in controversy as presented in the pleadings, framed in the issues and submitted by the respective litigants.

He cited the case of **Supreme Court Civil Appeal No. 1/2012: British American Tobacco (U) Ltd Vs. Shadrach Mwijikubi & 4 Others** it was held that

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

The Attorney General contended that the Hon. Justices of the Constitutional Court duly considered the matters and issues complained of by the 1st Appellant and the complaints of the 1st Appellant are in respect of style and not substance.

On the proposing answers to witnesses, The Attorney General submitted that the Court has discretion to regulate cross examination and guide litigants to cross examine witnesses on pertinent matter related to the litigation and surrounding circumstances.

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

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

that regard would therefore be moot. That the verbatim record of Parliamentary proceedings produced in the Hansard is already on Court record together with the Certificate of Compliance. The designated custodian of the records of Parliament is the Clerk to Parliament who fulfilled her duty by making the Hansard and Certificate of Compliance available to Court and the Litigants in the consolidated Petition who had the opportunity to cross examine her at length.

The Attorney General further submitted that neither the 1st Appellant, nor the 2nd Appellant, sought to examine the Rt. Hon. Deputy Speaker of Parliament, the Hon. Minister of Justice and Constitutional Affairs, the Chairperson and Deputy Chairperson of the Parliamentary Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi. Their submissions on the same was an afterthought and prayed that the Honorable Court finds the Appeal entirely without merit.

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

The Attorney General submitted that the Appellants participated at each and every stage of the proceedings in the Constitutional Court and duly were accorded a fair hearing in accordance with the **Article 28 of the Constitution.** The Respondent further contended that the procedures adopted by the Constitutional Court were entirely within their discretion and did not in any way prejudice the Appellant or occasion derogation of such right. In conclusion, he submitted that the Appellants had not proved any of their respective Grounds of the Appeal, prayed that the Consolidated Appeals are dismissed with costs.

Court's Determination of Issue No. 7

Failure to summon the Speaker.

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

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

"The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the

evidence of the witness is likely to assist the Court to arrive at a just decision."

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

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

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

Cross Examination after submissions

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

Interjections

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

Submissions of Authorities

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

Delay of the trial and delivery of the judgement.

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

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

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

"… **the position is this, Mr. Mabirizi is a Petitioner and he has every right to be heard like other Petitioners, the other Petitioners chose**

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

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

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

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

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

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

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

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

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

IssueNo.1.

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

Appellants' Submissions (MPS)

Counsel submitted that the basic structure doctrine attempts to identify the philosophy upon which a constitution is based as opposed to a textual exegesis of the same. He submitted that the doctrine has been instrumental in shaping the constitutional jurisprudence of different countries across the world since the case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC** where it was held as follows; **"According to the doctrine, the amendment power of Parliament is not unlimited; rather it does not include the power to abrogate or change the identity of the constitution or its basic features."** The

case was followed in **Minerva Mills v. Union of India, AIR 1980 SC 1789,** where court unanimously held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a constitution.

Counsel cited cases in other jurisdiction where the doctrine was followed like in Taiwan, where the Council of Grand Justices of Taiwan announced interpretation No. 499 and stated that**; "Although the amendment of the Constitution has equal status with the Constitutional provisions, any amendment that alters the existing constitution concerning governing norms and order, and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the constitution itself. As a result such amendment shall be deemed improper."**

In Bangladesh the Supreme Court in the case of **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, held: - **"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament... Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".**

In South Africa, the South African Constitutional Court in the case of **Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)** while discussing the applicability of the basic structure doctrine noted as follows:- **"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament**

followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case; could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."

In Kenya, the court of Appeal in the case of **Njoya vs Attorney General and Others (2004) AHRLR 157** held that:- **"Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alteration of the Constitution does not involve the substitution thereof a new one or the destruction of the identity or the existence of the Constitution attained."(Sic)**

In applying this doctrine to the instant petition, counsel strongly submitted that the learned justices of the Constitutional Court misconstrued the application of the basic structure doctrine in their finding that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure doctrine and as such S. 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. He faults the learned Justices in according the basic structure doctrine a narrow and restrictive application when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of parliament and not to the age limit. To this submission, he relied on the case of ***Kesavananda (supra)*** where court held that;

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

Counsel for appellant further associated himself with the finding of **Kakuru JCC** that the question of whether or not the doctrine of basic structure applies, depends on the constitutional history and the Constitutional structure of each country. Every Constitution is a product of historical events that brought about its existence. He relied on the **dissent judgment of Kasule, JA in Saleh Kamba & others Vs.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Attorney General's Submissions.

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

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

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

1. **Supremacy of the Constitution;**
2. **Republican and Democratic form of Government;**
3. **Secular character of the Constitution;**

4. Separation of Powers between the Executive;

5. Federal character of the Constitution;

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

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

According to the Attorney General, the Safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament, and a referendum, in fulfillment of the provisions of Articles 260 and 261 of the Constitution.

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

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

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

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

Therefore, it was within the powers of Parliament to enact sections 3 and 7 of the Constitutional Amendment Act 1/2018 into law and this did not in any way contravene the basic structure of the Constitution and neither was it inconsistent with or in contravention of the constitution

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

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

"...Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the Constitution, I am unable to fault it for the process it took to effect these amendments"

Justice Remmy Kasule noted on Page 77 paragraph 2051- page 78 paragraph 2070, Volume 4 of the Record of Appeal that;

"...The framers of the 1995 Constitution that is the Constituent Assembly, in their wisdom saw it fit to have the age limits of one who is to stand for election as President of Uganda, under the category of the qualifications of the President. They provided for

these qualifications under Article 102 of the Constitution. They did not put this Article 102 amongst those Articles that have to be amended after first getting the approval of Ugandans through a referendum."

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

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

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

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

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

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

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

Court's Determination of Issue No. 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Freedom from slavery or servitude;

(c) The right to fair hearing;

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

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

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

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

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

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

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

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

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE No. 2

This issue was framed as follows:

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

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

The appellants submitted that the procedure and manner of passing the entire Constitution (Amendment) Act No. 1 of 2018 was flawed and/or tainted with illegalities, procedural impropriety in violation of Articles 28, 42, 44, 79, 91, 92 and 259 of the Constitution and the Rules of Procedure Parliament. Parliament is enjoined under Article 94 of the Constitution to make rules to regulate its own procedure, including the procedure of its committees, subject to the provisions of the Constitution. That Parliament was obliged to follow the provisions of the Constitution and its own Rules of procedure. In support of this argument, they relied on the case of **Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14** which was cited with approval in the case of **Law Society of Kenya vs Attorney General & Anor [2016] eKLR** where court held that:

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

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

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

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

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

The Attorney General's Submissions in Reply

The Attorney General submitted that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda (and the Rules of Procedure of Parliament).

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

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

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

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

(3) A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may— (a) grant an order of redress; or (b) refer the matter to the High Court to investigate and determine the appropriate redress.

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

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

(7) Upon a petition being made or a question being referred under this article, the Court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it." (Underling for emphasis)

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

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

Submission by MPs

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

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

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

Counsel further submitted that there was a charge on the consolidated fund by paying each Member of Parliament UGX 29 million as facilitation to carry out consultations with the public regarding the Bill. Counsel invited this Court to make a finding that this exgratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

3rd Appellant's submissions

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

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

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

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

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

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

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

Rules of the House the Speaker ought to have made a ruling striking those amendments out and informing the House that the hands of Parliament were tied by the Constitution and they could not proceed with debate in respect of the motions introduced by Hon. Tusiime. Instead, the Speaker allowed the matter to proceed to debate and at the end she put the question and members voted on a motion which created a charge on the Consolidated Fund.

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

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

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

Counsel also faulted the Constitutional Court for not addressing its mind to the provisions of the Constitution and the Public Finance Management Act and thereby came to the wrong conclusion.

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

The Certificate of Financial Implications in respect of the Bill states that the planned expenditure will be accommodated within the medium term expenditure framework for Ministries Departments and agencies concerned. In so stating the Minister appears to concede that the Bill will have some sort of expenditure. The Minister then states there are no additional financial obligations beyond what is provided in the medium term. Expenditure framework "medium term" is defined in the Act as a period of three to five years.

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

On the other hand, the Consolidated Fund is provided for in **Article 153** of the **Constitution** and **Section 2** of the **Interpretation Act**.

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

In respect to the 29 million facilitation, counsel argued that **Article 156** of the **Constitution** requires Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill **"which shall be introduced into Parliament to provide for issue from the Consolidated Fund of the sums necessary to meet that expenditure ...."**

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

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

To hold otherwise would mean that expenditure on Magyezi bill was provided for in the 2016/17 Budget since it was introduced in September 2017.It would mean that at the time preparing budget estimates in 2016 Parliament was aware of this bill and made provision for it. That does

seem logical. The logical conclusion is that the Ministry of Finance provided the money. If it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act. The burden to do so lay with the Respondent but it failed to do so.

Mr. Mabirizi's Submissions

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

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

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

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

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

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

Attorney General's submissions

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

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

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

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

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

The Attorney General submitted that the evidence on record showed that on 27th September 2017, the Hon. Raphael Magyezi, a Member of Parliament representing Igara County West constituency, tabled in Parliament a motion for leave to introduce a private Members' Bill titled The Constitution (Amendment) (No. 2) Bill of 2017.

The Attorney General further submitted that his evidence showed that on 3rd October 2017, the Hon. Raphael Magyezi moved the House so that the bill could be read for the first time and the same was seconded and laid on the table of Parliament, accompanied by a Certificate of Financial Implications as required under the section 76 of the Public Finance Management Act, 2015 and the Rules of Procedure of Parliament.

The Attorney General was emphatic that that Parliament only proceeded with the bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that this position was confirmed by the Constitutional Court. The Attorney General referred this Court to the Judgment of Kasule, JCC and quoted the learned Justices holding thus:

"This Court accepts this Certificate of Financial Implications as being valid in law as a correct certification by Government,

through the Ministry of Finance, that the proposed amendments in the original Bill satisfied the provision of Article 93 of the Constitution, the Public Finance Management Act and the appropriate Rules of Parliament."

The Attorney General further referred to the same Judgment of Kasule, JCC were his lordship observed as follows:

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

He also referred us to the Judgment of Cheborion, JCC where his lordship held thus:

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

Lastly, the Attorney General referred this Court to the Judgment of Kakuru, where his Lordship held as follows:

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

The Attorney General also pointed out that a similar position was reached by Musoke, JCC in her judgment.

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

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

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination the Clerk to Parliament ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that said facilitation to Members of Parliament did not make the enactment of the impugned Act inconsistent with Article 93 of the Constitution. In support of his contention, he referred this Court to the Judgments of Kasule, Cheborion, JCC, Kakuru, JCC and Musoke, JCC.

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

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

Determination of the Court.

Article 93 of the 1995 constitution provide as follows:-

> **93. Restriction on financial matters.**
>
> **Parliament shall not, unless the bill or the motion is introduced on behalf of the Government—**

(a) proceed upon a bill, including an amendment bill, that makes provision for any of the following—

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

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

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

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

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

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

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

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

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

The Article forbids private members from introducing or proceeding with Bills that make a charge on consolidated fund. The language is in mandatory terms.

I therefore find that the process of debating and passing Constitutional (Amendment) Bill 2017 with its amendment that infringed on Article 93 of the Constitution was null and void and vitiated the entire enactment of the Constitutional (Amendment) Act 2018.

On the issue of 29 million.

The Parliamentary Commission spent moneys which were already appropriated. I would leave this matter for the Auditor General to establish whether or not there was misappropriation of the funds much as its source was the consolidated fund.

2. **<u>Consultation/Participation</u>**

Submissions by MPs

On the issue of Consultation/Public Participation, counsel submitted that the learned majority Justices of the Constitutional Court erred in

law and fact when they held that there was proper consultation of the people of Uganda on the impugned Constitution (Amendment) Bill, 2017. He submitted that the requisite consultation and public participation of the people, which is mandatory, was not conducted. He argued that public participation is one of the elements of the basic structures of our Constitution and therefore this being a matter which touched the foundation of the Constitution specifically Articles 1, 2 and 8A, public participation was paramount.

In support of his submissions above, counsel cited the persuasive Kenyan cases of:

i)**Law Society of Kenya Vs. Attorney General, Constitutional Petition No. 3 of 2016** where the Court noted that:

"...public participation in governance is an internationally recognized concept. This concept is reflected in the international human rights instruments. The Universal declaration of Human rights of 1948 proclaims in Article 21 that everyone has a right to take part in the government of his country, directly or through freely chosen representatives..."

The Kenyan Constitutional Court further pronounced that;-

*"...**To paraphrase Gakuru case (Supra), public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates. It behoves Parliament in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough to simply "tweet" messages as it were and leave it to those who care to scavange for***

it. Parliament ought to do whatever is reasonable to ensure that as many Kenyans are aware of the intention to pass legislation. It is the duty of Parliament in such circumstances to exhort the people to participate in the process of enactment of legislation by making use of as many for a as possible such as churches, mosques, public "barazas", national and vernacular radio broadcasting stations and other avenues where the public are known to converge and disseminate information with respect to the intended action..."

ii)**Robert N. Gakuru& Others –Vs- The Governor Kiambu County & Others** where the Court noted that:

*"...**the obligation to facilitate public involvement is a material part of the law making process. It is a requirement of manner and form. Failure to comply with this obligation renders the resulting legislation invalid. In my Judgment, this Court not only has a right but also has a duty to ensure that the law making process prescribed by the Constitution is observed. And if the conditions for law making process have not been complied with, it has the duty to say so and declare the resulting statute invalid..."***

Counsel stated that the significance of consultations is a fundamental value of our Constitution which was not appreciated by the majority Justices of the Constitutional Court. That the learned Justices of the Constitutional Court failed in their duty of evaluating the evidence on record and arrived at a wrong decision that the people were consulted on the impugned Constitution (Amendment) Bill, 2017 whereas not.

Counsel expounded that there was overwhelming and cogent evidence on record indicating that;-

a. The process leading to the enactment of the impugned Constitution (Amendment) Act was not preceded by a Consultative Constitutional review exercise as was the case with the promulgation of the 1995 Constitution and the 2005 amendments.

b. The Constitution (Amendment) Bill was presented in Parliament by a private member, Hon. Raphael Magyezi and there is no evidence on record to the effect that he consulted the people of Uganda later on his constituents in Igara West Constituency before tabling the same before Parliament.

c. Much as the Speaker directed that consultations should be conducted, Parliament as an institution never designed a structured frame work or process for public participation or consultation which may have included Parliamentary barazas, public rallies, radio and Television broad castings among others.

d. The Committee on Legal and Parliamentary affairs which was assigned the duty of processing the Bill did a shoddy job.

e. The opposition members of Parliament were denied the opportunity and right to engage the people over the aforesaid bill. The public gatherings for opposition members of Parliament which had been organized countrywide were blocked, ruthlessly and violently dispersed by the police and other security agencies and many Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment

In breaking up the opposition MPs' rallies, Police relied on the directive issued by Asuman Mugyenyi, the Director of operations which directive was unanimously declared unlawful, arbitrary, obnoxious, unfortunate

and unconstitutional by the Constitutional Court. Ironically, the Constitutional Court held that there was no evidence to demonstrate that the aforesaid illegal directive was ever implemented and that it had adversely affected the entire consultation process. Counsel submitted that the finding was untenable, both in law and fact as there was overwhelming evidence on record to the effect that the said directive was enforced as illustrated hereinabove. Indeed, Asuman Mugyenyi himself admitted during cross examination that his directive was enforced by all the police officers countrywide.

Despite the fact that Members of Parliament were given exgratia facilitation of UgX29m the purported consultation as argued by the Attorney General was illusory and ineffectual. He invited Court to adopt the finding of Justice Kakuru where he held that, "…**the process of public participation in my humble view is required to pass the SMART test; that is, it has to be Specific, Measurable, Attainable, Relevant and Time bound…"**

He further contended that Justice Kakuru, while applying the qualitative test, found that only 7 out of 455 members of Parliament who were on the Roll call, when the bill was passed were proved to have consulted the people in some way and that "…**The number of constituencies in which consultations were made appear to have been only 7 out of 290 constituencies representing 2.41% of the total…"**

In conclusion on this issue, Justice Kakuru observed that; "…**I find that Parliament failed to encourage, empower and facilitate active public participation of all citizens in the process of enacting the impugned Act in contravention of Articles 1, 2 and 8A of the constitution and this omission vitiated the whole impugned Act."**

Counsel therefore invited this Court to uphold the finding of Justice Kakuru that the Committee could not sufficiently consult the people of Uganda in a span of only 60 days given the fact that they needed to gather views from 15,277,198 registered voters, 290 Parliamentary /constituencies, 112 Districts, 1,403 Sub-Counties, 7,431 Parishes and 57,842 villages. The committee in its report, indicated that it managed to interact with only 53 groups and individuals, nearly almost of whom are Kampala based.

3rd Appellant's (ULS) submissions

Counsel submitted that the actions of the police during consultations deprived citizens of the freedom to assemble and associate There was evidence as found by the Constitutional Court of violent dispersing of rallies and stopping citizens from interacting with their members of parliament by the Police. Unfortunately, the Court did not pronounce itself on the infringed rights of citizens

Furthermore, counsel submitted that rights are vested in every individual. Even if only one Ugandan is deprived of a right it remains a contravention of the Constitution. Once proved as the judges clearly found, the burden shifted to the Respondent to show that the actions of violently dispersing rallies and intimidating the population is demonstrably justifiable in a free and democratic society.

Counsel argued that the Attorney General failed to discharge his burden and consequently this proved that the actions of the police contravened Articles 1, 8A, 29 and 38 of the Constitution. Counsel contended that the court erred when it failed to make declarations to that effect.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that there was no way the majority justices could find that public participation was sufficient in the face of violence during the process & restrictions to fundamental rights & freedoms. That participation of the people in legislation processes has historical roots & is a universally acceptable principle as elaborated by in the case of **Doctors for Life International v. The Speaker of the National Assembly & ORS South Africa Constitutional Court Case No. CCT 12/05.** It is an integral part of the law making process that the test for determining whether the legislature took all reasonable steps to ensure participation of the people in legislation as stated was not passed by the respondent because parliament was not reasonable in closing out people's participation and in rushing a constitutional amendment which sought to amend Articles that rotate around the sovereignty of the people. In all fairness, parliament was obliged to consult the people in the amendments and the failure indeed vitiated the entire process. There is a strong rationale for public participation in the legislation process as pointed out **in Doctors for Life (supra) by Ngobo, J & SACHS J,** The rationale is to ensure that people, who are sovereign retain that sovereignty, in presence of Parliament. Mr. Mabirizi submitted that the effect of failure of public participation renders the resultant law null & void.

Attorney General's submissions

On public consultation, the Attorney General submitted that the majority Learned Justices of the Constitutional Court made a proper finding that there was public participation and consultation in the process of conceptualization and enactment of the impugned Act.

The Attorney General also argued that unlike the Constitutions of South Africa and Kenya and the County Governments Act, 2012 of Kenya, the 1995 Constitution of the Republic of Uganda did not provide a standard measure or parameters for consultative constitutional review. Rather that it recognizes various roles of people and bodies in the constitutional amendment process and in so doing, permits amendment of the Constitution in various ways as provided in Articles 259, 260, 261 and 262.

The Attorney General further submitted that other than what is contained in the 1995 Constitution and as rightly observed by the Constitutional Court, Parliament has never enacted a law to guide consultation or set parameters or standard measure against which effectiveness of consultation or public participation can be measured, be it at pre-legislative stage, legislative stage, and post legislative stage. The Attorney General observed that the only exception was in Article 90(3)(a) which gives the committees of Parliament the power to call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence.

In light of this, the Attorney General submitted that there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the Constitution. He argued further that it was dependent on Parliament to determine how best to achieve the participation objective.

The Attorney General also distinguished two cases on public consultation relied upon by the appellants. He argued that the **Doctors For Life** Case which provided for what to look at while gauging whether a Parliament has met the consultation or public participation requirement, was decided basing on the South Africa Constitution which had mandatory provisions under section 72 that required public participation in the law making process which is not the case in Uganda.

In relation to the case of **Robert Gakuru and others v. Governor Kiambu County, Petition No. 532 of 2013**, the Attorney General submitted that while it was elaborate on public participation and consultation it is limited in its application to the Ugandan setting because unlike the provisions in the Constitution of Uganda, public participation is elaborately and illustratively provided for in the Constitution of Kenya and in the County Governments Act, 2012 of Kenya. Further that these requirements were clearly stipulated in a mandatory manner in Articles 10, 94, 118, 174, 196 and 201 of the Constitution of Kenya. Furthermore that the yardsticks to be used to measure compliance with the public participation and consultation requirements were also provided in section 87 of the County Governments Act, 2012 which is not the case for Uganda.

In the Attorney General's view, because of the different legal regime in these countries, it would be erroneous for the cited cases and standards set therein to be deemed 100% applicable to Uganda in the absence of a clear legal regime on public participation.

The above notwithstanding, the Attorney General submitted that at pages 620 – 640 Vol. 3 of the record, he detailed what the Parliamentary Committee on Legal and Parliamentary Affairs did to comply with the requirement for public participation. He adopted the same views. The Attorney General further submitted that the law making process it is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, he argued, the law does not require that the proposed legislation must be brought to each and every person wherever the person might be. In his view, he argues that what was required was that reasonable steps had been taken to facilitate the said participation. In other words, that what was required was that a reasonable opportunity had been afforded to the public to meaningfully participate in the legislative process.

The Attorney General also argued that the appellants' attack on the nature of consultations in terms of quality and quantity was not factual. He argued that notices of invitation were published in the print media inviting all persons who wished to be part of the process. He argued further that fifty four groups of persons, legal and natural, heeded the invitation, including the President of Uganda and registered political parties. The Attorney General also argued that Parliament could not deny them audience. He however argued that Parliament could not force unwilling participants to come to the committee.

It was also the Attorney General's contention that the committee operated within its powers and conducted open hearings as a means of accomplishing its mandate in relation to legislation.

The Attorney General further argued there was no merit in the appellants' contention that because only seven out of 455 members adduced evidence of consultation the Act should be nullified for lack of public participation. The Attorney General submitted that an examination of the relevant Hansard clearly showed that the reports of Members of Parliament through their debating and voting was representative of the consultations carried out.

The Attorney General invited this Court to uphold the majority Judgment of the Constitutional Court that in the circumstances proper consultation was carried out.

Determination of the Court.

As a brief Background I wish to quote paragraph O.22 of the Odoki report where the Constitutional Commission made the following remarks;

"The government also faced its challenge successfully. It created and maintained the atmosphere of peace, security and freedom of expression so necessary for the success of the exercise. It left in full freedom in the organization and direction of our work. At no time

did it in anyway interfere with what we were doing. The people everywhere manifested signs of tremendous growth in political maturity. They discussed issues without quarreling or fighting. We observed no hostile tensions in any of the seminars or meetings we conducted as a part of the exercise. Ugandans seems to have agreed that the constitutional making process was the critical exercise for the future peace and stability of Uganda."

The process of consultation and passing of the impugned Act was the exact opposite of the above observation.

The Magyezi bill was from the outset very controversial if what happened in parliament on 26th and 27th September, 2017 is anything to go by. Parliament was polarized. The Hon. Speaker recognized the importance of the bill and adjourned the House to allow consideration by the Parliamentary committee and consultation by members of parliament. Unfortunately the consultation by members of parliament was interfered with and interupted by directive by the Inspector General of Police issued by Assistant IGP Asuman Mugenyi which all the Justices of Constitutional court condemned.

I quote a passage in the judgement of **Cherborion Barishaki JCC** to illustrate the condemnation in very strong words;-

"I must state here that I find the obnoxious directive issued by AIGP Asumani Mugenyi appalling. It does not make any legal or logical sense. <u>The directive restricted freedom of association and movement of Members of Parliament without any justification whatsoever.</u>

<u>The directive was intended to prohibit Members of Parliament from holding joint rallies or canvassing support for certain positions outside their constituencies. This is unlawful. Firstly, in the current multiparty dispensation, most Members of Parliament belong to one party or another. They should therefore be expected to offer support for similar minded colleagues in their constituencies.</u> Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for

support for their views and positions or carry out consultations not only from their constituencies but throughout the country.

Secondly, there is absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies.

Thirdly, the directive was clearly ignorant of the fact that some Members of Parliament, such as the National Female Youth Representative, literally represent an electorate spread out all over the country. Other Members of Parliament such as representative for special interest groups also cover wide territories and regions with the possibility that they would hold joint consultative meetings with other Members of Parliament. This should have been foreseen and the directive adjusted accordingly. In my view, the directive was recklessly and wantonly issued without any regard for the law more specifically Article 29(2) which guarantees the freedom of every Ugandan to move freely in Uganda. Yet, it was issued, ironically, by a custodian of law enforcement.

During cross examination, AIP Asuman Mugenyi explained that their reason for the restriction was based on security intelligence that some MPs were planning to move people from their areas and cause chaos. He testified thus;

"My Lords, we had a reason and this was based on intelligence information pertaining at that time. If I am allowed to explain the genesis of the circular, my lords, we got intelligence information that some members of Parliament were planning to move people outside their constituencies to cause chaos and violence in other constituencies while consulting and as police we are mandated by the Constitution to detect and prevent crimes." There was no evidence adduced to prove that Members of Parliament were planning to cause chaos in the Country.

The directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi. However, the

evidence presented by the Petitioners fell woefully short of demonstrating that this directive had that chilling effect in actual fact.

In some cases the directive was rightly and roundly ignored while in other isolated cases such as parts of Lango and central region, at least based on the evidence on record, meetings and rallies were dispersed. Hon. Odur averred that on 24th October,2017, he with five other MPs were violently and unlawfully stopped from consulting their people and that police dispersed people who had gathered at Adyel Division in Lira District for consultation by firing live bullets and teargas inflicting severe fear in him (para 15(s) of his affidavit in support of the petition). Hon. Joy Atim Ongom who was part of the MPs mentioned in Hon. Odur's affidavit report that her consultation in Lira Municipality were interrupted by police with tear gas. She added that Cecilia Ogwal was beaten (see Hansard page at 5203). Though isolated, this was most unfortunate. I find that my position would have been different if there was sufficient evidence to prove that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory. I would not have hesitated to hold that there was no public consultation and participation thereby rendering the entire Bill a nullity. I do not have such evidence before me."(Underling for emphasis)

There is no doubt that this act was unconstitutional and the Attorney General conceded so. In terms of **Article 137 (3) (b)** already cited in this judgement, what the Constitutional court was required to do was to make a Declaration to that effect and give redress where appropriate. I do make the declaration the consequences of which are that the process in parliament following infringement of fundamental rights of not only the members of Parliament but also members of the public who might have been interested in participating in consultations vitiates the process.

3. 'Smuggling' of the motion to introduce the impugned Bill onto the order paper

Submissions by MPs

Regarding the issue of Smuggling of the motion to introduce the impugned Bill onto the order paper, counsel submitted that the Bill leading to the enactment of the impugned Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure by virtue of the fact that the same was smuggled onto the order paper.

He faulted Owiny Dollo, DCJ for holding that the Speaker enjoyed wide, and almost unfettered, discretionary powers to determine the Order of Business in the House and as such no wrong was committed by the Speaker in amending the order paper to include the motion seeking leave to introduce a private member's Bill.

He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. In the proviso to the said rule the Speaker is only given a prerogative to determine the order of business in Parliament. He contended that the evidence on record specifically under paragraphs 12, 13, 14, 15 and 16 of Hon. Semujju Nganda's affidavit in support of the petition demonstrates that on 19th September 2017 the Rt. Hon. Deputy Speaker assured the house that there was not going to be any ambush to MPs as far as handling the impugned Amendment Bill was concerned because there was a lot of anxiety and that the order paper will reflect the day's business. On 20th September 2017 the Rt. Hon. Deputy Speaker reassured Members that nothing would be done in secrecy since all business has to go through the Business Committee under Rule 174. However, the bill was never presented in the Business Committee for appropriate action and consideration.

He therefore argued that the Members of Parliament were taken by surprise on the 26th day of September 2017 when Rt. Hon. Speaker amended the order paper on the floor of the house to include a motion by Hon. Magyezi that sought leave to introduce a private member's Bill to amend the constitution. Efforts made by the shadow Minister of Justice and Constitutional Affairs, Hon. Medard Sseggona MP Busiro East and other MPs to raise procedural matters specifically the fact that there were other motions which had preceded this one were futile.

Counsel contended that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. In Rule 29 that there must be a weekly order paper including relevant documents that shall be distributed to every Member through his/her pigeon hole and where possible, electronically. All these Rules were flagrantly violated.

Attorney General's Submissions

The Attorney General refuted the appellants' contention that the Bill from which the impugned Act emerged was smuggled into the House. He submitted that in the exercise of its legislative powers set out in Article. 91, Parliament has power to make law. Further that under Article 94(1), it had powers to make rules to regulate its own procedure, including the procedure of its committees.

The Attorney General further pointed out that under Article 94(4) the Speaker had powers to determine the order of business in parliament; and that a Member of Parliament had a right to move a private members Bill.

The Attorney General contended further that on 27th September 2017, in exercising his powers under Article 94(4), the Hon. Raphael Magyezi tabled in Parliament a motion for leave to introduce a private Members' Bill entitled, The Constitution (Amendment)(No. 2) Bill, 2017. The Attorney General submitted that the inception, notice of motion and tabling of the motion was undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill as alleged by the appellant.

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25) wherein she had power to set the order of business and that under Rule 7 she presides at any sitting of the house and decides on questions of order and practice. In the Attorney General's view, the Speaker was aware of Rule 25(s) old and 24(q) new that provides for an Order of precedence and therein the Private Members Bills come before all others.

The Attorney General also asserted that the Magyezi Bill met requirement set by Rules 120 and 121 (1) which allow every Member to move a Private Members Bill. He pointed out that the bill was introduced by way of a Motion to which was attached the Proposed Bill noting that the other two Bills, that is the Nsamba and Lyomoki Bills had no attachments and one was a mere Resolution.

The Attorney General further contended that the Speaker had [under Rule (47 old) 55 new] been given written Notice of this Motion three days prior. In his view, the Speaker as the Custodian of what gets onto the Order Paper under Rule 24(Old) Rules gave a go ahead to the Magyezi Bill.

In conclusion, the Attorney General submitted that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the

Constitutional Court finding that the Bill required procedure, up to its enactment.

Determination by Court

The allegation of 'smuggling' of the Magyezi bill onto the Order Paper emanate from session of the 7th sitting –first meeting of parliament held on 26th September 2017.The speaker of Parliament Ms. Rebecca Kadaga during communication from the chair, she told the members of Parliament that she was amending the order paper so as to permit those members of eligible motions to amend the communication to present them. She went further and stated that they had been demanding government to present constitutional amendment to parliament but it had failed. That she had been constrained and she could no longer hold on the members who wanted to bring their motions foe constitution amendment.

The speaker went ahead outlined motions which were eligible and had passed the test under Rule 47 and these include;

1. A motion for leave of parliament to introduce a constitutional amendment by Hon. Raphael Magyezi amend the constitution to provide for time within which to hold presidential, parliamentary and local government election and amend articles 102 (b) and 183 (2) b to remove the age limit.
2. A motion for leave of parliament to introduce a constitutional amendment by Hon. Dr.Sam Lyomoki to amend the constitution under Article 98 to provide for a transitional term and arrangements for peaceful, smooth and democratic transition for first president under the 1995 constitution while providing immunities, exemption and privileges to same individual when they cease to be president.
3. A Notice of motion by Hon.Patrick Nsamba for a resolution of parliament urging Government to constitute a constitutional review commission to comprehensively review the constitution.

The speaker went ahead and outlined motions which were not competent and she excluded them from the order paper because they were not copied to the Clerk to Parliament or did not have a draft motion and draft bill and this include;

1. A motion for leave of Parliament to introduce a constitutional amendment by Hon. Mbwatekamwa to amend the constitution to remove all academic restrictions imposed in the constitution.
2. A motion for leave of Parliament to introduce a constitutional amendment by Hon.John Nambeshe to amend the constitution to require members of parliament to relinquish their parliamentary seats once appointed ministers.
3. A motion for leave of Parliament to introduce a constitutional amendment by Hon.Mbabaali Muyanja to amend the constitution to create a second chamber so that parliament constitutes two houses lower and upper chamber.
4. A motion for leave of Parliament to introduce a constitutional amendment by Hon.Muyanja Ssenyonga to amend the constitution to make provision for the issue of federal.
5. A motion for leave of Parliament to introduce a private members bill by Hon.Dr Sam Lyomoki entitles the Museveni succession transition and immunities bill 2017.

The above amendment of the order paper by the speaker was challenged by the leader of opposition (Ms. Winfred Kiiza) because the Deputy speaker who presided over the 19th and 20th sitting of a parliament had promised members of parliament that they would not be surprised and ambushed. The Leader of opposition was questioned by the speaker, if she was questioning the powers of the speaker.

From above it can be seen that each of the Members of Parliament was seeking leave by way of motion to amend the constitution. Three motions were ready and 5 motion were not.

The speaker of parliament is mandated under **25(1) and (2) of the Rules of Procedure of Parliament 2017** to determine Order of business in Parliament. It provides that:-

25. **Order of business**

(1) The speaker shall determine the order of business of the House and shall give priority to Government business.

(2) Subject to sub rule (1) the business for each sitting as arranged by the business committee in consultation with the speaker shall be set out in order paper for each sitting

It is clear from above that order paper which contains business for each sitting is prepared by Business committee with consultation of the speaker.

I find that the speaker has powers to determine the order of business and even amend the same. As to whether or not the speaker did so with consultation of the business committee of Parliament is an internal matter of the workings of parliament in which court is not going to interfere .

Denying MPs adequate time to debate and consider the impugned Bill.

Submissions by the MPs

In regard to denying MPs adequate time to debate and consider the impugned Bill, counsel submitted that there was overwhelming evidence on record to show that Members of Parliament were not accorded sufficient time to debate on the report of the Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great national importance.

He contended that immediately after the report was "tabled", a resolution was hastily passed suspending rule 201 (2) of the Rules of parliament which required a minimum of three sittings. Each Member was given only 3 minutes within which to make their submissions on the report and hard copies of the said Report were not duly tabled before the House as provided under Rule 201(1) of the Rules of Procedure.

Counsel for the Appellants further contended that the actions of the speaker of Parliament to close the debate on the impugned bill before

each and every MP could debate and present their views on the bill was in violation of Rule 133 (3) of the Rules of Procedure of Parliament.

Attorneys General's submissions

The Attorney General submitted that Rule 80 (2) of the Rules of Procedure of Parliament provides that if the question of closure is agreed to by a majority, the motion which was being discussed when the closure motion was moved shall be put forthwith without further discussion. He argued that the requirement is that the majority have to agree to the closure and that this was done in. the Attorney General further argued that there was no requirement that each and every Member of Parliament must debate before closure.

He called on this Court to find that the Constitutional Court rightly arrived at the decision they made and prayed that this Court upholds the same.

Determination by Court

The time given to each Member of Parliament to speak is determined by the speaker. **Rule 69 (11) of Rules of Procedure of the Parliament 2017**, provide "**The speaker may, on the commencement of the proceedings of the day or on any motion, announce the time limit he or she is allow each member contributing to debate and may direct a member to his seat or her seat who has spoken for period given"**

Under Rule 70 Close of debate provides that "**No member may speak on any question after it has been put by the speaker, that is after the voices of both Ayes and Noes have been given on it**"

It can be seen from the Hansard that the majority of the members who had an opportunity to address the House were timed out. Out of 452 Member of Parliament only 124 members of parliament contributed or debated on the constitution (Amendment) Bill No.2 of 2017 leaving out others notably the leader of opposition pleading for time to debate. The time given for debate and closure of the same is determined by the speaker in accordance with Rules 69 and 70. I can only comment that the debate was rushed leaving out members of Parliament who still wanted to express their views yet in the first place it was the speaker who had sent them to gather the views of the electorate in accordance with Article 1 of the constitution. There was also no time for debate on other aspects of the Bill relating to electoral reforms as recommended by this court but that again is prerogative of the speaker and court cannot interfere.

4. ***Suspension of MPs***

Submissions by MPs

On the Suspension of some members of parliament and other illegalities committed by the speaker during the Parliamentary sitting of 18th December 2017, counsel submitted that on the 18th December 2017 when parliament convened to consider the report of the legal and parliamentary affairs committee, three honourable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling. Instead at the time of adjourning the house arbitrarily suspended the 1st, 2nd, 3rd, 4th and 5th Appellants and other Members of Parliament from parliament in contravention of Article 1, 28(1), 42, 44 (c) and 94 of the Constitution.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that it was unconstitutional for the speaker to suspend members of parliament for several sittings after stating that the bill was dealing with the sovereignty of the people. This in a way disenfranchised not only the members but also their voters. Contrary to court's finding the right of members of parliament to represent people is absolute and stands taller than normal rights, it did not fault the speaker for suspending the MPs. Mr. Mabirizi contended that the constitutional court's justification for suspension of members of parliament at was only based on morals & emotions as opposed to sound constitutional principles. Eviction of a member from the house is not an event as the Speaker did it. It is a process starting with naming for the suspension to begin in the next sitting excluding the one in which he has been suspended and then he is given an opportunity to write a regret. Indeed one of the purposes of prohibition of an instant exclusion is to enable member table a formal application for review.

Mr. Mabirizi submitted that evicting members from the same sitting in which they were suspended robbed them of their right to request for a reversal. In **Uganda Law Society & Anor V. AG, CCCPS NO.2 & 8/02, Kavuma JCC** held that "…**It is unacceptable that any free democratic society in the modern world, which jealously protects fundamental human rights of all, which Uganda's society is, should ever experience a situation where even one life of an individual can be terminated by a court of first instance without at least a second opinion on whether or not such a life should be terminated.".**

Submissions by Attorney General

The Attorney General contended that Rule 7 of the Rules of Procedure of Parliament provided for the general power of the Speaker. He argued that

under Rule 7(2), the Speaker had an obligation to preserve order and decorum of the House. Further that Rules 77 and 79(2) give the Speaker powers to order any members whose conduct is grossly disorderly to withdraw from the house. Furthermore that under Rule 80, the Speaker is permitted to name the member who is misbehaving and that under Rule 82 the Speaker has power to suspend the member from the service of the House.

The Attorney General submitted that the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and disruptive to withdraw from Parliament and the Speaker properly did so.

The Attorney General further pointed out that once a Member who conducted him/herself in a disorderly manner was suspended, Rule 89 required that such a member had to immediately withdraw from the precincts of the House until the end of the suspension period. The Attorney General also argued that Rule 88 (4) gives guidance on the period of suspension of a member and that it requires that a Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. The Attorney General placing reliance on Rule 88(4) argued that the 3 sittings for which the member was suspended started running from computed from the next sitting of Parliament.

In light of his submission, the Attorney General submitted that the Appellant misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances in this case. He argued that going by the Appellant's arguments, it would be absurd that a Member who was found by the Speaker to have conducted himself in a disorderly manner in the House and is therefore suspended from the services of the House, is then allowed to remain in the House for the day's sitting.

As far as the right to fair hearing was concerned, the Attorney General submitted that Rule 86(2) of the Rules of Procedure of parliament provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the house, except upon a substantive motion made after notice which in the instant case was not made by the suspended Members.

Regarding the contention that the speaker while suspending the Members was out of her chair, the Attorney General submitted that this was not true. In support of his contention, he referred to the hansard of 18th December 2017 [at page 726 of the record] of appeal where the speaker said

> "... I **suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended..."**

The Attorney General further submitted that the reason for suspension was at page 731 of the record of appeal.

The Attorney General submitted that under Article 257 (a) of the Constitution as well as under Rule 2(1) of the Rules of procedure of Parliament define, 'sitting' is defined to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee. Furthermore, that Rule 20 of the rules of Procedure of Parliament provide that the Speaker may at any time suspend a sitting or adjourn the house.

In light of this, the Attorney General contended that the Speaker only suspended the sitting to 2.00 O' clock and did not adjourn the house, hence there was a continuous sitting and therefore she was not functus officio.

In conclusion on this point, the Attorney General submitted that the Speaker properly acted within her mandate to suspend Members of Parliament for their unparliamentarily conduct. Further that there is no evidence to show that the suspended Members of Parliament moved a

substantive motion challenging their suspension. He prayed that the findings of the Justices of the Constitutional Court be confirmed.

Determination by Court

There were two suspensions by the speaker, the first being on Wednesday, 27 September 2017, where by the speaker suspended twenty five members for gross misconduct which ranged from carrying a firearm into chambers of Parliament and unruly conduct which included failure to listen to the speaker in silence, standing and climbing on chairs and tables and dressing in manner not appropriate. The speaker clearly explained to the members the above reasons before suspending them under Rule (80) (2). This first suspension is what the constitutional court dwelt on and I cannot fault them for finding that the Speaker was right to act the way she did.

There was a second suspension on Monday, 18 December 2017, whereby the Speaker suspended 6 members of parliament who included Hon. Ibrahim Ssemujju, Allan Ssewanyana, Gerald Karuhanga, Jonathan Odur, Mubarak Munyagwa and Antnony Akol without assigning any reason for their suspension.

I am aware that the Rules of Procedure of Parliament clearly show the procedure to take to challenge the Speaker's ruling which is by motion. The members should have taken that course of action and this court cannot intervene where this specific remedy is available and members omitted to take it.

6. ***Failure to close doors to the chambers at the time of voting the Bill.***

Submissions by MPs

On the Failure to close the doors to the chambers at the time of voting on the bill, counsel submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament before voting on the 2nd reading of the Bill and during voting was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution and rule 98(4) of the Rules of Parliament which fact was also admitted by the clerk to Parliament in her affidavit. According to counsel the rationale of this Rule 98 (4) is to bar Members who had not participated in the debate to enter Parliament and in decision making. The speaker however not only left the doors wide open but called for members who were outside the chambers during the time of debate to enter and vote.

Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how failing to close all the doors during voting made the enactment of the Act to be unconstitutional and that the rules of procedure were not made in vain. They must at all material times be obeyed and respected save where they have been duly suspended and that noncompliance renders the entire process and the outcome thereof illegal.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted failure to close the doors during the roll call & tally voting was well pleaded. Closing the doors was not at the speaker's discretion as the majority justices held looking at the provisions of Article 89(1) of the Constitution which requires "**voting in a manner prescribed by rules of procedure made by Parliament under Article 94 of this Constitution."**

Submissions by the Attorney General

The Attorney General submitted that Rule 98(4) of the Rules of Procedure of Parliament provide that the Speaker shall direct the doors to be locked and the bar drawn until after the roll call vote has taken place. Further that the Speaker in not doing stated [at pages 373 of the record citing Hansard dated Wednesday 20th December 2017] that:

> ***"...ideally I was supposed to have closed the doors under Rule 98(4). However that exists in a situation where all members have got seats. Therefore it is not possible to lock them out and that is why I did not lock the doors....."***

According to the Attorney General, this action by the Speaker was validated by Rule 8(1) where the Speaker can make a decision on any matter *"having regard to the practices of the House..."*

The Attorney General further pointed out that under **Rule 8 (2) of the Rules of Procedure of Parliament** the Speaker's ruling under sub rule (1) becomes part of the Rules of Procedure of Parliament until such a time, when a substantive amendment to these rules is made in respect to the ruling. The Attorney General contended that the action taken by the Speaker not to close the doors of the House during voting was within the ambit of these powers. The Respondent therefore submits that the court properly arrived at the decision they made.

Determination by Court

By unanimously decision, the Constitutional Court found that the Speaker gave a sound reason on her failure to observe this rule and this what Hon. Kakuru Kenneth JCC, stated:-

"The Speaker explained why the rule could not be complied with. I find that voting when the doors were open offended the Rule of Parliament cited above, however this did not in any way violate the

Constitution and vitiate the enactment of the impugned Act. The Hansard of Wednesday, 20thDecember 2017 at pages 5264-5269 indicate that all Members of Parliament who were present and wanted to vote, voted and there is no evidence to the contrary. I find no merit in this ground. The issue is resolved in the negative."

I concur with the Constitutional Court that it was hard for Parliament to observe this rule due to space and enormous numbers of the members who could not fit in the chamber. There was also no suggestion that the voting was compromised in any way.

7. ***Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill.***

Submissions by the MPs

On the Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill, counsel contended that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill.

Counsel submitted that the Speaker's certificate of compliance was materially defective, ineffectual and it rendered the presidential assent a nullity. The requirement of a valid certificate of compliance under Article 263 (2) of the Constitution is couched in mandatory terms.

It is apparent that the speaker's certificate of compliance which accompanied the impugned Bill was but full of glaring inconsistencies and discrepancies. Whereas the certificate clearly indicated that the impugned bill not only amended Articles 61, 102, 104 and 183 of the

Constitution, the bill itself indicated that parliament had amended in addition to the said provisions; Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel for the appellants vehemently averred that the discrepancies and variations which appeared between the speaker's certificate of compliance and the constitutional (amendment) bill were gross both in content and form; thus in contravention of Article 263 (2) of the Constitution and S.16 of the Acts of Parliament Act and rendered not only the presidential assent to the bill a nullity but even the resultant Act.

However the Constitutional court wrongly concluded that the discrepancies only affected those provisions forming part of the Constitution (Amendment) (No. 2) Bill, 2017 amending Articles 77, 105, 181, 289, 289A, and 291 of the Constitution which were not included in the speaker's certificate; and, not the entire Act.

Counsel submitted that the Constitutional Court misdirected itself on the legality of the speaker's certificate of compliance in light of the Supreme Court authority of **Ssemwogerere & Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002** where court held that:

"In the case of amendment and repeal of the constitution, the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent to the provision is and remains, even though it receives the Royal Assent, invalid and ultra vires."

While citing the foregoing position in the instant matter, Owiny – Dollo DCJ, made held that:

"This requirement, in my view, is not only about the issuance of a certificate of compliance; but is equally about its content, as is provided for in the Format for such certificate in the Schedule to the Acts of Parliament Act"

Counsel averred that the highlighted inconsistencies were deliberate and intended to subvert and fraudulently circumvent constitutional provisions which required for a referendum for the amendment to be valid under Article 263 (1) of the constitution.

Submission by Mr. Mabirizi

He submitted that the presence of the purported certificate of compliance is not conclusive on its validity or compliance with the constitution

Submission by the Attorney General

The Attorney General refuted the appellant's contention that the learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent. He further refuted the Appellant's contention that the Speaker's Certificate of compliance was materially defective, ineffectual and that this rendered the presidential assent a nullity.

The Attorney General submitted that the Constitutional Court came to the right finding in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent.

The Attorney General submitted that the learned Justices of the Constitutional Court individually dealt with the discrepancy and

variances between the Speaker's certificates of compliance and found that the discrepancies were not fatal. In the Attorney General's view, majority learned Justices came to the right conclusion in holding that the discrepancy in the Speaker's certificate of compliance and the Bill was not fatal.

The Attorney General further contended that it was not in dispute that the Bill that was sent to the President for assent was accompanied by a certificate of compliance as required in Article 263 (2) (a) of the Constitution. He further argued that The Certificate however indicated that four (4) Articles of the Constitution were being amended and yet ten (10) Articles of the Constitution were amended. He noted that the Articles that were indicated in the Certificate were Articles 61, 102, 104 and 183 while the Articles that had been amended but excluded were Articles 77,105,181,289 and 291.

The Attorney General submitted that that the decision of the majority Justices in upholding the validity of the certificate of the Speaker was a recognition that the certificate complied with the form prescribed in section 16 (2) and Part VI of the second schedule of the Acts of Parliament Act Cap 2 since the Articles that were being amended were enumerated thereunder.

The Attorney General further submitted that in holding that the other Articles that had been amended but not included in the Speaker's Certificate to be unconstitutional, the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution.

Determination by Court

Certificate of compliance and Presidential assent are mandatory requirement that must be met before any Bill can become law. See **Article 91 and 263 of the Constitution.**

Article 263(2) (a) provides that:-

(2) **A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if— (a) it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it; and**

Parliament passed the Constitution (Amendment) (No. 2) Bill, 2017 which in fact amended Articles 61, 102, 104,183, 77, 105, 181, 289, 289A, and 291 of the Constitution. The speaker of Parliament prepared certificate of compliance in which she included Articles 61, 102, 104 and 183 of the Constitution as the only ones amended and excluded Articles 77, 105, 181, 289, 289A, and 291 of the Constitution

The speaker was supposed to send the entire bill with all Articles amended and passed by parliament to the President. The majority of constitutional court justices found her action to be irregular and Hon. Justice Cheborion, JCC stated that;

"**There is no doubt in my mind that the exclusion by the Speaker, of Articles 77,105,181,289 and 291, from the Certificate of Compliance accompanying the Constitution (Amendment) Bill sent for Presidential assent is fatal. It is a mandatory requirement under Article 263 that must be met in respect of each amended Article of the Constitution and cannot be waived in any circumstance."**

In Paul Semwogerere & Others vs Attorney General (supra), Justice Oder held that "It is my view that the Constitutional procedural requirements for the enactment of legislation for amendment of the Constitution are mandatory conditions, which cannot be waived by Parliament as mere procedural or administrative requirements. They are conditions to be complied with. Mandatory Constitutional

requirements cannot simply be waived by Parliament under its own procedural rules".

This omission per se invalidates Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018 on grounds that the Speaker of Parliament did not certify that Articles 77, 105, 181, 289 and 291 had been amended in strict compliance with the provisions of the Constitution. As already determined above, the purported amendments in respect of these Articles were fundamentally flawed and invalid for other reasons already highlighted.

However, I will hasten to add that the Speaker's Certificate is not invalid as asserted by the Petitioners. The only logical result of the omission of certain clauses in the certificate is that the omitted Articles were not validly amended."

The learned justice properly explained the importance of certificate of compliance and clearly stated it is mandatory requirement under Article 263 of the Constitution. This position was stated by this court in case of **Paul Semwogerere & Others vs Attorney General (supra).** With due respect to the majority of the Constitutional Court justices, once it was found that the certificate of compliance was fatal it is contradiction to conclude that it was valid. I therefore find there was no valid certificate of compliance prepared by the speaker.

8. . Illegal assent to the Bill by the President

Submissions by the MPs

On the Illegal assent to the bill by the President, counsel submitted that the act of the President assenting to the bill without scrutinizing the same to ascertain its propriety was in contravention of Articles 91(1) (2) and

(3), and 263 of the Constitution and Section 9 of the Acts of Parliament Act. He also relied on the decision of the Supreme Court in the **Ssemwogerere case (supra)** where court held that;

"The presidential assent is an integral part of law making process. Under Article 262(2), the Constitution commands the President, to assent only if the specified conditions are satisfied. The command is mandatory, not discretionary. It does not allow for discretion in the President to assent without the Speaker's certificate of compliance."

He therefore submitted that the constitutional duty imposed on the President requires him to scrutinize the certificate of compliance and the accompanying Bill as to their regularity before appending his signature.

Submissions by Mr. Mabirizi

Mr. Mabirizi submitted that presidential assent is an integral part of a law making process & any defect therein renders the law a nullity. S.9 (1) of The Acts of Parliament Act, provides that "**The President shall, subject to article 91 or 262(263) of the Constitution, assent to the bill presented to him.."**

That any disparity between a certificate & any other related document, invalidates it as it was in **Wakayima & Anor V. Kasule, CA EPA NO. 50/16.** In light of the disparity between the Hansard, the final bill and the Certificate, the president would have done more before he could assent.That the president was not "guided by considerations of reasonableness, good faith, honesty and diligence" in assenting to the bill since the purported speaker's certificate was not a certificate at all.

That the certificate from the electoral commission is a mandatory requirement whose absence invalidated the act as held in **SSEMWOGERERE & ANOR V. AG,** by Mulenga, JSC, even if the president assented, the assent does not validate the act which flouted.

That passing of a constitutional amendment act is not only about the majority numbers, it is also about the constitutional due process & integrity. That the amendment process was a sham & an imitation short of any validity.

Submissions by the Attorney General

The Attorney General invited Court to reject the assertion by the Appellants and uphold the findings of the majority that the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent was not fatal to the Bill

Determination by the court

Having held that there was no valid certificate of compliance it follows that there was nothing valid to assent to. I find that there was no valid assent to the Bill by the president.

9. **Failure to comply with the 14 days sitting between the 1st reading and the 2nd reading.**

Submissions by ULS

Counsel faults the majority learned Justices for finding that the passing of the Act without observing the 14 days between the 2nd and 3rd reading contravened the Constitution but did not find the contravention fatal that this was not a correct approach. When the clauses in the Bill requiring 14 days separation were passed at third reading they became part of the

Act. However Article 260(1) states that such Bill shall not be taken as passed unless the votes at the second and third reading is by fourteen days

In the ordinary meaning of the words "a bill shall not be taken as passed, means that the Bill will not make it to 3rd reading where the House does not comply with the 14 days.

Having amended Article 1 of the Constitution by infection, the proper course was to separate the two votes at second and third reading by 14 days. Thereafter it would be referred to referendum. It is irrelevant that one year later the court declares some of the provisions unconstitutional. Each of the two arms of government namely the Judiciary and the Legislature has its own functions and responsibilities. The one for the legislature is to ensure that there is a 14 days separation of the two votes. The legislature cannot sit back and say, "These provisions will be struck down by the Constitutional Court; there is therefore no need for us to separate the two sittings with 14 days". The constitutional provisions must be complied with. It cannot be left to speculation what will happen in future.

Article 260(1) is clear that a bill [not some provisions of a bill] "shall not be taken as passed unless.....the votes on the second and third reading.....separated by at least fourteen days...."

The motions of passing it at third reading and sending it to the President for assent was all in vain. The bill remained and remains what it was- a Bill. I submit that the court gives effect to the words "shall not be taken as passed" and holds that the failure to separate the two sittings is fatal to the Act. The Act cannot be validated and given Constitutional

cover when it never passed. That means validating a constitutional illegality.

Submissions by Mr. Mabirizi

Mr. Mabirizi it was mandatory for the speaker to separate the 2nd & 3rd readings with 14 sitting days of parliament. By unanimously deciding that the Act amended Articles 1,2 & 260 of the Constitution, had the justices keenly looked at the language of the constitution which uses the word 'Act' as opposed to the word 'Section', they would have not saved any part of the law. Article 257(1)(a) provides that "Act of Parliament" means a law made by Parliament;" it does not define it as a section, subsection or part of the law made by Parliament.

Mabirizi relied on the authority **of SSEKIKUBO V. AG, CHOWDHARY V.UEB SCCA No. 27/10 and KASIRYE V. BAZIGATTIRAWO, CAEPA No.03/16,** where Court held that it was evident that the voting could not take place without separating the sittings with 14 sitting days.

Submissions by the Attorney General

The Attorney General refuted the appellant's contention that the Constitutional Court erred in holding that the failure to separate the second and third seating by 14 days was not fatal. He further refuted the appellant's submissions that the failure to submit a Certificate of the Electoral Commission envisaged in Article 263 (2) (b) invalidated the whole Act.

The Attorney General submitted that the issues of observance of the 14 days sitting between the second and third reading as well as the failure to submit a certificate of the Electoral Commission were ably determined

by the Constitutional Court. In support of his contention he relied on the Judgments of Cheborion, JCC and Owiny-Dollo, DCJ.

He submitted that the majority learned Justices came to the right conclusion in holding that the non-observance of the 14 days sitting as well as the failure to accompany the Speaker's certificate of compliance and the Bill was not fatal.

He further argued that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14 days. Further that in the same vein, the Bill did not contain any provision the amendment of which required its ratification by the people of Uganda through a referendum, thereby necessitating the issuance of a certificate of the Electoral Commission.

He further pointed out that as the learned Justices found, it is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution. Thus, that having found that the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution and therefore null and void, the learned Justices were right to apply the severance principle and severed those Articles that offended the Constitution from those whose enactment would not require the separation of the second and third reading by 14 days as well as those ratification of such a decision through a referendum.

He invited Court to reject the assertion by the Appellant and uphold the findings of the majority Justices.

Determination by the Court

The majority of the Justices of Constitutional Court found that sections 2, 6, 8 and 10 of the Constitution (Amendment) Act 2018 required fourteen days separation between the second and third readings followed by approval in a referendum. On the other hand Sections 1,3,4,7 and 9 which did not amend any of the Articles covered by Articles 260, 261 and 263 did not require the second and third readings of the Bill to be separated by fourteen days.

The contention of the appellants is that failure to observe the constitutional requirement renders the Constitution (Amendment) Act No. 1 of 2018 nullity. While the argument of the Attorney General is that the two sets of laws were severable. I deal with the principle in this judgement but it suffices to state that the Act was passed as one and the original bill lost it originality at the Committee stage when the amendments which required 14 sitting days of Parliament between the 2nd and 3rd reading were introduced. Upon introduction of this provisions Parliament was bound to observe Article 263 of the constitution which require the fourteen sitting days between 2nd and 3rd reading of the Bill.

10. <u>Debating in absence of Opposition Leader</u>

Mr. Mabirizi contended that the absence of leader of the opposition, opposition chief whip & other opposition members & allowing ruling party members to sit on opposition side was well pleaded without any rebuttal That parliament was not properly constituted in absence of the leader in opposition.

Mr. Mabirizi argued that the reasons given by the Constitutional Court for justification of proceeding without opposition have no constitutional basis since The fear that parliament may be taken at ransom by opposition when a decision is made that it is not properly constituted is

without any legal basis. It actually goes against the very purpose of multi-party democracy which is to promote tolerance of divergent minority views as opposed to a single party system which is prohibited in the Constitution.

Submissions by the Attorney General

The Attorney General submitted that Rule 24 of the rules of parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of parliament shall be one third of all Members of Parliament entitled to vote. In his view, it followed that the business of parliament can go on in the absence of the leader of opposition and opposition Members of Parliament as long as there is the requisite quorum in Parliament and under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

Determination by the Court

On this issue, Justice Owiny Dollo, DCJ had this to say:-

"**The evidence regarding the absence of the Leader of Opposition when certain proceedings took place is quite interesting. When the Speaker ruled that she should sit down, the Hon. Leader of Opposition took offence, and on her own volition, walked out of the Chamber of Parliament. I do not understand why anyone should blame the Speaker for the Leader of Opposition's free willed choice to evacuate herself from the Chambers of Parliament. If every time a Member walks out in protest, the Speaker must suspend proceedings, I can envisage a situation where Parliament would always be held at ransom; thus paralyzing the work of Parliament."**

The rest of the Justices of the Constitutional court were in full agreement with DCJ Owiny Dollo. The Constitutional Court rightly found that leader of Opposition on her own volition exited the House. The speaker's stance to proceed in her absence was the correct one.

11. Crossing the Floor of Parliament

Mr. Mabirizi submitted the speaker was estopped from allowing members to cross the floor yet she had punished others for doing the same. The fact of crossing the floor was not in issue and members did not cross for purposes of voting as found by Justice Musoke & Barishaki, JJCC hence Barishaki, JCC's call for a video was not required. That contrary to what Justice Kasule, JCC held the powers of the speaker do not involve violating the Administration of Parliament Act and Rules that prohibit crossing the floor.

He submitted that it applied to Parliament, the Speaker cannot exercise her general power is the face of clear provisions Rule 9 which prescribes sitting arrangements and Rule 82(1)(b) providing that "During a sitting—a Member shall not cross the floor of the House or move around unnecessarily;" That the finding that no evidence was adduced that the crossing prejudiced any members was unexpected of a constitutional court in light of the above stated constitutional provisions and Rules of Parliament which call for Members of Parliament to be accountable to the electorate. Mabirizi argued that if there is no prejudice in casual crossing of the floor, why is it prohibited and punishable?

Therefore, Justices Musoke & Barishaki, JJCC were wrong to assume that the point in issue before them was actual switching of political sides yet it was a breach of rules of procedure because if it was membership, the right court would be the high court and not the constitutional court.

Submissions by the Attorney General

On this point, the Attorney General submitted that Rule 9 (1) of the Rules of Procedure of Parliament obligated the speaker to as far as possible reserve a sit for each Member of Parliament. Further that Rule 9(4) on the other hand obligates that speaker to ensure that each Member has a comfortable sit in Parliament.

The Attorney General submitted that since the members of the opposition walked out leaving empty seats, the Speaker was justified in the circumstances to permit Members of Parliament to sit on the available sits in the chambers of Parliament. The Attorney General further argued that embers taking up available sits as had been directed by the speaker did not amount to them joining the opposition and did not contravene any rules of procedure of parliament and therefore the Justices of the Constitutional Court rightly found so.

In light of his submissions above, the Attorney General submitted that the majority learned Justices of the Constitutional Court did not err in law and fact when they held that entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda (and the Rules of Procedure of Parliament) and pray that court finds as such.

Determination by the Court

On this issue, Justice Cheborion, JCC had this to say:-

"**It has not been proved that by inviting Members of Parliament to sit on the seats left vacant by the opposition members of Parliament, who had stormed out of Parliament, the Speaker in essence allowed**

Members of the Ruling Party to Cross to the Opposition. In my view "crossing the floor" of Parliament must be with the intention of joining the Opposition or otherwise as envisaged in Article 83 of the Constitution. I am of the considered view that even if members crossed the floor that would not render the Act unconstitutional."

I concur with the unanimous decision by the Constitutional court that permitting members from Ruling party to sit on Opposition side did not any way amount to crossing the floor. Crossing is a mental and not a physical and there was no suggestion that after that particular sitting members had changed parties.

12. Signing of the Report by Non-Committee Members

Mr. Mabirizi submitted that there was ample evidence that members who did not participate in committee proceedings signed the report .The majority justices misconstrued the law & acted casually in failing to nullify the report signed by members who never participated in the proceedings of the committee. Rule 187(2) of the Rules of Procedure relied on by Barishaki JCC to find that the committee had quorum does not apply because the Legal and Parliamentary Affairs Committee is not a select committee. Select committees are set up under Rule186 and they are temporary Committees. That the legal and parliamentary Affairs Committee is a sectoral Committee established under Rule 183(1) & 2(g). Contrary to the justices stated 5 members' minimum, under Rule 184(1), the minimum number for a sectoral committee is 15. Had the justices keenly looked at Article 90(2) & (3) of The Constitution, they would not have treated the matter the way they did.

Mr. Mabirizi submitted the majority justices erred in relying on Article 94(3) which does not apply to committees of parliament because Article

94(3) deals with the entire Parliament and not Committees which are provided for under Article 90. Article 257(1)(u) provides "Parliament" means the Parliament of Uganda;" and does not include committees. The compliant before court was whether it was in line with the Constitution for members who never participated in the proceedings of the committee to sign a report but they veered off the rail when they started going into issues of vacancy and participation of none-members which were not in issue.

Submissions by the Attorney General

On this point, the Attorney General submitted that the Committees of Parliament are provided for under Article 90 of the Constitution and Rule 183(1) of the Rules of Procedure of Parliament. Further, that Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not by itself invalidate those proceedings. Furthermore, that Rule 184 (1) of the Rules of Procedure of Parliament provides that each Sectoral Committee of Parliament shall consist of not less than fifteen Members not more than thirty Members selected from among Members of Parliament.

The Attorney General further placed reliance on Rule 201 (1) of the Rules of Procedure of Parliament which provides that a report of the Committee shall be signed and initialed by at least one third of all the Members of the Committee. The Attorney General argued that the Members who constituted the Legal and Parliamentary Affairs Committee were listed in the report of the Legal and Parliamentary Affairs Committee and were 26 members.

In light of his submissions above, he contended that the requirement of the law in regard to quorum and non-validation of the report were

considered and correctly adjudicated by the Constitutional Court and prayed that this Court upholds the same.

The Attorney General submitted that in his affidavit in rejoinder to the affidavit of Jane Kibirige, the Clerk to Parliament, Mr. Mabirizi submitted that that the report of Legal and Parliamentary Affairs Committee was not valid since it had delayed in the Committee beyond 45 days contrary to Rule 128 (2) and 140 of the Rules of Procedure of Parliament.

The Attorney General submitted that it was crucial to note from the outset that the appellant did not specifically plead this issue in his petition but only brought it up in an affidavit in rejoinder. According to the Attorney General, this explains why he could not respond to it.

The Attorney General further argued that this also constituted a departure from pleadings and should be disregarded.

Without prejudice to his submission above, the Attorney General submitted that Rule 128 of the Rules of Procedure of Parliament provides that whenever a Bill is read the first time in the House, it is referred to the appropriate Committee for consideration, and the Committee shall report to the house within 45 days.

He further pointed out that Rule 140 (1) provides that no Bill shall be in the Committee for more than 45 days. Further that Rule 140 (2) provides that if a committee finds itself unable to complete consideration of any Bill referred to it, the Committee may seek extra time from the Hon. Speaker

The Attorney General submitted that the basis of the appellant's argument was that the Bill was referred to the Committee on the 3rd of October, 2017 and the 45 days run out on 17th November 2017 yet the

committee reported to the House on 14th December, 2017 after expiry of 45 days.

The Attorney General submitted that had this matter been raised in time, he would have led evidence to prove that the committee acted well within the provisions of Rules 128 and 140 of the Rules of procedure of Parliament in that whereas the Bill was referred to the committee on 3rd October 2017, the house was sent on recess on 4th October 2017. Further that during recess, no parliamentary business is transacted without leave of the Speaker, therefore, the days could not start running until the leave was obtained.

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Rt. Hon Speaker on the 3rd November 2017. That both letters are annexed. Further that the 45 days started running from the 3rd November 2017. In the Attorney General's view, this meant that the days would expire on 16th December 2017. Thus, the Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.

He added further that in any event none compliance with the 45 days rule does not vitiate proceedings on a Bill. He placed reliance on Rule 140 which provides that where extra time is granted, or upon expiry of the extra time granted under sub rule 2, the House shall proceed with the Bill without any further delay.

The Attorney General submitted that the report of the committee was duly presented to the whole House within the period stipulated under Rules 128 and 140 and alternatively, if it delayed, which is denied, the

delay did not vitiate or invalidate the enactment of the constitutional amendment Act No.2 of 2018.

Determination by the Court

This matter was first raised by Hon Ssekikubo shortly after the chairperson of the committee on legal and a parliamentary Affairs was presenting the majority report of the committee. He noted that two Hon members of Parliament, namely Hon Lilly Akello and Hon Akampurura Prossy who signed the report of the majority were members of committee of Defence and Internal Affairs and that they were brought as mercenaries to append their signatures. The speaker later on the evening told members that the said members had been designated to that committee by the Government chip whip on the 29th November 2017.

It is on record that the Constitution (Amendment) bill 2017 was read for the first time on 3rd October 2017 by the Hon. Raphael Magyezi and subsequently referred to committee on legal and a parliamentary affairs for scrutiny .The committee started its work without the effort and input of the said members of parliament .It was almost two months when they were sent to committee by the Government Chief whip and it was correctly argued by the Hon Ssekikubo on floor of parliament that these members were sent there to sign the report and form the majority.

The Constitutional court justices had their take on this and held that;

The Hon .Justice Owiny Dollo, DCJ stated that " **In <u>the same vein, the fact that people who were known not to be members of the Legal Committee signed the report</u> is not fatal to the process; though it was irregular. First is that, on the evidence, they did not participate at the hearings; but merely signed after the conclusion of the proceedings. Second is that even if they are removed from the list of those who signed the report, there would still be sufficient members who attended the Committee propceedings, and signed the**

report. Lastly, Article 94 of the Constitution covers this type of situation, since it provides as follows:

"(3) The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings."

The Hon .Justice Kasule, JCC Stated that;

"<u>It was not clearly established at what stage these members began participating in the deliberations of the committee. Some of these members, it was asserted, signed the report of the committee.</u> This, if true, was irregular. However, Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings. Accordingly the proceedings of the Legal and Parliamentary Affairs Committee cannot be invalidated because of the signing of the report by those very few members who joined the committee late."

The Hon .Justice Kenneth Kakuru, JCC held that;

"From the above excerpts, it <u>is very clear that some Members of Parliament who were not originally on the Legal and Parliamentary committee when the impugned bill was sent to it for consideration, later joined it while they were still Members of other committees</u>.

With all due respect, to the Rt. Hon. Speaker, her Ruling that the issue should be treated as simply indiscipline had no legal justification. It is clear from the excerpts above that some members who signed the Legal and Parliamentary Affairs Committee report in

respect of the impugned bill which was later enacted into law, were not legally members of that committee. This is a legal matter that has an impact on the validity of the process of enacting legislation. It is not an issue of discipline.

I am, however, unable to find that, in ordinary circumstances failure to comply with Rule 155 of the Rules of Procedure of Parliament, would vitiate the proceedings of a Parliamentary committee in view of the provisions of Article 94 (3) of the Constitution."

The Hon .Justice Musoke, JCC stated that;

"**Act of the Legal and Parliamentary Affairs Committee of Parliament allowing some Committee members to sign the Report after the public hearings on the bill.**

I am inclined to agree with the Respondent's submission that the fact that 8 members joined the Committee at a later stage, did not negatively affect their participation in the proceedings of the Committee because they were adequately briefed.

From perusal of the Report and the signatures attached, I find that with or without the additional 8 members to the Committee of Parliamentary and Legal Affairs, the original members who signed the Report constituted a third of the total number. The report was, therefore, validly signed since under subsection (2) of Rule 201, the decision of the Committee is collective.

I therefore resolve this issue in the negative."

The Hon. Justice Cheborion, JCC stated that;

"The participation of the new members that were added to the Committee, even if irregular, cannot invalidate the Committee report because even if their number was deducted, the majority report still had enough signatures to pass it. Rule 187(2) of the 2017 Rules of Parliament sets the quorum of a select committee of Parliament if the committee consists of more than five members to be 1/3 of all the members. In this case, even if the members complained of were not to be considered, still the quorum would be met. I therefore answer issue 7(d) in the negative"

I have endeavored to reproduce Constitutional Court finding on this issue, in order to demonstrate that it was unanimously held that the added 8 members of a parliament were not originally members of the committee when the bill was sent to it. They were brought to sign the report without actual participation in proceedings and hearing of the said committee that drafted the final report.

All the justices found this to be irregular and relied on **Article 94(3) of the Constitution** to effect that it validates their act. I also agree with the Constitutional court that signatures of the members who had not participated in the discussion did not vitiate the report.

13. Waiving the requirement of a minimum of three sittings from the tabling of the Report and Non- Secondment of the motion

Mr. Mabirizi submitted that majority justices were dishonest in finding that the motion to suspend rule 201(2) by Hon. Rukutana was at the committee of the whole house stage yet the evidence prove that it was at plenary. The speaker was estopped from claiming that secondment is not essential yet she had earlier made it essential. The failure to second the motion by Hon. Rukutana was an illegality that rendered subsequent

proceedings invalid, in line with **Makula International Ltd V.CARDINAL Nsubuga & ANOR (1982) HCB 11.**

Mr. Mabirizi submitted that the finding by majority of the Constitutional Court justices that MPs had obtained the committee report 3/4 days prior to 18/12/17 had no evidential basis according to Section 8(2) and (4) of The Electronic Transactions Act The words of Hon. Rukutana that "…**this report has been on our ipads for the last five or more days…"** did not pass the test of the report being delivered to the ipads contrary to the finding that there was evidence that members of parliament were prevented from debating the bill and that only 28% of the house debated

Submissions by the Attorney General

The Attorney General refuted the Appellants' assertion that the suspension of Rule 201 (2) of the Rules of Procedure of Parliament and non seconded of the motion to waive Rule 201 adversely affected the whole process of enacting the impugned Act. He further disputed the appellants' assertions that the suspension of Rule 201(2) deprived Members sufficient time to debate the report of the Legal and Parliamentary Affairs Committee in that they were given only 3 minutes to debate and that hard copies were not duly tabled before the house as provided in Rule 201 (1).

The Attorney General submitted that the evidence [at page 719 of the record] shows that on 18th December, 2017 the Right Hon. Speaker informed the House that on the preceding Thursday, she directed the Clerk to upload all the on their ipads and that therefore the highlighted Rule did not apply. The Attorney General further submitted that at page 263 of the record, wherein the motion to suspend Rule 201 (2) was moved and debated, the said motion was supported by Hon Janepher Egunyu at Page 761 of the record and other members who rose up to debate and support the motion.

Relying on the decision of Alfonso Owiny-Dollo, [DCJ at page 176] and Cheborion, JCC [at Page 95], the Attorney General submitted that Members of Parliament had adequate notice as to the contents of the report (four days before debating the same) and that therefore the purpose of Rule 201(2) was achieved

He prayed that since, the Members of Parliament received the report of the Committee three days before the debate, this Court should uphold the finding of the Constitutional Court that no prejudice was put on the members.

Regarding the issue of secondment of the motion by the Deputy Attorney General , the Attorney General submitted that this issue was extensively interrogated by the learned Justices of the Constitutional Court before making their findings. He argued that all the Justices of the Constitutional Court found that found since Parliament was proceeding as a Committee of the Whole House, the failure to second the motion of Hon Mwesigwa Rukutana offended no Rule at all.

The Attorney General contended that the Constitutional Court came to the right conclusion on this matter and asked this Court to find that the Constitutional Court came to the right decision as far as the secondment of the motion for suspension of Rule 201 was concerned. He invited this to reject the assertion by the Appellants and uphold the findings of the majority Justices.

Without prejudice to his submissions above, the Attorney General submitted that Rule 59 of the Rules of Procedure of Parliament does not prescribe the manner of seconding a motion. Rather that it simply required a motion to be seconded. I the Attorney General's view, considering that the Rules are silent on the manner of secondment, the practice that has been adopted by the House is for Members who are seconding a motion to either rise up in support when a motion is proposed or if the motion is with notice, the designated Members stand

up and speak to the motion in support. He further argued that the adoption of such practice was premised on the authority of Rule 8 of the Rules of Procedure of Parliament which allows the adoption of practices of the House, the Constitutional provisions and practices of other Commonwealth Parliaments in so far as they are applicable to Uganda's Parliament.

He then concluded that since in Parliamentary practice, secondment of a proposed motion acts only as an indication that there is at least one person besides the mover that is interested in seeing the motion considered and debated by the House and the motion by Hon. Rukutana to suspend Rule 201 (2) of the Rules of Procedure of Parliament satisfied the requirements of Rule 59 of the Rules of Procedure of Parliament

Determination by the Court

Rule 201(2) of The Rules of Procedure of parliament 2017 provides that:-

Debate on report of a committee on a bill, shall take place at least three days after it has been laid on the Table by the chairperson or the Deputy Chairperson or the member nominated by the committee or the speaker.

The purpose of the rule was well articulated by Hon. Justice Cheborion when he stated that:-

"The purpose of the rule is clearly, to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament."

It was the argument of the speaker and the Constitutional court justices that the requirement of the said rule was met when the work of the

committee was loaded on the MPs Ipads four days before. I find this rule to be in mandatory terms **"shall",** it calls for strict adherence. This was well stated Justice Kakuru JCC that:-

"The Speaker of Parliament with all due respect failed to apply Rule 201(2) which is mandatory. I accept the submission of Counsel in this regard that "laying on the table" means physically presenting the bill on the table of Parliament and does not include sending an electronic copy to members. I note that, Parliament amended and adopted new Rules as recently as October 2017. Had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore the submissions of the Hon. The Deputy Attorney General on the floor Parliament that when the Members of Parliament were availed with Ipads Rule 201 no longer serves any useful purpose has no legal basis .I therefore, find that, Parliament while passing the impugned Act, failed to comply with Rule 201(2) of its Rules of Procedure, which is mandatory. I find that failure contravened Article 94(1) of the Constitution and as such vitiated the whole process of enactment of Act 1 of 2018."

The Hansard of Monday 18, December 2017, shows that the Chairperson of the committee on legal and parliamentary affairs stated that;-

"**Madam Speaker, I beg to lay on the table a copy of the main report before I make the presentation, which is accompanied by the minutes of the proceeding of the committee**."

At that point the Hon Karuhanga rose on point of procedure and pointed out Rule 201 (2) was being flouted by Parliament. The speaker overruled him pointing that the report was uploaded on iPads and the rule did not apply.

In addition to what Justice Kakuru stated I wish to add that if indeed the introduction of the iPads had rendered the rule inapplicable evidence should have been adduced to show that a number of motions and reports had been laid on table through that method. But if following the introduction of the iPads Parliament continued to follow the physical laying on the table there was no reason why the practice was not followed in this case.

I also need to comment on motion that was moved by The Deputy Attorney General to suspend Rule 201(2).This motion was moved after the Chairperson of committee had stated reading out part of his report to House. Parliament was not in committee stage as stated by majority of the justices of the Constitutional court. It was receiving and debating the report of the committee and therefore there was need for secondment of the motion which was not done. Failure to second the motion means that there was no substantive motion moved by Deputy Attorney General to suspend Rule 201(2) hence the violation of Rule 59(2) of the Rules of Procedure which I find that vitiates the subsequent legislative process and the enactment of the Constitutional (Amendment) Act .2018.

14. <u>On Severance</u>

Appellant's submissions

Mr. Mabirizi submitted that court granted the remedy of severance, which was not pleaded. That no issue was framed on whether none compliance affected the act in a substantial manner, or even whether court should sever some parts of the act from others because both parties knew that failure to comply leads to nullification. The court originated the 'pleading' & 'prayer' of severance it is the court that originated the discussion of un-pleaded matter relating to severance and court indeed turned into the pleader for the respondent who never pleaded any alternative prayer that severance be adopted or even that the none-compliance did not affect the amendment in a substantial manner.

He contended that court had no power to frame sub-issues of whether severance can be applied & whether the none-compliance affected the act in a substantial manner which did not arise out of the pleadings.

He submitted that the court could not originate issues of whether the amendment affected the Act in a substantial manner or whether there would be severance. That it was contrary to fair hearing for court to apply the principles & grant un-pleaded remedy of severance.

Mr. Mabirizi further that it was erroneous for the Constitutional Court to rely on Article 2 of the constitution & the case of **Salvatori Abuki v AG; Constitutional case No. 2 of 1997** to support severance. That the Court relied on **Salvatori Abuki v AG; (supra)**, which was not relevant to this case because as per the issues laid out in the lead judgment of Manyindo, there was no issue of the procedural validity and constitutionality of the Witchcraft Act 1957 which was passed by the colonial regime when there was no democracy to talk about or even rule of law. The petitioner's complaint was on the exclusion order under Section 7 of The Act and no other provisions or the enactment process.

That the decision in **Ag For Alberta V. Ag For Canada (1947)AC503 AT518** relied upon by Justice Kasule to support severance was quoted out of context because from the facts as summarized by Viscount Simond at it is clear that the only point in contest was whether the legislature could legislate on 'Banking' and not whether the procedure adopted in

the legislation was contrary to that laid down by the law granting powers to the legislature. This decision would have instead helped him to find for him on Article 93.

That the decision of **Matiso V Commanding Officer, Port Elizabeth Prison** was not relevant to the facts before court. Justice Kasule relied on it but the facts as summarized by KRIEGLER J, reveal that the petitioners therein were not challenging the process of enacting legislation. They were challenging some parts of the Magistrates Courts Act, enacted prior.

That the decision of Lord Denning, **In Kingsway Investment (Kent) Ltd V. Kent County Council (1969) 1 ALLER 601 AT 611** was misapplied by Justice Barishaki, because in the circumstances of this case, no severance could be done because the law depended on the process. Looking at the facts as stated at, the issue before court was whether the provisions of the urban authority outline planning permissions were in line with the law at the time and the effect of invalidity of a clause of a permission or license. It is also clear that severance was only used in reference to a building permission and not to a statute making process.

That Justice Barishaki's reliance on the decision of **South Africa National Defence Union Vs Minister Of Defence & Another Constitutional Court Case NO. 27 OF 1998** was misconceived because looking at facts as summarized by O'REGAN, J at what was under challenge was only Section 126B of the South Africa Defence Act 44 of 1957, which was stated to be in contravention of the 1994 South African Constitution. That there was no challenge on the procedures and processes adopted in enacting the Act as it is here.

MP's submissions

Counsel submitted that the Constitutional Court made a finding that the impugned Act violated the provisions of **Article 93 of the constitution** but declined to nullify the entire Act contending that noncompliance only affected Sections 2, 6, 8 and 10 of the impugned Act extending the term of Parliament and local government councils from five to seven years as from the date of the last elections since they were introduced by way of

amendments that imposed a charge on the consolidated fund. They accordingly applied the doctrine of severance to strike out the said provisions.

He submitted that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution in 'absolute' terms prohibits Parliament from proceeding on a private member's bill or a motion including amendments thereto which has the effect of creating a charge on the consolidated fund. Parliament therefore flagrantly violated Article 93 of the Constitution when they proceeded to consider and enact into law the impugned Bill with its amendments which had the effect of imposing a charge on the consolidated charge as found by the constitutional court. It was therefore erroneous to apply the doctrine of severance in a Bill was considered and passed as an integral legislation in the same process.

ULS Submissions

Counsel Wandera Ogalo submitted that all the authorities the Respondent cited and relied like **Abuka Silverori vs Attorney General, Kauesa vs Minister of Home Affairs, Matiso vs. Commanding officer of Port Elizabeth, Attorney General for Alberta vs. attorney general for Canada , Kingsway investments vs. Kent County and South Africa National Defence Union vs. Minister of defence** on the principle of severance to justify the refusal to nullify the whole Act by the lower Court were foreign and non-binding authorities for the following reasons.

That those authorities interpreted the witchcraft Act, Regulations under Police Act, the Magistrate Courts Act, the Alberta Act and Defence Act respectively in their respective jurisdictions. None of those authorities were amending the Constitution. Different standards and procedures apply in enacting an ordinary law as opposed to the Constitution.

That in Uganda the produce of enacting legislation is to be found in rules 112 to 136 of the rules of procedure of the House. That all bills have to comply with those rules. However in respect of constitutional amending legislation, Articles 259 to 263 are applicable in addition to rules 112 to

136. An ordinary legislation does not go through the process laid down in Articles 259 to 263.

Counsel contended that all legislations cited above were enacted by respective Parliaments using the rules of procedure of the House and not their national Constitutions. Authorities applying the principle of severance to legislation enacted under the ordinary rules of procedure of Parliament are not applicable to legislation enacted under a procedure prescribed by the Constitution. Those authorities apply parliamentary regulations fundamentally different from the one in the instant case. That in all the cases cited above, the process followed by Parliament was never in issue. What was in issue was simply the final product as it appeared on the law books viz-a viz the Constitutions. That in all the cases cited, Parliament was not warned that it was about to enact unconstitutional law but nevertheless went ahead to enact the law as is in the case now before the court. That in the cases relied upon the challenged and severed sections were not arrived at as a result of constitutional breaches. The severance maintained the purpose of the Bill, it is not a valid reason because purpose of a Bill can change after it is introduced in Parliament. Rule 133(20) allows Parliament to amend the long title to reflect amendments made to the Bill. It is therefore not a sound reason to justify severance on maintaining the original purpose of a Bill.

Counsel prayed that this court to hold that the principle of severance is not applicable in the present case.

Attorney General's Submissions

The Attorney General submitted that the Court was right in making reliance on the provisions of **Article 2 of the Constitution** while applying the principle of severance. That the Constitution of Uganda allows for the application of the Doctrine of Severance under Article 2(2). The Hon, Alfonse Owiny Dollo cited the authority of **Salvatori Abuki V Attorney General; Constitutional Case No. 2 of 1997** where the Constitutional Court considered the constitutionality of Sections 3 and 7 of the witchcraft Act Cap 108 . Justice Remmy Kasule stated that;- '**I also hold and order that sections 1,3,4,and 7 of the Constitution**

(Amendment) Act No. 1 of 2018, ...hereby retained as constituting the said Act by reason of their having been enacted in compliance and in conformity with the Constitution.'

Also that Justice Cheborion Barishaki, applied the authority in **South African National Defence Union vs Minister of Defence& Another Constitutional Court case No. 27 of 1998**, the same approach was applied as is evident from this passage,

"The offending provisions, however, can be rendered constitutionally valid by the technique of severance applied to both subsection (2) and (4) of t section 126 B....."

He also stated **that "In the circumstances, I hold that section 2, 5, 8, 9 and 10 of the Constitution (Amendment) Act 2018 are hereby struck down and expunged from the Act. Section 1, 3, 4 and 7 of the Act are upheld since they are constitutionally valid."**

That the Hon. Justice Elizabeth Musoke applied the principle of severance when she declared that section 1, 3, 4, and 7 of the Constitution (Amendment) Act No. 1 of 2018 are not inconsistent with and/or in contravention of the 1995 Constitution.

It is the Attorney General's submission that Justices of the Constitutional Court properly applied the principle of severance when they upheld sections of the Act that had been validly passed into law and invite this Court to uphold the decision of the Constitutional Court.

The Attorney General submitted that the core role of the Constitutional Court under Article 137(1) of the Constitution is to interpret its provisions while Article 137(3)(b) and 137(4) provide for the grant redress within the discretion of the Court based on the circumstances pertaining. Accordingly, while declarations are the primary duty the Court may grant redress including the remedy of severance either at the pleading or prayer of Counsel or a Litigant or exercising its own discretion.

The Court has the discretion to require Counsel or litigants to address it even on under pleaded issues and remedies and even to accordingly frame issues for Counsel and litigants to address. Severance is a well-

established legal remedy and there is no bar to the Hon. Justices of the Constitutional Court exercising their discretion to grant the remedy of severance. The Respondent addressed Court on the remedy of severance, The 1st Appellant had every opportunity to address the Hon. Justices of the Constitutional Court on the issue of severance, did not suffer any prejudice and was duly accorded a fair hearing.

The Attorney General submitted that in the course of a Court conducting its enquiry the Court has wide discretion to draw on existing Constitutional and legal principles and both pleaded and not pleaded depending on the circumstances of the case and it is the duty of the Court to apply the relevant principles for the ends of justice. The Hon. Justices of the Constitutional Court in applying the remedy of severance relied on Article 2(2) of the Constitution as well established authorities. The principles considered and applied by the Court are well established Constitutional and legal principles which the 1st Appellant had opportunity to address Court on. No prejudice was occasioned and the 1st Appellant was accorded a fair hearing.

Additionally, the 1st Appellants arguments are misconceived because authorities cited related to litigants being bound by facts and matters pleaded. They do not preclude a litigant from relying on the abundance of legal principles to advance their cases

Court's Determination on Severance

The majority of Constitutional Court Justices applying the principle of severance, severed the amendments which were introduced by Hon Tusiime Michael of the extension of tenure of parliament and that of Hon Nandala Mafabi of Term limits at Committee stage of the whole House from the original Magyezi bill.

I don't agree with Mr. Mabirizi that because the principle was not pleaded or argued by any of the parties at the trial the Constitutional Court was precluded from applying it. To me if court, through its own research finds a principle that may have been missed by the parties but is helpful in solving a case there is nothing to stop the court from relying on it. The

concern to the parties should be whether the principle is actually applicable or the court was misconceived in applying it.

The above two amendments emanated from the Legal and Parliamentary Affairs committee's general recommendations where by the committee recommended for reinstatement of the presidential Term Limits and expansion of the term of president from five to seven years**(see parliamentary Hansard of 18 December 2017 at page 32-33)**.

During the debate of the report of the committee some of the members of parliament supported the above amendment which influenced debate as shown below:-

The Hon James Waluswaka NRM Bunyole County West Butaleja stated that "…**My people told me that <u>we restore the term limits</u> not only for the president but for all elected members of parliament. There are members of parliament who have been for several years but they do not want to leave. Why don't they serve two terms and go? That is what they told me**…"

The Hon Kenneth Luboogo NRM Bulamogi County Kaliro stated that "**Madam Speaker the report talks of about reinstatement of term limits and entrenching and expanding the same<u>. I agree with the reinstatement and entrenchment of the same but disagree with expansion from five to seven years</u>…I think we should we maintain the five term and restore term limits"**

The Hon. Violet Akurut NRM woman Representatibe Katakwi stated that "**I did consult my people of Katakwi we have ten sub counties and out of ten sub counties ,seven agreed to the amendment of the constitution and other three did not.<u>as a safeguard, however they also recommended that term limits be reinstated in the constitution</u>… Thank you."**

The Hon Norah Bigirwa NRM Woman Representative ,Buliisa stated that "**<u>The people of Buliisa are saying that they look forward to seeing us, as country adhering to what is embedded in the constitution. They requested me to go ahead and restore the term limits and entrench</u>**

them within the constitution because they feel that these are some of the things that will help us to run this country…"

The Hon. Alex Byarugaba NRM Isingiro County South states that **"it was on that basis that I took my consultative meetings to the five sub-counties in my constituency with a population of about 220,000 people. I traversed all the sub counties and collected the following : yes sometime in the parliament, term limits were removed.My people instructed me to come back and share with you that we must keep this country together and that term limits must be reinstated and entrenched."**

The Hon. Eric Musana NRM Buyaga County East Kagadi stated that "**I also support the committee's recommendation of establishing the constitution review commission. We have a number of serious issues that must be incorporated and this commission will help us to bring all these warring parties and Uganda to a better consensus. I am also in support of reinstating term limits. This was paramount in my constituency…"**

The Hon.Dononzio Kahonda NRM Ruhinda county Mitooma stated that "**Madam Speaker on the issue of term limits, it was raised at Kabira Sub County by lay Canon, that it should be reinstated to address the issue of transition that all Ugandan have been yearning for."**

The Minister of State for Health (General Duties) Hon. Sarah Opendi stated that "**Madam Speaker, the people however said we should restore term limits. I am glad that this is clearly contained in report of the committee."**

The Hon. Gilbert Olanya FDC Kilak County south, Amuru stated that "**I would like to stand firm in this ground and support the position of the committee to reinstate terms limits**."

There were some members of parliament who were totally against the reinstatement of the terms limit and the following were their views

The Hon. Patrick Opolot NRM Kachumbala County,Bukedea stated that "… **if a leader is very good, the people will decide to continue**

renewing his mandate. If the people find a leader unworthy-maybe if he is a drunkard-even the leader himself can decide to abandon power. It has ever happened in 1985, a leader abandoned power here because he saw that he could not manage it. Therefore <u>I don't support the reinstatement of term limits in our constitution. I beg to submit madam speaker"</u>

The Hon .Joseph Kasozi (NRM Bukoto County Mid-west Lwengo) started that "**Madam Speaker on issue of reinstating terms limits. I remember very well 12 years ago this parliament removed terms limits. My question is what mischief was meant to be cured by the removal of term limits? Has that mischief been cured so that it requires us to reinstate term limits once again as proposed by the committee?"**

Later when it comes to second reading of the Bill, The Hon Beatrice Anywar stated that "**Madam Speaker on lifting the term limits I vote 'yes'.**" she was called back by the speaker to vote properly and she voted yes but her support for the Bill was clearly influenced by the return of term limits.

I am of the opinion that the amendments introduced were not foreign to the Magyezi bill. The members of Parliament were sent out by the speaker and she emphasized that they should properly consult the people in accordance with Article 1 of the constitution. The members during the debate clearly demonstrated that their voters had strictly demanded for reinstatement of the term limits in the constitution.

At the committee stage of the whole house, the Hon Tusiime sought permission to chairperson to introduce his amendment to original Bill. His amendments were on Articles 61, 77,181,289 291 of the constitution. His proposal of the amendments were debated by members of Parliament, some of them like Hon. Nandala Mafabi were strictly opposed to the amendment.

The chairperson put a vote on it and her words she stated "**Honorable members, I put the question that new clause be introduced as proposed**." the Hansard show shows (Question put and agreed to).

Towards the end of proceeding of the committee, the Hon.Nandala Mafabi sought leave of the chairperson to add amendments on Article 105 of the constitution and introduce the terms limits which were to be entrenched .Again the chairperson put the question to members and stated "**Honorable members, I put the question the question article 105 be amended as proposed**." the Hansard show that Question put and agreed to. Later on the Hon.Nandala requested the amendment be re-entrenched and question was put and agreed upon by members.

The Deputy Attorney General moved to block the amendment by Hon. Mafabi because it was not debated and that it was matter of referendum that would reinstate them. He was overruled by chairperson since the matter had been voted on.

After the committee stage, the chairperson put question to members the title to do stand part of the bill and Hansard shows that question was put and agreed to.

From above it is crystal clear that the two amendment were proposed and voted upon by entire members of parliament in the committee and agreed that the form part of the original Magyezi Bill. From this moment up to the conclusion of the process the amendments become an integral part of the Bill judging from the report of Raphael Magyezi indicates below:-

At report from the committee of the whole house, the Hon Raphael Magyezi stated that "**Madam Speaker, I beg to report that the committee of the whole House has considered the Bill entitled, 'The Constitution (Amendment) No.2 Bill,2017' and passed the entire Bill with amendments and also introduced and passed new clauses-amending articles 77,181,29,291,105 and 260. I beg to report.**"

At the motion for adoption the report from the committee of the whole House and the again the Hon. Magyezi sated "**Madam Speaker, I beg to move that the report of the committee of the whole House be adopted.**"

The speaker put question to members that the report of the committee of the whole house be adopted and the Hansard shows that the question was put and agreed to.

The bill went to third reading. The Hon Magyezi moved that the bill be read for third time and do pass and speaker put the question to member and voting for the third reading started.

On the third reading it is important to note that bill was voted on as a whole without separately voting on each clause. The pattern of the vote also indicates that the amendments influenced the vote as a few example will show the Hon. Deputy Attorney General who fought 'tooth and nail' to block the amendment of Hon. Nandala Mafabi voted yes to the Bill and so do did other members like Hon. Joseph Kasozi and Hon. Patrick Opolot who were categorically against the return of term limits. Interestingly the Hon. Nandala Mafabi who substantially contributed to the Bill by adding an amendment to it voted No to the Bill.

The third voting as shown from above was done on the Bill as a whole. After the voting the Clerk to Parliament tallied the votes which were 315 vote in favour of the bill and 62 voted against. The speaker declared The constitutional (Amendment)No.2 Act,2017 had been passed.

I have reproduced the above part of Hansard to show that the amendments by Hon.Tusiime and Mafabi were passed by members of Parliament and allowed to be added on Original Magyezi Bill at the committee stage. Secondly the report of the committee of the whole house which contained the amendments was adopted by Members of Parliament. Thirdly the third voting on the Bill was done as one. Fourthly the Act was passed as one by Parliament and lastly some Members of Parliament as seen from above were sent by their people (electorates) and instructed to reinstate the term limits and that must have greatly influenced their third time voting on the Bill.

The Constitutional Court Justices with due respect misconstrued the doctrine of severance because from time of the introduction the amendment, the bill become one. The speaker left out the contents of the

amendment in her Certificate of compliance which rendered the certificate invalid as already determined in this judgement.

The second point about the misapplication of the principle of severance is that well before the introduction of the amendments to the Bill, the process of enacting the Act was already tainted with acts of unconstitutionality already discussed in this judgement.

Both Justice Kasule JCC and DCJ Dollo followed the case of **Silvatori Abuki v Attorney General; Constitutional Case No. 2 of 1997,** Where the Constitutional Court considered the constitutionality of **Sections 3 and 7 of the Witchcraft Act, Cap 108**.With due respect, the case of Abuki is different from the present case because it was not concerning the enactment of Witch Craft Act as whole being null and void and it be said that Act must be have been enacted according to the law but had the two sections inconsistent with constitution which is not the case we have now where by the whole Act was not passed according to Constitution.

In conclusion having found that some of the acts and omissions vitiated the enactment Constitution (Amendment) Act 2018 the doctrine of severance was wrongly applied by the Constitutional Court. The Act was passed as one and I find the principle inapplicable. I answer issue No.2 in the positive.

ISSUE 3: VIOLENCE

This issue was framed as follows:

"Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?"

Appellants' Submissions

Submissions of MPs

Counsel submitted that the Constitutional Court rightfully established that the UPDF, the Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act.

According to counsel, use of force to amend the Constitution is not only prohibited but is also treasonable.

Counsel contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting was unconstitutional because the effect of the said directive was to curtail and restrict the conduct of consultative meetings. The same was calculated and aimed at muzzling public participation and debate on the proposed amendment bill.

Counsel averred that the bill was passed amidst violence within and outside Parliament, and also in the whole Country during public consultations thereby vitiating the entire process, and thus making it unconstitutional.

That It was as a result of the heavy deployment and unprecedented violence meted out against Members of Parliament within the precincts and chambers of the August House that prompted the Speaker of Parliament to write a letter addressed to the President of Uganda inquiring into the existence of armed personnel in the perimeters of Parliament.

That the unlawful invasion and/or heavy deployment at the Parliament by combined forces of the Uganda People's Defence forces, the Uganda police force and other militia before and on the day the impugned bill was tabled before Parliament amounted to amending the Constitution using violent means, undermined Parliamentary independence and as such was inconsistent with and contravened the Constitution.

Counsel submitted that the learned Justices of the Constitutional Court acknowledged that security forces committed acts of violence in and out of Parliament but held that those acts were not sufficient to vitiate the enactment. Their Lordships applied the qualitative test. It was erroneous for the learned justices of the Constitutional Court to apply and/or misapply the qualitative test on grounds that where the prohibited conduct amounts to an offence, like in the instant case, then the qualitative test is inapplicable. The moment Court found as proved that security forces violently restrained or stopped many people from participating in the enactment of the impugned amendment, then the offence was proved.

Counsel criticized the Constitutional Court finding that the violence was not as prevalent as to vitiate the enactment process. Submitting that the violence had a chilling effect on other members of the public that wished to participate and other members of Parliament that would have wished to oppose the amendment.

It was imperative for the learned Justices of the Constitutional Court to find that the amendment was begotten from violence inflicted on persons opposed to the amendment, and therefore contravening to Art 3 (2) of the Constitution.

Counsel contended that all the five justices of the Constitutional Court held that public participation is one of the basic structures of our constitution and cannot be wished away nor taken lightly.

Counsel cited the case of **In Doctors for Life International & Ors -Vs- The Speaker of National Assembly & Ors. Constitutional Court (of South Africa) 12/05, the South African Constitutional Court** emphasized the concept of participating democracy (as is found in Art.1 of our Constitution)

"… **therefore our democracy includes as one of its basic and fundamental principles of participatory democracy. The democratic**

government that is contemplated is partly representative and partly participatory ... and makes provision for public participation in the law making process ..."

In conclusion counsel submitted that the invasion of Parliament by the combined armed forces of the Uganda People's defence forces, the Uganda police and other militia was unwarranted and uncalled for as rightly found by the learned Justices of the Constitutional Court. It was unjustified in the circumstances which later on had an adverse effect of curtailing several persons and Ugandans at large from participating in the process leading to the enactment of the Constitution (Amendment) Act. Counsel invited court to answer this issue in the affirmative and find that the learned trial justices of the Constitutional Court erred in law and fact when they held that the violence inside and outside Parliament during the enactment of the Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Submissions of Uganda Law Society

Counsel submitted that the violence inside Parliament included the arrest, assault detention of members of Parliament and their forceful exclusion from representing the Constituents. The actions complained of violated several provisions of the Constitution. That the constitutional Court erred in failing to come to definite conclusions that Article 23 24 and 29 were contravened. As a result the Court neither made any declarations nor granted redress as required by Article 137 of the Constitution for the contraventions.

There was no attempt whatsoever to bring the actions of the security forces within the defenses stipulated in Article 43 instead court embarked on rationalizing the limitations on the member's right to liberty. That there is no evidence whatsoever of misconduct being a basis for the constitutional limitations on their liberty. On the contrary it is the

Speaker's orders which should be faulted as the events of 26th and 27th September show.

Counsel submitted that the court erred when it held that the Members misbehaved and this led to loss of liberty. If Court came to correct conclusion that there was no misbehavior, it would have come to a different conclusion. It would not have held that exclusion from debate, assault and detention was necessitated by the member's bad conduct. Instead it would have found that the suspension of the member by the Speaker is what was unjustified. The invitation of the police was therefore without foundation and the eventual trespass by Special Forces uncalled for. Consequently the limitations to the fundamental rights of the members to liberty and to represent their constituents and was unjustified.

Applying the test laid down **in Onyango Obbo and another Vs Attorney General** he submit that

(a) The continuance of debate in Parliament on that particular day was not particularly important to warrant overriding the fundamental rights. Debate could have taken place on another date. The debate continued for only 46 minutes and adjourned at 5.00p.m. There was nothing important about a debate. A member was simply seeking permission of Parliament to introduce a bill. I submit there is nothing particularly important in that debate to justify the limiting of fundamental rights.

(b) The limitation of the fundamental rights cannot be rationally connected to the object. How misbehavior in the House is linked to limiting MPs fundamental rights. That is not rational. It is arbitrary and unfair. The rules of the House provide for a procedure to follow in case of misbehavior. It does not include inviting in the army and police. The limitations were therefore unjustifiable

(c) The means used to impair the right were not necessary to accomplish the object of eviction. The record is full of evidence of assault

inhuman treatment and deprivation of liberty. All those were not necessary to remove the members.

Counsel submitted that had the Justices in the lower Court addressed themselves to the pleadings and affidavits there would have held that there was contravention of Article 24 and would have made a declaration to the effect and given redress.

Counsel submit that the redress to the violations has to be related to reasons his submissions which were to start the Age Limit bill on its path without the voices of opposition. The product is as good as the process. That product is tainted with deliberate and planned constitutional violations and this Court ought not to allow it to stand. The ghosts of unconstitutionality will only go back to sleep if the Act is struck down. If it is not, those ghosts will disturb the country for a long time to come.

Submissions of Mabirizi

Mr. Mabirizi submitted that violence which was well pleaded/ deponed to in the affidavits was not rebutted by the respondent but as could be seen the justices had a pre-conceived mind that violence was justified.

He submitted that it was erroneous to approach the violence as a disciplinary measure by the speaker yet parliament had been suspended. The Chamber ceased to be the House and her directions to Sergeant-At Arms could not be implemented because no parliament was sitting, the Sergeant at arms could only act in the sitting and under supervision of the Speaker.

Mr. Mabirizi contended that violence, whether real, perceived or attempted vitiates not only legislation but also any action done pursuant to it. Violence is defined by **BLACK'S LAW Dictionary,8th Edition T**he use of physical force, usu. accompanied by fury, vehemence, or outrage; esp., physical force unlawfully exercised with the intent to harm...and veiled threats by words and acts." Violent is defined at pg 4857 as

"…**relating to, or characterized by strong physical force….2. Resulting from extreme or intense force…3. Vehemently or passionately threatening…"**

That the Amendment of the Constitution through violence was foreseen by the framers of the Constitution who made a strong prescription against violence of any kind in the constitutional amendment process and invalidated each and every thing arising out of violence and created an offence of treason. The perpetrators of violence in the Constitutional amendment process committed the treason envisaged under Article 3 of The Constitution.

All the provisions rhyme well with the language in Article 3 of the Constitution against violence because in every offence where violence is an element, the maximum punishment is either death or life imprisonment, including heavy punishments for attempts. Therefore, there was no way the justices could justify violence simply because the MPs could have originated it.

He cited the cases of THE EAST AFRICAN COURT OF JUSTICE in **KATABAZI & ORS V. THE SECRETARY GENERAL, East African Community & ANOR, Reference No.1/07], SADC REGIONAL COURT in CONGO & ANOR V. ZIMBABWE, (supra) & THE CONSTITUTIONAL COURT ITSELF in DR. BESIGYE & ORS V. AG,CCC Petition** No.7/07 have set precedents that violence & arbitrary rule invalidates the resultant or intended benefit and the constitutional court was bound by this authority.

He submitted that the court erred in applying a subjective test as opposed to an objective test approved by this court in **onyango obbo's** case at in dealing with the violence and prayed that court reverse it.

The Attorney General's Submissions

The Attorney General submitted that Learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act 2018 did not amount to a breach the 1995 Constitution of the Republic of Uganda sufficient to justify a declaration of the whole process as unconstitutional and prayed that this Honourable Court does uphold the decision of the Court on this matter.

He pointed out that it is factually incorrect for the Appellants to state that the learned Justices of the Constitutional Court found that the UPDF, Uganda Police force and other militia wrongfully intervened in the entire process leading to the enactment of the Constitution (Amendment) Act. It was the unanimous decision of the Court that the intervention of the Uganda Police Force was lawful and there was never any reference to militias as alleged by the Appellants should make factual references to the Judgments of the Court.

The Attorney General contended that the evidence on record clearly illustrated that the proceedings of Parliament on the 21st, 26th and 27th September 2017 was characterized by unprecedented chaos, disorder and misconduct from the Hon. Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House. However, the Hon. MPs chose not to heed the Speaker's orders to leave the House and this led to their eviction by members of the security forces under the command of the Sergeant-at-Arms.

That Article 79(1) of the Constitution gives Parliament power to make laws on any matter for the peace, order and development and good governance of Uganda under **Article 94(1):**

Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees.

In line with the above Constitutional Provisions; Part XIV of the Rules of Procedure of the Parliament of Uganda was enacted that provide for Order in The House and Regulation 85. Rule 88 (6) Where a Member who has been suspended under this rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force 83 is necessary in order to compel obedience to his or her direction, and the Sergeant At Arms shall be called upon to eject the Member from the House.

It was the Appellants' case that there was an unlawful invasion and/or heavy deployment at the Parliament of the armed forces on the day of tabling of the impugned bill before Parliament which action amounted to amending the Constitution using violent means, undermined Parliament independence and was therefore inconsistent with the Constitution.

The Attorney General submitted that from the authorities cited above it is apparent that the Rt. Hon. Speaker is legally mandated to ensure that order and decorum is maintained in the House and she clearly had the powers as derived from the 1995 Constitution to suspend the MPs who perpetuated violence in the Parliamentary chambers.

The Attorney General prayed that this Honourable Court upholds the decision of the Learned Justices of the Constitutional Court that in the circumstances as presented by the evidence, the Rt. Hon. Speaker acted within her powers and in accordance with the Constitution to evict the names 25 Members of Parliament as a

It was the Attorney General's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with our security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces.

It was apparent from the findings of the Constitutional Court that their Lordships considered the evidence on the record and came to the appropriate conclusions on this issue of the alleged violence against the members of the public.

The Attorney General faulted the Appellants for allegation that the Constitutional Court did not address this issue and the evidence was evaluated and yet it was found that an overwhelming number of Members of Parliament carried out their meetings of consultations with the people in an uninterrupted manner and they were then able to come and vote on the Constitutional Amendment Bill No. 2 of 2017.

That the Appellants, as was the case in the Constitutional Court, have not illustrated any evidence to show that there was a group of Ugandans whose right to participate in the process leading to the enactment of the Constitutional Amendment Bill No. 2 of 2017 was curtailed by the security forces.

He invited this Honourable Court to confirm the finding of the Constitutional Court that the consultative process was not marred with violence by the security forces against the people and there is no need to invalidate the same.

The Attorney General argued that the Appellant had raised a new argument on appeal that force was used to amend the Constitution and as a result the Respondents are in breach of Article 3(2) of the constitution.

That Appellants never raised this issue at the Constitutional Court and they are therefore precluded from raising this argument at the Supreme Court. Rule 82 (1) Judicature (Supreme Court Rules) Directions S.I. 13-11.he submitted that this particular argument cannot be raised by the Appellant as it was never raised at the Constitutional Court level and there is no decision on the same to be appealed against. However, in the event that this Honourable Court accepts to consider the ground of

appeal in the manner that has been raised by the Appellant, the evidence as has been led by the Respondents clearly illustrates that the amendment was done with the full participation of the Members of Parliament and this contention should be dismissed. The Attorney General prayed that this Honourable Court finds that the Appellants severely misconstrued the application of Article 3 (2) of the Constitution as the expulsion of the Members of Parliament was not a singular event but was a result of their consistent misconduct during the debate of Constitutional Amendment Act No. 1 of 2018.

The Attorney General in conclusion prayed that this Honourable Court finds that the Constitutional Court correctly found that the violence inside and outside Parliament was not sufficient to warrant a finding of inconsistency with the Constitution.

The Attorney General submitted that the Appellant had misconstrued the Speaker's order to have been effected when the house was not in session and it was his contention that the order could be implemented when the House was suspended and there was no misdirection on either Law or fact by the Learned Justices of the Constitutional Court.

He referred this Honourable Court to page 165 of the record of Appeal where the Rt. Hon. Speaker clearly explains that the suspension of the MPs was for actions that had occurred the previous day the 26th September 2017 and goes ahead to direct them to leave the House which they objected and she chose to leave the House to enable them to be removed by the Sargent at Arms. Clearly, the House was still in session and regardless the Speaker did have powers to evict the errant MPs.

That his Lordship the DCJ Owiny Dollo at page 2431 paragraph 2 line 7 and Her Lordship Justice Elizabeth Musoke at Page 2563 of the record of proceedings, paragraph 5, Line 976 found that the Rt. Hon. Speaker is

empowered to maintain order, discipline and decorum in the House. We pray that this Honourable Court accepts our submission that based on the enabling Laws cited above, the Speaker was mandated to maintain order, discipline and decorum in the proceedings in Parliament and is at liberty to use *Rule 77 and 80(6) of the Rules of Parliament* in order to achieve this purpose.

He further contended that such internal mechanisms, control and disciplines in Parliament of Uganda will be able to maintain effective discipline and order during debates. The essence of debate in a multi-party dispensation in Parliament is that Peoples' representatives are allowed to engage in debates and once its concluded, vote on the matter and that would be the conclusion of the particular issues.

It was the Appellant's submission that the forceful removal of the MPs on the 27th September 2017 amounted to a treasonous act under *Article 3(2) of the 1995 Constitution*.

That the Appellant had severely misconstrued this *Article 3 (2) of the Constitution* as this was a singular event that came about due to the misconduct of the MPs whereas the debate, passing and eventual enactment of the Constitutional Amendment Act No. 1 of 2018 was carried out strictly in accordance with the Constitution.

He argued that the public interest was the debate on such an important issue as the Constit*utional Amendment Bill No. 2 of 2017* which needed to be conducted in a manner that promoted debate by members across the political spectrum as the matter were clearly of high national importance. The orders of the Speaker to maintain decorum should have been adhered to by the offending Members of Parliament.

He contended that the test of consideration of the phrase "acceptable and demonstrably justifiable" under *Article 43(2) of the 1995 Constitution* was defined in the case of *Charles Onyango Obbo & Andrew Mujuni Mwenda Versus Attorney General* In C.P. 15/1997. See page 33: paragraph 2: that illustrates the criteria in assessment of what amounts to establishing limits in a free and democratic society.

The Attorney General prayed that this Honourable Court finds it appropriate to adopt the finding of His Lordship Justice Cheborion Barishaki at page 2727 of the record of appeal and specifically paragraph 5 line 25 when he found that the intervention of Uganda Police was to enable parliament to execute their mandate.

He further prayed that in resolving these issues, Court should employ the principle of harmony and completeness in the interpreting the Constitution as one whole singular document with no particular provision destroying the other but each sustaining the other.

Refer to *Hon. Lt. (Rtd) Kamba Saleh & Anor Vs Attorney General & Four Others Consolidated Petitions Constitutional Petition No. 16 Of 2013*

The Attorney General submitted that the MPs must not confuse their right to legislate to mean it extends to disruption of other peoples' representatives right to debate and the disruption of the conduct of Parliamentary business. The enjoyment of *Articles 1, 2, 3(2), 8A, 97, 208(2), and 211(3)* must be read together with *Article 43(2)(c)* and it is our submission that Court should confirm the findings of the Constitutional Court that the actions of the Uganda Police passed the proportionality test and did not in any way contravene the 1995 Constitution in trying to ensure that the debate went on smoothly.

The Attorney General submitted that it is important to note the nature of our political system is that it is a multi-party dispensation. The implication of this fact is that each party and every Member of Parliament must have a right to full and meaningful participation in and contribution to the parliamentary process and decision-making. In the event that these rights are curtailed, the very notion of our constitutional democracy is abused.

However, in the exercise of the debate in a multi-party dispensation there can be no doubt that the Speaker's authority under Part XIII of the Rules of Procedure is wide enough to enable Parliament to maintain internal order and discipline in its proceedings by means which the Speaker considers appropriate for that purpose.

In the case of **Twinobusingye Severino Versus Attorney General Constitutional Petition No. 47/2011** in the Judgment of the Court at page 24, paragraph 2 the Court observed that;

"We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen, to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

It was the Attorney General's submission that this Honourable Court should adopt the persuasive reasoning of the Constitutional Court in finding that the Rt. Hon. Speaker was well within her powers to order the eviction of the errant 25 Members of Parliament.

It is not in dispute that the MPs enjoy rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and enjoy the privileges as enshrined in the 1995 Constitution. However, the enjoyment of such rights as illustrated above is valid only if it is done in a manner that is "acceptable and demonstrably justifiable in a free and democratic society" as illustrated in Article 43(1):

It was the Attorney General's case that the events that transpired on 26th and 27th September 2017 that led to the scuffle with our security agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces.

Submissions in rejoinder for MPs

That on the record there is no explanation whatsoever that was given either by the sergeant at arms or by the police or any security officer or even the addressee the president himself never responded to that letter and it is very clear that the parliament was invaded. The speaker calls it invasion of parliament by strangers.

Court's Determination of Issue No. 3

The Constitutional court unanimously found and rightly so in my view that given the gross indiscipline of some members of Parliament who were involved not only in a shouting match in complete disregard of the decorum of parliament but also in a brawl all in full view of the speaker, the speaker was left with no alternative but to wield the stick and suspend the offending members of the House. As a court we should not be seen to interfere with the discretion of the speaker to reign on errant

members of parliament to protect the integrity of the House as the Circumstances prevailing warranted.

However, what I find disturbing and of concern to this court is that after the speaker had pronounced her punishment the execution of her orders was bungled by what she describes as strangers in her letter to His Excellency the president which I reproduce hereunder.

"Your Excellency,

RE: INVASION OF THE PARLIAMENT PRECINTS BY SECURITY AGENCIES ON THE 27TH SEPTEMBER 2017

As you may be aware there were some disruptions of parliament proceeding by some rowdy members of parliament on the 21st September, 26th and 27th September 2017.

I took action to suspend 25 members of parliament from the service of the house for three (3) sittings.

However, after I had requested the Sergeant At Arms to remove the members from the precincts unknown people entered the chamber beat up the members, including those not suspended and a fight ensued for over one hour.

I have had the opportunity to view camera footage of what transpired and noticed people in black suits and white shirts who are not part of the parliamentary police or the staff of the Sergeant At Arms beating members.

Additionally footage shows people walking in single file from the office of the president to the Parliament precincts.

I am therefore seeking an explanation as to the identity, mission and purpose of the unsolicited forces. I am also seeking an explanation about why they assaulted the Members of Parliament.

I am also seeking an explanation why the members were arrested and transported and confined at police stations.

I would also like to know the commander of operations was since the Parliamentary Commission/Speaker did not request for any support.

Yours faithfully

Rebecca A. Kadaga (MP)

SPEAKER OF PARLIAMENT OF UGANDA

cc. Rt.Hon. Prime Minister

cc. Minister of Internal Affairs

cc. Inspector General of police

cc. Commander of the Special Forces Command"

I do not need to go any further than this communication from the Hon. Speaker as to the unconstitutionality of the actions by the strangers. There is no evidence that anybody responded to her concerns which raises a question of interference of one branch of Government into the activities of another branch which is a breach of the constitution.

The second question it raises is that the Members of Parliament including those who were not on the Speaker's list were assaulted, thrown on police vehicles, detained and released without charge all of which amount to inhuman treatment which is in contravention of the Constitution. In terms of **Article 137 clause 3 (b) of the constitution** I would interpret both the acts of interference with the work of Parliament as complained about by the speaker and the mistreatment of members of Parliament as unconstitutional. The provision of the constitution does not require this court to inquire into the consequences of an unconstitutional 'act' as the constitutional court did and neither is it required to make an order for redress. The unconstitutionality the act vitiates the process. I find issue No.3 in the positive.

ISSUE 4: SUBSTANTIALITY TEST

This issue was framed as follows:

"Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?"

Appellants' submissions

Submission of MPS

Counsel submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of Procedure of Parliament as well as the invasion of Parliament. According to counsel the test is only applicable in Electoral matters.

Counsel further submitted that it is an absurdity and indeed a paradox that the Constitutional court, whose primary mandate and duty is to jealously guard and defend the sanctity of the Constitution to suggest that there can be room for certain individuals and agencies of government like Parliament to violate the constitution with impunity which is charged with the duty of protecting the constitution and promoting democratic governance in Uganda under Article 79 (3) of the Constitution. He relied on the decision of this Honourable court in ***Paul K. Ssemogerere & 2 Ors versus Attorney-General SCCA. NO. 1 OF* 2002;** where it was held that the constitutional procedural requirements are mandatory.

Submissions of Mr. Mabirizi

Mr. Mabirizi submitted that under Article 137 of the constitution, the constitutional court has no jurisdiction to apply the 'substantiality' test. He contended jurisdiction of the constitution court is to determine whether the actions complained of are inconsistent with and/or in contravention of the Constitution and if so to make declaration and give redress or refer the matter to investigation.

He cited the case of **Centre for Health, Human Rights & Development (CEHURD) V.AG, SCCA No.1/13, Kisaakye, JSC**, stated "…**the Constitutional Court…may, after hearing the parties, grant the declaration that such an act or omission is inconsistent with or contravenes the provision(s) in question" "…the Constitutional court was established and given powers under Article 137(1) and (3) to consider these allegations and determine them one way or another. Indeed, the Constitutional Court as had no problem in the past in dealing with such kinds of problems before…with striking out the Referendum and other Provisions Act, 1999 on ground that the Act had been passed by Parliament without the requisite quorum stipulated in the Constitution…the Anti-Homosexuality Act 2014 on ground that it was passed by Parliament while it lacked the requisite quorum required."**

He contended that it is only the presidential & parliamentary elections acts which provide for 'substantial test' & there is no law enabling it in constitutional petitions. The substantial test is found in two specialized laws; S. 59(6)(a) of Presidential Elections Act, 2005 and S.61(1)(a) of The Parliamentary Elections Act, 2005 and in no other law.

Submissions of ULS

Counsel for the appellant submitted that the Court misunderstood the test laid down by the Supreme Court and therefore misapplied it to the facts of the Constitutional Petition resulting in a wrong decision. He faulted the Court for the following reasons;

1. The Election Petition case of **Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001** interpreted Section 65(a) of the Presidential Election Act which lays down the principle that an election cannot be set aside unless the non-compliance with the Act affects the result in a substantial manner. Counsel contended that it relates to standard and burden of proof in election petitions and in a Constitutional Petitions where Article 137(3) and (4) as well as the usual rules of evidence which apply.

2. The allegation of facts in the Besigye case was that the number of voters on the voters roll was unknown, voters were disfranchised and not verifiable and the petitioners agents were not allowed an opportunity to scrutinize the voters roll or safeguard the interest of the petitioner at polling stations. Counsel asserted that the Court was required to interpret the Act to determine whether proved facts were widespread. The facts in the present case are infringement of constitutional rights i.e. limitations to free speech and expression, movement and participation. According to counsel, the Court is not required and there is no legal basis for it to determine the extent of proved facts.

3. The Supreme Court was called upon to determine the result of an election while in the present case the court was called upon to determine the constitutionality of particular acts. According to counsel, one considers nominations campaigns polling counting tallying and declaration of results, the other considers policemen running all over the country unleashing violence and violating the Constitution. In one the Court inquiries into a legal process while the other it inquiries into an illegal process. The test cannot be the same.

4. Substantial effect was defined as the effect must be calculated to really influence the result in significant manner" Counsel argued that, if that was applied to the present set of facts, it would mean proof that the action of the police were calculated to influence the consultation

in a significant manner. That with greatest respect shows the inapplicability of applying the test. According to counsel, the constitutional limitations were intended to impact the Members of Parliament and not the process and its results.

5. If the test is applicable, then the Court would have to determine what the result of the consultation was. Can the views on a bill be quantified the same way votes can? I submit not. How would one handle a view which says;

"I support removal of age limit provided term limit is reinstated: or I support the inclusion of the recommendations of the Supreme court but I do not support the removal of the age limit?".

According to counsel, the outcomes of the consultations cannot be equated to the number of votes obtained by candidates.

6. Lastly counsel submitted that unlike in election petitions it is impossible to prove the extent of the constitutional limits imposed by police, the degree of such limitations and the substantial effect they had on the outcome of the consultations. Counsel contended that it is impossible to measure the degree of curtailed speech or restricted movement of a member of parliament. A right cannot be quantified the same way votes can. How does the failure of a member to go to a particular constituency because of limitations be related to result of the consultations? Clearly the test cannot apply.

Counsel for the appellant submitted that the wrongful application of the test prevented the court from applying the proper test which is whether the limitations imposed by the police were justified. He argued that where a directive by any organ of the state is sent to all districts of Uganda requiring police officers all over the country to breach the Constitution and indeed there is evidence that the directive was complied with in any part of the country, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or

that it was in public interest to do so. Where the respondent fails to do so, as was in this case, the petitioner has proved breach of the Constitution. All that remains is the remedy.

Counsel submitted that it cannot be argued that violations of the Constitution have to be widespread throughout the country for the Court to invalidate the Constitutional Amendment Act (the subject of the constitutional breaches). That the test ought to be whether the violations contributed or had the effect of contributing to the enactment of the Act. If in the affirmative the Act ought not to stand. According to counsel, there is abundant evidence that the violations in and out of Parliament had that effect.

He submitted that the directive speaks for itself. It reminds all Regional Police Commanders, District Police Commanders, Directors, the IGP , the Deputy IGP that there is a proposal to amend the constitution " to remove presidential age limits" (it does not refer to the other provisions of the Bill). Only the age limit.

Counsel further submitted that the directive then requires all police officers to all over Uganda to stop any Member of Parliament moving or "intending to move" to a constituency other than his or hers. "A member consulting in any other constituency must be stopped……". According to counsel, it was in furtherance of this that the police violated the Constitution. He argued that the subsequent actions of the police cannot be separated from the age limit specifically mentioned in the directive. The author of the directive wants the recipients to know that limiting fundamental human rights they are called upon to do is linked to the passage of the Bill.

The limitations were calculated to increase the chances of removing the age limit from the Constitution. The constitutional violations cannot be delinked from section 3 of the Constitution Amendment Act. Since the constitutional limitations were intended to facilitate its passage, the

redress the court can give must be in relation to that section. According to counsel, the only remedy available is to strike that section down.

Counsel submitted that if the court had not applied the substantiality test, it would have come to this conclusion. To hold otherwise is to send a message that the Court will tolerate violations of the Constitution. That is the surest way for us to return to our dark past ably spelt out in the Preamble to the Constitution i.e. our history being characterized by political and constitutional instability. A message has to go out that it is expensive to breach the Constitution and there will be a price to pay. A slap on the wrist is to play around with the future of our children and their children. This Court ought not to countenance that. Only then will the rule of law and continued stability be guaranteed. The Constitutional Court is the Guarantor but with the greatest respect it failed to protect us and future generations. It emboldened those who will breach the Constitution.

He contended that once the Court found Constitutional violations as it did, it was required to make a declaration to that effect and grant redress.

Counsel prayed for court to substitute the order of the Constitutional Court with one striking down section 3 of the Act.

Attorney General's Submissions

The Attorney General submitted that the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion.

He relied on the finding of Odoki, C.J in **Kizza Besigye Vs Yoweri Museveni Kaguta Election Petition No.1 of 2001**,the learned Chief Justice, where he stated the evaluation tests for the effect of non-compliance on an election. He stated,

"In order to assess the effect, court has to evaluate the whole process for the election to determine how it affected the result and then asses the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produce those numbers. Numbers are useful in making adjustment for irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial".

The Attorney General submitted that the substantiality test is used as a tool of evaluation of evidence. To fault the Court for applying the substantiality test in a constitutional petition meant that a court in interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it, that proposition would be absurd.

He contended that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether it is constitutional court, or an ordinary suit, it is trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

He cited the case of **Nanjibhai Prabhudas& Co. Ltd versus Standard Bank Ltd [1968] E.A 670** where it was held that the Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. In my view the alleged non-compliance is a procedural irregularity, which is not of a most fundamental nature, as to render a law null and void.

The import from the above is that there was general compliance with the constitutional requirements and procedure for the enactment of the impugned Act.

He pointed out that it was pertinent to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. The Court's evaluation of evidence and resulting decision is not exclusively based on the quantitative test. The Court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation must were not sufficient to satisfy nullifying the entire process.

He argued that the facts of this case, the process in Parliament was not negatively affected as was observed by the majority Learned Justices of the Constitutional Court. That the Learned Hon Lady Justice Elisabeth Musoke, JA applied the Quantitative Test (verifying the impact of non-compliance or inaccuracy on the actual vote numbers and final outcome).

The Attorney General submitted that the qualitative requirements appraise the entire legislative process prior to and during tabling motion for leave, tabling bill for First Reading, consideration by the Committee, debate, voting and assent to the Bill. There was thus substantial compliance.

The two tests were expounded in **Winnie Babihunga v. Masiko Winnie Komuhangi & Others, HTC-OO-CV-EP-004-2001** where it was stated;

"The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in most suitable where the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair."

He therefore argued that the learned Justices of the Constitutional Court found that the few instances of irregularities did not adversely affect the process of passing the impugned Act.

The Attorney General submitted that the question that begs an answer is therefore whether the Court was wrong to use that test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

He contended that a perusal of the pleadings (petitions and affidavit) of the Appellant showed that he was seeking the Constitutional Court to determine the effect of certain events/actions/commissions that occurred during the process of enacting the impugned Act on the entire Process/Promulgation of the Constitution (Amendment) Act, No. 1 of 2018.

That the Appellant pleaded and argued in the Constitutional Court that the entire process of amending the Constitution from the tabling of the Bill, to the passing thereof, were compromised and the whole process was marred/tainted with such illegalities, irregularities and violence.

He therefore argued that the Petitioners did not adduce credible evidence to show that such violence and intimidation affected the validity of the Constitution (Amendment) Act, No. 1 of 2018.

He also pointed out that the big question that should be raised is what then is the standard of proof in dealing with Constitutional matters, most especially where the matters touch on amendment and breaches of the Constitution? Is the standard of proof different from the usual on the balance of probabilities?

The Attorney General submitted that it was not in dispute that the common law concept of burden of proof that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. In this case therefore, it is common ground that it is the Appellant who bore the burden of proving to the required standard that, there were such irregularities/violence that affected the result of the entire passing of the Bill into law and should be nullified.

He noted that the form of evidence that was presented during the hearing of the Petition was both affidavit and oral evidence. A scrutiny and evaluation of the above evidence did not support the Petitioners' assertion of such widespread/massive irregularities and violence that would have led Court to nullify the entire resultant Act.

He concluded by supporting the conclusion of the Court that the evidence did not disclose any profound irregularity in the management of the legislative process for the enactment of the impugned Act, nor did it prove that the participation of some members of Parliament was gravely affected. The parts that were so affected were rightly severed by the Court.

He submitted that in this particular case, the Constitutional court was right to inquire into the extent of the alleged massive irregularities and in so applying the qualitative and quantitative test, it considered whether the errors, and irregularities identified sufficiently challenged the entire legislative process and lead to a legal conclusion that the Bill was not passed in compliance with the requirements of the constitution.

In conclusion, Attorney invited this Court to uphold the finding of the Constitutional court that certain irregularities/errors were mere

technicalities and were not fatal to sufficiently invalidate the entire process of enactment of the Constitution (Amendment) Act, No. 1 of 2018.

Court's Determination of Issue 4

The Substantiality test as applied in Election Petitions simply means that even if court was to find that an election was not conducted in accordance with the principles laid down in those provisions, it is required to find that non-compliance affected the results of the an election in a substantial manner.

Section 62 of the **Parliamentary Elections Act (2005**) as amended

62. Grounds for setting aside election

(1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court—

(a) non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the result of the election in a substantial manner;

(b) That a person other than the one elected won the election; or

(c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or

(d) That the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.

(2) Where an election is set aside, then, subject to section 64, a fresh election shall be held as if it were a by-election in accordance with section 4 of this Act.

(3) Any ground specified in subsection (1) of this section shall be proved on the basis of a balance of probabilities.

Section 57 of the **Presidential Elections Act as amended**

57. **Challenging a presidential election.**

(1) **Any aggrieved candidate may petition the Supreme Court for an order that a candidate declared elected as President was not validly elected.**

(2)A petition under subsection (1) shall be in a form prescribed by the Chief Justice under subsection (11) and shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

(3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its finding not later than thirty days from the date the petition is filed.

(4) Where no petition is filed within the time prescribed under subsection (2), or where a petition having been filed, is withdrawn by the person who filed it or is dismissed by the Supreme Court, the candidate declared elected shall conclusively be taken to have been duly elected as President.

(5) After due inquiry under subsection (3), the Supreme Court may—

dismiss the petition; declare which candidate was validly elected; or annul the election.

(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court—

non compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the noncompliance affected the result of the election in a substantial manner;

That the candidate was at the time of his or her election not qualified or was disqualified for election as President;

That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

Nothing in this section confers on the Supreme Court when hearing an election petition power to convict a person for a criminal offence.

Where upon hearing a petition and before coming to a decision, the court is satisfied that a recount is necessary and practical, it may order a recount of the votes cast.

Where it appears to the Supreme Court on hearing an election petition under this section that the facts before it disclose that a criminal offence may have been committed, it shall make a report on the matter to the Director of Public Prosecutions for appropriate action to be taken and shall state in the report the name of the person, the nature of the offence and any other information that the court may consider relevant and appropriate for the Director of Public Prosecutions.

(10) Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.

(11) The Chief Justice shall, in consultation with the Attorney General, make rules providing for the conduct of petitions under this Act. (Underlining provided)

It was a misdirection for the Constitutional Court to apply the substantiality test as it is applied in Electoral matters. Secondly the Parliamentary Elections Act and Presidential Elections Act make a clear distinction between an illegal practice where the substantiality test is applicable and an electoral offence where the test is not applicable.

I would put an unconstitutional act in the category of cases where it is impossible to apply the substantiality test as I illustrate below from the Attorney General's argument.

The Attorney General argued that the substantiality test is used as tool of evaluation of evidence and I agree, however the purpose for which the evaluation is required becomes relevant. If the evaluation of evidence is for determination of an election result the test is specifically provided for by the statutes cited in this judgement. If the test was for general application in evaluation of evidence it would not be necessary to specifically provide for it in election related matters. On the other hand if the evaluation of evidence is related to interpretation of the Constitution under Article 137 Clause 3 of the Constitution, the substantiality test is irrelevant because once a petitioner makes a case that an 'act' or 'Act' is inconsistent with or in contravention of a provision of the Constitution the proof of inconsistency or contravention does not require application of the substantiality test.

In my view a constitutional infringement in relation to any 'act' or 'Act' that is declared unconstitutional under Article 137 (3) (b) of the Constitution cannot be subjected to the substantiality test. An infringement on the supreme law which is the Constitution is a grave matter. Its interpretation does not go beyond the declaration unless there is need for redress under Article 137 (4) of the constitution.

Issue No. 5

This issue was framed as follows:

"Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution? "

Appellants' Submissions

Submissions of MPs

The MPs argued this issue 5 together with issue 4

Submissions of ULS

Counsel for the appellant had in paragraph 1(d) of the Petition in Constitution Petition 3 of 2018 challenged the removal of the age limit and supported it with the affidavits of Professor Sempebwa, Professor Latigo and Francis Gimara. The issue was also argued in the lower Court. Counsel's complaint is that none of the evidence was evaluated nor the arguments considered. The challenged provision was not tested as against Articles 8A and 38. Counsel submitted that if the court had considered the Appellant's case, it would have come to a different conclusion.

Counsel submitted that peaceful transfer of power and orderly succession of Government is a principle of democracy which ought to be used in interpretation of the Constitution. He cited the case of **Sekikubo**

and others vs. Attorney General (supra) for application of democratic principles. According to counsel, the Court below did not consider this argument and therefore made no decision on it.

Counsel referred to the affidavit of Professor Sempebwa which refers to the Constitutional Review Commission which was specifically mandated to examine sovereignty of the people, democracy and good governance and how to ensure that the country is governed in accordance with the will of the people. However, as found in the evidence of Professor Sempebwa, Professor Latigo and Francis Gimara there was abuse of human rights, violence, harassment, humiliation, assault and illegal detentions all of which negate a conducive atmosphere to genuinely seek the views of the people.

He submitted that those reasons advanced in respect of term limits equally apply in respect of a non-limit on age.

Counsel argued that the evidence of Professor Sempebwa is also to the effect that the conflict in Uganda is instigated by unchecked executive power and unlimited incumbency to the position of president.

Counsel referred to the Odoki Commission report on the questions of orderly succession and clinging to power via disregard of constitutional provision.

He contended that, had the Court held that orderly succession is one of the principles of democracy, it would have come to the conclusion that given our history, removal of the age limit is in conflict of with orderly succession and peaceful transfer of power and therefore inconsistent with Articles 1, 8A and 38 of the Constitution. According to counsel, the Court would have nullified the Act if it has considered all these facts.

Counsel submitted that the process of consultations invalidates the Act inclusive of Section 3. He referred to the authority of Robert Gakuru

which deals with public participation. The following are the discerned principles;

(i) Invitation must be given to those participating sufficient time to prepare

(ii) In Adequate time must be given to the public to study the Bill consider their stand and formulate representatives to be made

(iii) The legislature should facilitate public involvement

(iv) Parliament should create conditions that are conducive to the effective exercise of the right to participate

(v) Parliament should designate places where consultations would be held.

Counsel submitted that there were no consultations in contravention of Articles 1, 8A and 38 of the Constitution that invalidate the Act. He argued that, since the consultations were primarily in respect of the age limit, Section 3 cannot stand.

Submissions of Mabirizi

Mr. Mabirizi submitted that removal of the age limit under article 102 was a 'constitutional replacement' which has no place in a constitutional democracy. He referred to Carlos Bernal's article, Unconstitutional constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the constitutional replacement doctrine, Published in International Journal of Constitutional Law, Volume 11, Issue 2, 1 April 2013, Pages 339–357, which demonstrated what the standard for determining Constitutional Replacement. Bernal laid down the seven-tiered test. According to Mabirizi the Constitution (Amendment) Act 2018 is nothing more than a partial constitutional Replacement which cannot stand.

Mabirizi submitted that, in the instant case, the essential element of the constitution which is at stake is the qualifications/capacity of the president/fountain of Honour which is underpinned under 63 provisions of the Constitution.

That the element of qualifications/capacity of the president/fountain of Honour is essential because of the huge powers and duties vested in the president. Those powers were balanced in such a way that the president is neither too young nor too old. Removal of such may have grave consequences on exercise of such powers in the 63 provisions. Although the element of qualifications of the president are essential, that is not to say that they are eternal, not capable of amendment but can only be amended in a compliant and careful way not to destroy the entire constitutional system & base. That the essential element of the restricted qualifications of a president has been opened-up and the unrestricted qualities of a president is in conflict with restricted qualifications.

That the powers to remove the age limit only rests in a constituent assembly not parliament since it amounts to a constitutional replacement.

Mabirizi contented that, upholding of section 3 of the Act will deharmonize the constitution so as to render among others Articles 51(3), 144(1)(a) & (b), 146(2)(a) & 163(11) unconstitutional, which is against the spirit of the Constitution. That it will open a flood-gate of private members' bills to amend those Articles which have age restrictions.

Attorney General's Submission in Reply

The Attorney General submitted that the appellants challenged the removal of the Age limit from the Constitution in Constitutional Petition No.5 of 2018. That the appellants contend that that section 3 and 7 of the impugned Act which scrapped the age limit qualification for election to the office of the President and district Chairperson amended Article 1 of the Constitution by infection. They further contend that Parliament

also amended Article 21(3) of the Constitution creating another form of discrimination to wit; age.

The Attorney General contended that the Justices of the Constitutional Court correctly directed themselves to the law by holding that amendment of articles 102(b) and 183(2)(b) did not in any way infect Article 1 of the Constitution.

He cited Article 1 which states that, all power belongs to the people who shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Parliament is enjoined to make laws under Article 79 and 259 and this power is exercised through bills passed by Parliament and assented to by the President. (see Article 91(1) of the Constitution)

The Attorney General submitted that the Justices of the Constitutional Court were unanimous and rightly held that this power extends to Articles 102 and 183. The Justices of the Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b).

He contended that, contrary to the appellants' argument in C.A No. 3/2018 that the amendment takes way the sovereignty of the people of Uganda enshrined under Article 1, the respondents agree with the finding of the Court that in amending Articles 102 (b) and 183 (2) (b), the sovereignty of the people is not infected at all.

In contrast, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to the office of the president. According to counsel, the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 of the

Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

The Attorney General agreed with the finding of the Constitutional Court that the amendment of Article 102 (b) did not in way infect the provisions of Article 21 (3) of the Constitution.

The Attorney General submitted that the appellant in C.A No. 2/2018 advances the theory of Constitutional replacement. That the appellant argues that the amendment of Article 102 to remove the age limit qualification for election to the office of the President amounts to Constitutional replacement. He labours to justify this assertion by citing various Constitutional provisions which he claims vest so much power in the office of the president and goes on to peddle without any proof or authority the notion that a president must not be too young or too old as a justification for the restriction on age as a qualification for election to the office of the President.

The Attorney General concurred with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. He averred that Article 102 (b) provides that; - a person is not qualified for election as President unless the person is not less than thirty-five years and not more than seventy-five years of age. According to counsel, the amendment of Article 102(b) did not undermine any of the 63 provisions of the Constitution cited by the petitioner or any other provision of the Constitution. Counsel contended that the learned Justices of the Constitutional Court rightly directed themselves to the law in holding that amendment of Article 102 (b) did not amount to Constitutional replacement of Article 1.

The Attorney General submitted that Article 1 (1), 1 (4) illustrates that power belongs to the people and is exercised through elections of their

representatives. According to counsel, the Justices of the Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). He cited Article 259 of the Constitution which vests Parliament with powers to amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in Chapter Eighteen. That the Justices of the Constitutional Court were unanimous and rightly so that this power extends to Articles 102 and 183. Counsel entirely concurred with the Constitutional Court that the qualifications for election to the office of the President and Local Council V Chairpersons can and should be amended by the people's representatives where circumstances that necessitate the change arise. He added that the appellant's argument that upholding section 3 of the Amendment Act will disharmonize Articles 51(3), 144(1)(a) and (b), 146(2)(a) and 163(11) of the Constitution is speculative and lacks merit. According to counsel, it is not against the spirit of the Constitution and upholding the appellant's argument would curtail the right of Members of Parliament to bring bills in accordance with Article 94 (4)(b) of the Constitution.

The Attorney General argued that the amendment of Article 102 (b) was not a Constitution making process that requires a Constituent Assembly. According to counsel, it was an amendment process which the peoples' representatives are empowered to do in accordance with Chapter Eighteen of the Constitution.

The Attorney General agreed with the finding of the Constitutional Court that the amendment of Article 102(b) and 183 did not contravene any provisions of the Constitution.

The Attorney General submitted that the appellants raised no grounds in reference to this particular issue. That their submissions are therefore not premised on any grounds contrary to the provisions of rule 82 of Judicature (supreme Court Rules) Directions which are mandatory.

The Attorney General prayed that the Appellants' submissions to this particular issue be disregarded by this Court. That without prejudice to the above, the appellants challenged the removal of the Age limit qualification for election to the offices of President and District Chairpersons respectively from the Constitution in Constitutional Petition No.3 of 2018. In their submissions they allege that the Constitutional Court did not consider her evidence thus reaching a wrong conclusion. They claim that if the Constitutional Court had considered their submissions in regard to the infection of articles 8A and 38 of the Constitution by the amendment to Article 102 (b), Court would have come to a different conclusion.

According to the Attorney General, the amendment did not in any way take away the people's right to choose who leads them in free and fair elections held regularly every five years. That it is on this basis that the Constitutional Court found that the enactment of sections 3 and 7 of the Constitutional Amendment Act No. 1 0f 2018 did not infringe on the basic structure of the Constitution and therefore was not inconsistent with and or in contravention of the Constitution.

Submissions in reply by ULS

The 3rd appellant challenged section 3 which removed the 75 years age limit.

In Ground 2 of its memorandum of appeal the 3rd appellant objects to the finding by the lower court that the entire process of conceptualizing and enactment of the Constitution [Amendment] Act did not contravene the Constitution. In its prayer the 3rd appellant specifically prays that section 3 of the Constitution [Amendment] Act 2018 be annulled and declared unconstitutional

Counsel submitted that in the consolidated the petitions in the lower court, this particular issue was argued both under issues 6 and 12[volume 1 pages 136, 195, 257, 288, 355 and 404]

As seen from prayer 2(ii) in the memorandum of Appeal it is specifically prayed that section 3 of the Act be declared unconstitutional for inconsistence with Articles 1, 8A, 38, 105(1), and 260(1). This prayer arises from ground 2. This is also in line with the petition of the appellant.

Counsel submitted that it was framed as an issue and agreed to by the Respondent. He argued that it is rather late for the Respondent to attack an issue agreed upon as arising out of the grounds of appeal and argue it as never raised.

Counsel submitted that Rule 82 is not applicable. It amounts to raising a preliminary objection in reply to submissions. Further this offends the whole purpose of scheduling at which issues to be submitted on were agreed upon. In any case Rule 98© allows a ground set forth or implicit in the memorandum of appeal. All is required is an opportunity for the respondent to be heard which the respondent has done.

Court's Determination of Issue No.5

In my finding in issue No.1 above, I have opined that the constitution is amendable as longer as the procedure laid down in Chapter 18 of the constitution is followed.

Under **Article 79 of the Constitution**, Parliament is mandated to carry out the following functions;-

> (1) **Subject to the provisions of this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.**
>
> **(2) Except as provided in this Constitution, no person or body other than Parliament shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament.**
>
> **(3) Parliament shall protect this Constitution and promote the democratic governance of Uganda.**

The petitioners/appellants put forward arguments against removal of age limits while the Attorney General Vehemently defends their removal. I would not go into the merits or demerits of the removal of age limits because if the people of Uganda through their representatives decide to remove them the debate goes to the legislature and not to the Constitutional Court. Evidence was adduced of what transpired during the debate in parliament and it is very clear that is where the debate belongs. The issue is answered in the negative.

Issue 6

This issue was framed as follows:

> ***"Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?"***

Appellants' Submissions

Submissions by Mabirizi

Mr. Mabirizi submitted that, had the learned justices harmonized article 83(1)(b) with 102(b) of the constitution, they would have found that the

president elected in 2016 ceases to hold office on attaining 75 years of age.

He adopted his submissions in the lower court on this issue and added that by calling upon court to make an interpretation that a president ceases to be qualified to hold office the moment he/she ceases to posess the qualifications which were the basis of his/her qualifications, he called upon them to perform their duty of harmonization as elaborated by Odoki CJ in the case of Ssemwogerere when he stated that: *"…**It is not a question of construing one provision as against another but of giving effect to all the provisions of the' Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution."***

Mr.Mabirizi submitted that this is because the constitution, sets similar qualifications for the holders of all national elected offices and Local council V chairman but they do not repeat them in every article. They are pegged on that of a member of Parliament the reason why Article 102(c) for president states that **"a person qualified to be a member of Parliament" and Article 183(2)(a) for District Chairperson goes that "qualified to be elected a member of Parliament',** 108A(1) for Prime minister states that **'persons qualified to be elected members of Parliament', 113(1) for ministers reads that 'persons qualified to be elected members of Parliament'**

Therefore, with proper intentions of interpretation and harmonization of the Constitution, no one can divorce the qualifications and disqualifications of a president from those of a Member of Parliament, prime minister, minister or a district chairperson, unless the constitution is explicit on that difference.

Just like how Article 80 prescribes what is expected of a person at nomination, Article 102(b) prescribes the nature of a person to appear for

nomination. This has nothing to do with what happens after nomination and possibly elections.

He prayed that this issue be answered in affirmative, in the spirit of posterity of our constitution and to ensure that all its provisions are harmonized.

Respondent's Submissions

The Attorney General submitted that this issue was only raised by Mr. Male Mabirizi . It arises from grounds 76 and 77 of the appellant's memorandum of appeal in C.A No. 2/2018. The Learned Justices of the Constitutional Court rightly directed themselves to the law when they found that Articles 102 (b) which provide for the qualifications of a person wishing to stand for election to the offices of President, purely relate to the qualifications prior to nomination for election and not during the person's term in office. Article 102 (b) of the Constitution before the amendment provided that; A person is not qualified for election as President unless that person is not less than thirty-five years and not more than seventy-five years of age;

The Attorney General emphasized that the Constitutional Court considered the provisions of Article 102 and unanimously found that the provisions therein purely relate to the qualifications prior to nomination for election and not during the person's term in office. In interpreting the Constitution, the basic principle to be followed is that where the words of the Constitution are clear and unambiguous, then they ought to be given their primary, plain, ordinary and natural meaning.

That from the onset, Article 102 is clear that it provides for the qualifications for a person to be elected President. In other words, one must be seized with these qualifications prior to being elected to the office of the President. The learned Justices of the Constitutional Court were

unanimous that this issue had no merit and rightly resolved that Article 102 refers to qualification prior to being elected as President. See Judgment of Justice Keneth Kakuru, Justice Remmy Kasule at and Justice Owiny A.C. Dollo.

The Attorney General concurred with the finding of the learned Justices of the Constitutional Court that a President elected in 2016 is not liable to vacate office on attaining the age of 75 years.

Court's Determination of Issue No.6

This issue was framed at Constitutional court as Issue No.13 and stated as:-

> ***"13. Whether the continuance in office of the President of Uganda by one who was elected in 2016 and who attained the age of 75 years is inconsistent with or in contravention of Articles 83(1)(b) and 102(c) of the Constitution."***

All the Constitutional Court Justices found that the office of the President does not become vacant on the incumbent attaining the age of 75 years. One of the principles of the Constitutional interpretation already stated in this judgement and explained by the Attorney General in his submissions is that where the words of the constitution are clear and unambiguous they ought to be given their primary, ordinary and natural meaning.

I am in full agreement with the Constitutional court and my interpretation of Article 102(b) of the constitution is that the Qualifications referred to are pre- nomination qualifications and not midterm. I do not think that the framers of the Constitution intended for example that a seventy four year old person would be qualified for

elections but a year later he or she no longer qualifies and the Country goes through another election.

Article 102(b) of the constitution should be read together with Article 105 which provides that:-

105. Tenure of office of the President.

(1) A person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years.

(2) A person may be elected under this Constitution to hold office as President for one or more terms as prescribed by this article.

(3) The office of President shall become vacant—

(a) on the expiration of the period specified in this article; or

(b) if the incumbent dies or resigns or ceases to hold office under article 107 of this Constitution.

So quite clearly the office of the president does not become vacant on attainment of seventy five years of age of the incumbent. The issue is answered in the negative.

Issue 8

This issue was framed as follows:

"What remedies are available to the parties?"

Appellants' Submission

The MPs submission.

The counsel prayed that the appeal be allowed in the terms and prayers specified in the Memorandum of Appeal and specifically that the Constitution (Amendment) Act, No. 1 of 2018 be annulled and that the Respondent pays costs of this Appeal and in the Court below.

In the alternative but without prejudice to the foregoing, they prayed that if court answers issue 7 in the affirmative a retrial should be ordered.

Submissions by ULS

Counsel relied on the authority of **Tinyefuza vrs Attorney General Appeal 1 of 1997 Oder JSC at page 37** which cited with approval the case of **Troop vs. Dulles** where the Supreme Court of the US stated that:

> "**The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital. Living principles that authorize and limit government power in our nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not the words of the Constitution become little more than good advise"**

Oder JSC then went on to say

> "**These remarks were cited with approval in Zimbabwe Supreme Court in the case of A Juvenile vrs the State [1989] LCR [Const.] 774 at 789 by Dumbutshena CJ. I agree with the remarks of the US Supreme Court. It is the duty of this Supreme Court of Uganda to enforce the paramount commands of this Constitution. I have already said in this judgment that, following highly persuasive opinions from courts in the commonwealth, that court should apply generous and purposive construction of the provisions of the Constitution that give effect to and recognition of fundamental rights".**

Counsel went on and submitted that Article 20(2) requires all organs and agencies of government to uphold and promote rights and freedoms enshrined in the Constitution

That Article 137(4)(a) of the Constitution provide that Court may grant an order of redress in addition to the declarations sought.

That the Petition before the court shows that the violations and limitations to the fundamental rights and freedoms do not even come near any of the possible defenses in Article 43. That there is callousness and extreme disregard for humanity in the manner the violations were carried out.

He noted that the Judges lamented over the conduct of Constitutional violators. Elizabeth Musoke JCC at line 1789 page 70 stated "therefore although the said violence and restrictions in themselves are to be condemned in the strongest terms……. Cheborion Barishaki JCC at line 25 page 210 makes it clear that the treatment of members of Parliament was inhuman and degrading and their arrest and detention uncalled for. Owiny – Dollo Dy CJ castigates military intervention page 545 as does Kasule JCC.

That clearly the court appears to appreciate that the security forces crossed the red line. Indeed in many instances the Court holds that the constitutional limitations were not justifiable though no declarations are made.

It was his submission that this was not just violation of the Constitution, it was a well thought out strategy to facilitate enactment of the Act as he submitted above. That it was calculated to end a message to the Members of Parliament and their constituents that opposition to the Bill was a red line for government. Counsel submitted that it was intended to instill terror and fear.

In addition he also submitted that also the emboldened of the army that grievously beating up our Members of Parliament to an extent of long hospitalization is now acceptable. It is for these reasons that he submits that redress must be tied to the Act. That the country must know that there is a price to pay for contravention of the Constitution. Nullifying the Act is the only remedy. That then in future individuals in government

shall not look at violence as a means of achieving their objectives, there will always be the fear that the objective will not be achieved.

Counsel prayed that the Petition be allowed. Declarations and redress as stated herein above be granted. That Issues 2 3 4 and 5 be answered in the affirmative. That just as in the lower Court the Appellant in Appeal Number 4 of 2018 did not seek costs of the Appeal but prays for disbursements only.

Submissions by Mabirizi

He prayed that court nullifies the entire process in the Constitutional Court for reasons stated above. That however, given the nature of this dispute, in the alternative court nullifies the entire law in order to re-assert the relevancy of courts in Constitutional development of this country as was done by this court in **Ssemwogerere V. Ag**(supra), the Constitutional Court in **Oloka-Onyango & 9 Ors V. Ag**(supra) and the then Constitutional Court in **Ssempebwa V. Ag**(supra).

That the above position is supported by **Nwokoro & Ors V.Onuma & Anor-Nigeria**(supra) where ESO,JSC, held that

> "**It is a fundamental principle of legality that where an act or course of conduct fails to meet with the requirements prescribed by law, such that the non-compliance renders the act or course of conduct devoid of legal effect no legal consequences flow from such acts or course of conduct…"**

It was his submission that since it is clear that the entire process of introducing, processing and enactment of The Constitution (Amendment) Act 2018 was flawed, in addition to other factors discussed above, the entire process was vitiated rendering the Act unconstitutional, null and void.

He prayed for general damages and full costs of the case in this court and the court below with an interest of 25% per annum from the date of

judgment till payment in full, putting in mind the Ugandan experience as expressed by Twinomujuni, JA in **Akpm Lutaaya V. Ag**(supra) that "…from Ugandans experience, he is likely to chase the proceeds of this decree for yet many years to come.."

The Attorney General's Submissions.

The Attorney General contended that the Appellants have not made out any case on appeal to justify this Court reversing and/ or varying the decision of the Constitutional Court of Uganda of 26th July 2018 in the Consolidated Constitutional Petitions.

In the premises, the Attorney General prayed that the Honourable Court finds that the appeal lacks merit and thereby dismisses the appeal accordingly with costs to the Respondent and declined to grant all prayers specified and orders sought in the Memoranda of Appeal.

The Attorney General further prayed that this Honourable Court be pleased to affirm and uphold the findings of the majority Justices of the Constitutional Court of Uganda in their Judgment of 26th July 2018 that sections 1, 3, 4 and 7 of the Constitution (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson of Local council V to contest for election to the respective offices and for implementation of the recommendations of the Supreme court in **Presidential Election Petition No. 1; AmamaMbabazi vs. Yoweri Museveni** were lawfully enacted in full compliance with the Constitution and valid provisions of the Constitution (Amendment) Act, No. 1 of 2018.

In regard to the alternative prayer that the court orders a retrial, it is contended for the Attorney General that this prayer is, with all due respect, misconceived and ought to be denied as the Appellants have not adduced evidence before this Honorable Court to warrant issuance of an order for a retrial. The respondent prays that the prayer for a retrial be denied.

Regarding the prayer for general damages with interest at 25% per annum from the date of judgment that it is trite that general damages are awarded to restore a party to a position he or she was in before he suffered injury, loss or inconvenience arising from a breach of duty or obligation. That general damages are awarded to fulfil the common law remedy of restitutio in integrum meaning the innocent party is to be placed so far as money can do so in the same position as if he had not suffered loss or inconvenience arising out of a violation.

It is contended for the Attorney General that the Appellant has not proved or adduced evidence to show that he suffered any material inconvenience or at all a loss by the passing of the Constitution (Amendment) Act No. 1 of 2018. Damages are usually measured by the material loss suffered by a party. It is thus submitted for the Respondent that the Appellant's claim for general damages with interest at 25% per annum from the date of judgment until payment in full is misconceived and ought to be denied.

Court's Determination of Issue No.8

It follows from my finding that as a consequence of a number of 'acts' that infringed on the Constitution in the process of enactment of the Constitutional (Amendment) Act 2018, the Act cannot be allowed to stand and is hereby annulled.

It also follows from my findings and declarations that there were 'acts' which were inconsistent with and in contravention of the constitution the prayer for nullification of the entire Constitutional (Amendment) Act of 2018 is granted.

On costs I would order that each party meets its own cots.

Dated at Kampala this ..... day of ..... 2019.

.....

JUSTICE ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL APPEALS Nos. 02 of 2018, 03 of 2018 AND 04 of 2018

CORAM: (Hon Justice Bart Katureebe C.J, Hon Justice Arach-Amoko JSC, Hon Justice Eldad Mwangusya JSC, Hon Justice Opio Aweri JSC, Hon Justice Lilian Tibatemwa-Ekirikubinza JSC, Hon Justice Mugamba JSC, Hon Justice Jotham Tumwesigye JSC

1. CONSTITUTIONAL APPEAL NO. 02/ 2018

MALE H. MABIRIZI ……. APPELLANT

VERSUS

ATTORNEY GENERAL ……. RESPONDENT

3. CONSTITUTIONAL APPEAL NO. 03/2018

1. HON GERALD KAFUREEKA KARUHANGA }
2. HON JONATHAN ODUR }
3. HON. MUNYAGWA S. MUBARAK }} :::::::::::::::::::::: PETITIONERS
4. HON. ALLAN SSEWANYANA }
5. HON. SSEMUJJU IBRAHIM NGANDA }
6. HON. WINIFRED KIIZA }

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

3. CONSTITUTIONAL APPEAL NO. 04/ 2018

UGANDA LAW SOCIETY ……. PETITIONER

VERSUS

ATTORNEY GENERAL ……. RESPONDENT

JUDGMENT OF HON. JUSTICE OPIO-AWERI, JSC

INTRODUCTION.

This is a consolidated appeal from the Constitutional Court wherein the appellants are challenging the constitutionality of Constitutional Amendment No.1 of 2018 regarding the lifting of the Age limit qualifications to become president and District Chair persons.

Background:

On the 27th day of September 2017, Mr. Raphael Magyezi, a Member of Parliament representing Igara County West Constituency, Bushenyi District, moved a motion in Parliament seeking leave to table a private member's Bill to amend the Constitution. Leave was granted and he introduced Constitutional (Amendment) Bill No. 2 of 2017 wherein he sought to amend Articles 61,102(b),104(2), (3), 104(6) and 183(b) of the Constitution. The objectives of the Bill were as follows;

(i) To provide for the time within which to hold Presidential, Parliamentary and Local government council elections under Article 61,

(ii) To provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102 (b) and 183 (2) (b).

(iii) To increase the number of days within which to file and determine a presidential election petition under Article 104 (2) and (3).

(iv) To increase the number of days within which the Electoral Commission is required to hold a fresh election where a Presidential election is annulled under Article 104 (6); and,

(v) For related matters.

Objectives 3 and 4 were recommendations made by this court in **Amama Mbabazi Vs Yoweri Kaguta Museveni & 2 Ors Presidential election Petition No. 1 of 2016.**

Prior to the tabling of the impugned Bill on the 19th day of September, 2017, the Deputy Speaker of Parliament, the **Rt. Hon. Jacob Oulanya**, while presiding over Parliament assured members that the Constitution (Amendment) Bill was not going to be introduced by way of amending the Order Paper. Further, on the 20th day of September, 2017, the Deputy Speaker who again chaired the proceedings, informed Parliament that he had received two notices of motion relating to Constitutional amendment and that they would be referred to the Business Committee for re-scheduling. The first notice, together with the motion, was submitted by Hon. Patrick Nsamba Oshabe, Member of Parliament for Kassanda North.

On 26th September, 2017, the Speaker of Parliament, the **Rt. Hon. Rebecca Alitwala Kadaga**, however, amended the Order Paper to include the motion by Hon. Raphael Magyezi where he sought leave

of Parliament to introduce a private member's Bill to amend the Constitution and to amend Article 102 (b) of the Constitution removing the presidential age limit, among others.

Thereafter, the shadow Minister for Constitutional Affairs, Hon. Medard Lubega Sseggona questioned the Speaker as to why Hon. Raphael Magyezi's motion which was submitted on 21st September, 2017 was being placed on the Order Paper ahead of Hon. Patrick Nsamba's motion, which had been submitted prior, on 18th September, 2017, and had met all the requirements but the Speaker went ahead with her earlier stand on the matter.

In the course of the passage of the Bill in Parliament, more specifically at the stage of the second reading of the Bill, when the House was sitting as a Committee of the whole House, two separate motions were moved to amend the Bill. The first motion sought to amend the Constitution by extending the tenure of Parliament and Local Government Councils from five to seven years; with a rider provision that the amendment would be effective from 2016 when each of the two legislative organs assumed office. The other motion sought to reinstate the Presidential term limit, which a previous Parliament had lifted from the Constitution. As expected members of the opposition parties in Parliament, some independent members and a few ruling party members strongly opposed the move to have the Constitution amended. However, the majority of the Ruling NRM Party members supported the motion vigorously. The bill, after the aforementioned amendments was passed into law and assented to by the President on 27th December 2017. It became the Constitution

(Amendment) Act No. 1 of 2018 with its commencement date as 5th January 2018.

7 Aggrieved by the Constitution (Amendment) Act (No. 1) of 2018, nine petitions were filed under Article 137(3) of the Constitution and Rule 13 of the Constitutional Court (Petitions and References) Rules, S.I 91 of 2005 seeking various declarations, orders and other remedies. The Constitutional Court however dismissed four of them either due to the parties and their counsel being absent or voluntary
14 withdrawal of the petitions by the parties. The remaining five Constitutional Petitions were consolidated for the purpose of being heard and determined together due to the similarity of the issues each one raised.

The Petitioners' (now appellants') case was that the Amendment Act in question was enacted in violation of the Constitution both as to the content of its provisions and also as to the process through
21 which the same was enacted.

The respondent's response was that there was nothing unconstitutional about the Act, neither regarding its contents nor the process through which it was enacted by Parliament.

The Petitioners (now appellants) prayed for the following declarations:

a) The Constitution (Amendment) Act No.1 of 2018 be annulled
28 *having been passed in contravention of the procedural requirements laid down in the Constitution.*

b) *In the alternative but without prejudice to paragraph (1), Sections 2, 3, 5, 6, 7, 8, 9 and 10 of the Constitution (Amendment) Act No.1 of 2018 be annulled.*

c) *The inclusion of the extension of the terms of the 10th Parliament and the current Local Government Councils in the Constitution (Amendment) Act No.1 of 2018 without consultation with the electorate and following due process was unconstitutional and contravened* ***Articles 1, 8A and 259 (2) (a) of the Constitution.***

d) *The invasion and/or heavy deployment at the Parliament by the UPDF and Uganda Police Force and other militia in using violence, arresting, beating up and torturing Members of Parliament was unconstitutional and contravened* ***Articles 1, 8A, 23, 24, 29, 79, 208(2), 209, 211(3) and 212 of the Constitution***

At the joint scheduling conference held prior to the hearing of the consolidated petitions, the following issues were agreed upon namely;

1. *Whether sections 2 and 8 of the Act extending or enlarging of the term of life of Parliament from 5 to 7 years is inconsistent with and/or in contravention of Articles 1, 8A, 61(2) & (3), 77(3), 77(4), 79(1), 96, 105(1), 233(2)(b), 260(1) and 289.*

2. *And if so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 8A, , 77(3), 77(4), 79(1), 96 and 233 (2) (b) of the Constitution.*

3. *Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.*

4. *If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.*

5. *Whether the alleged violence/ scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.*

6. *Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as hereunder:-*

a) Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.

b) Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/ or in contravention of Article 93 of the Constitution.

c) Whether the actions of Uganda Peoples Defense Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining

the said Members is inconsistent with and/ or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.

7

d) Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/ or in contravention of Articles 29 (1) (a), (d), (e) and 29(2) (a) of the Constitution.

e) Whether the alleged failure to consult on sections 2, 5, 6, 8
14 *and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.*

f) Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2) (b) of the Constitution.

21

g) Whether the Constitution (Amendment) Act 2018 was against the spirit and structure of the Constitution under paragraph 12 of the National Objectives of State Policy.

7. Whether the alleged failure by Parliament to observe its own Rules of Procedure during the enactment of the Act was
28 *inconsistent with and in contravention of Articles 28, 42, 44, 90 (2), 90 (3) (c) and 94 (1) of the Constitution.*

a) Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of 2017 was inconsistent with and in contravention of the

provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

7

b) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition Members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

14 *c) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1),69 (2) (b), 71, 74, 75, 79, 82A, 83 (1) (g), 83 (3) and 108A of the Constitution.*

d) Whether the alleged act of the Legal and Parliamentary Affairs
21 *Committee of Parliament in allowing some committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.*

e) Whether the alleged act of the Speaker of Parliament in
28 *allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition Members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.*

f) *Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.*

g) *Whether the action of Parliament in:-*

i. *waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded.*

ii. *of closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every member of Parliament could debate on the said Bill.*

iii. *failing to close all doors during voting.*

iv. *failing to separate the second and third reading by at least fourteen sitting days are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.*

8. *Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.*

9. *Whether the Presidential assent to the Bill allegedly in the absence of a valid Certificate of Compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.*

10. Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2) (a) of the Constitution.

11. Whether section 9 of the Act, which seeks to harmonize the seven year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.

12. Whether sections 3 and 7 of the Act, lifting the age limit are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

13. Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 105 of the Constitution of the Republic of Uganda.

14. What remedies are available to the parties?

Findings of the Constitutional Court.

The court made the following findings;

By unanimous decision, the court found that sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extensions of the tenure of Parliament and Local Government Councils by two years, and for the reinstatement of the Presidential term–limits unconstitutional for contravening provisions of the Constitution.

That accordingly, sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, be struck out of the Act.

.By majority decision, the court further held that sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, which removed age limits for the President, and Chairperson Local Council V, to contest for election to the respective offices, and for the implementation of the recommendations of the Supreme Court in Presidential Election Petition No. 1; Amama Mbabazi vs Yoweri Museveni, have, each, been passed in full compliance with the Constitution; and therefore remain the lawful and valid provisions of Constitution (Amendment) Act No. 1 of 2018.

The Constitutional Court awarded professional fees of Ug Shs. 20m/= (Twenty million only) for each Petition (and not Petitioner). The Court however noted that this award did not apply to Petition No. 3 of 2018 since the Petitioner prayed for disbursements only, and Petition No. 49 of 2017 where the Petitioner appeared in person.

The Court further awarded two–thirds disbursements to all the Petitioners; to be taxed by the Taxing Master.

The petitioners were aggrieved by part of the decision of the Constitutional Court hence severally lodging appeals in this Court. The appellant in Constitutional Appeal No. 02 of 2018 lodged a memorandum of appeal containing 84 grounds of Appeal. The appellants in Constitutional Appeal No. 03 of 2018 on the other hand lodged a memorandum of appeal containing 24 grounds of appeal

and the appellant in Constitutional Appeal No. 04 of 2018 lodged a memorandum of appeal containing 3 grounds of appeal.

7 At the pre-hearing conference, the several appeals were consolidated into one appeal because of the similarities in their points of contention. The parties agreed that all the above grounds be reduced into the following issues;

1. **Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine?**
14 2. **Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing , consulting , debating and enactment of Constitutional (Amendment Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament. ?**
21 3. **Whether the learned Justices of the constitutional Court erred in law and fact when they held that the violence / scuffle inside and outside parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda. ?**
4. **Whether the learned justices of appeal erred in law when they**
28 **applied the substantiality test in determining the petition. ?**
5. **Whether the learned majority justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No.1 of 2018 on the removal of age limit for**

the president and local Council v offices was not inconsistent with the provisions of the 1995 Constitution. ?

7 **6. Whether the Constitutional Court erred in law and in fact in holding that the president elected in 2016 is not liable to vacate office on attaining the age of 75 years. ?**

7a. Whether the learned justices of the Constitutional court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities?

14 **7b. if so, what is the effect of the decision of the Court.**

8. What remedies are available to the parties?

<u>Representation</u>

The Appellant in Constitutional Appeal No. 02 of 2018 represented himself.

The appellants in Constitutional Appeal No. 03 of 2018 were represented by **Mr. Lukwago Elias and Mr. Rwakafuzi and assisted by**
21 **Mr. Mpenge Nathan and Mr. Nalukola Elias.**

The appellant in constitutional Appeal No. 04 of 2018 was represented by **Mr. Wandela Ogalo assisted by Mr. Moses Kiyemba.**

The respondent was represented by **William Byaruhanga, the Hon. Attorney General, Mwesigwa Rukutana, the Hon Deputy Attorney General, Mr. Francis Atoke the Solicitor General, Ms. Christine Kahwa the Ag. Director Civil Litigation, Mr. Martin Mwambutsya**
28 **Commissioner Civil Litigation, Mr. Phillip Mwaka, Principal State Attorney Mr. George Karemera, Principle Senior State Attorney, Mr.**

Richard Adrole, Senior State Attorney Mr. Geoffrey Madete State Attorney, Ms. Imelda Adongo, State Attorney, Mr. Johnson Natuhwera, State Attorney, Ms. Jacky Amusungut, State Attorney, Mr. Sam Tusubira, State Attorney and Mr. Allan Mukama, State Attorney.

Principles of constitutional interpretation relevant in this Appeal.

I shall adopt the principles of constitutional interpretation as set out in the judgement of Justice Kenneth Kakuru(JCC) which will guide me in resolving the raised issues;

They were laid as follows:-

1) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent with or in contravention of the Constitution is null and void to the extent of the inconsistency. See:- *Article 2(2)* of the Constitution. See:- also The Supreme Court decision in Presidential Election Petition No.2 of 2006 *(Rtd) Dr. Col Kiiza Besigye Vs Y.K. Museveni, Supreme Court Constitutional Appeal No.2 of 2006.*

2) In determining the constitutionality of a legislation, its purpose and effect must be taken into consideration. Both purpose and effect are relevant in determining constitutionality, of either an unconstitutional purpose or an unconstitutional effect animated by the object the legislation intends to achieve. See:- *Attorney General vs. Salvatori Abuki Constitution Appeal No. 1 of 1998.(SCU)*

3) The entire Constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness. See:- *P.K Ssemogerere and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 1 of 2002 and The Attorney General of Tanzania vs Rev. Christopher Mtikila [2010.].EA 13.*

4) A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation, keeping in view the ideals of the people, their socio economic and political cultural values so as to extend the benefit of the same to the maximum possible. See:- *Okello Okello John Livingstone and 6 others Vs The Attorney General and another, Constitutional Court Constitutional Petition No. 1 of 2005, Dr. Kiiza Besigye vs Attorney General: Constitutional Court Constitutional Petition No.1 of 2006 and South Dakota vs. South Carolina 192, U.S.A 268, 1940.*

5) Where words or phrases are clear and unambiguous, they must be given their primary, plain, ordinary or natural meaning. The language used must be construed in its natural and ordinary sense.

6) Where the language of the statute sought to be interpreted is imprecise or ambiguous, a liberal, generous or purposeful interpretation should be given to it. See: *The Attorney*

General Versus Major General David Tinyefuza, Supreme Court Constitutional Appeal No. 1 of 1997.

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7) The history of the Country and the legislative history of the Constitution is also relevant and a useful guide in constitutional interpretation. See: *Okello Okello John Livingstone and 6 others Versus the Attorney General and Another, Constitutional Court Constitutional Petition No.4 of 2005.*

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8) The National Objectives and Directive Principles of State Policy in the Constitution are also a guide in the interpretation of the Constitution.

9) In searching for the purpose of the Act, it is legitimate to seek to identify the mischief sought to be remedied by the
21 legislation. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We are obliged to understand the provisions within the context of the ground to detect if any, of the related provisions and of the Constitution as a whole, including the underlying values of the Constitution are promoted and protected. Although the text is often the
28 starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

10) In construing the impugned provisions, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights. We are obliged to pursue an interpretation that permits development of the law and contributes to good governance. See:- *Apollo Mboya Vs Attorney General and others* (Supra).

11) It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone. All constitutional provisions bearing upon a particular subject are to be brought into view and interpreted as to effectuate the greater purpose of the instrument. See: *Smith Dakota Vs North Carolina, 192 US 268(1940)*.

12) The duty of a court in construing statutes is to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in *Article 8A(1)*.

See:- *Apollo Mboya Vs Attorney General and others, High Court of Kenya, Constitutional and Human Rights Division Petition No. 472 of 2017.*

Bearing the above principles in mind, I shall now proceed to consider the parties' submissions and resolve the issues in contention. I shall resolve the issues in the order of presentation.

i.e. Issue No.1,2,3 ,4, 5,6, 7and lastly 8 simultaneously.

Before I proceed with the discussion of the merits of the issues raised in this appeal, I have to deal with preliminary objections raised by the parties. The first one was raised by Mr. Mabirizi who objected to the written submissions of the Attorney General on the ground that it was presented outside the scheduled time frame directed during the pre-hearing session. We considered this objection and found that under Rules 2 (2) of our Rules, we should in the interest of justice to both parties, validate the submissions to enable the matter to be heard on its merits.

The 2nd objection arose from the Attorney General who objected to the entire memorandum of appeal filed by Mr. Mabirizi offended Rule 82 of the Supreme Court Rules.

The 2nd objection by the Attorney General was that the petition by Mr. Mabirizi did not conform to the requirements under Article 137 of the Constitution.

Mr. Mabirizi opposed the objections vehemently.

After pursuing the submissions of the parties on the above objections and considering the importance of the matter before Court, I found that the objections should not succeed.

It is true that under Rule 82, this Court does not allow grounds which are argumentative and narrative to stand:- see **Hwang Sung Ltd v M & D Timber Merchandise and Transporters Ltd C.A No. 2 of 2018 (SC).**

It is true from the perusal of Mabirizi grounds of appeal that he raised 84 issues, some of which are argumentative and narrative. However, this objection was raised very late in the proceedings. It should have been raised during the pre-hearing stage.

This court should not forget that this petitioner is a lay person although he is a trained lawyer. As a Court of Justice and of last resort I would not strike out this appeal. That would tantamount to punishing the litigant other than doing justice.

With regard to Article 137 of the Constitution, it is my view that the petition clearly conforms to the same in that it clearly describes the act or omission complained of and the provisions of the Constitution which have been offended: see **ISMAIL Serugo v KCCA and another SCCA NO. 2 OF 1998.**

For the above reasons, I overrule the preliminary objections.

Issue no.1

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine?

Appellants' submissions

This issue was submitted on only by the appellants in Constitutional Appeal No.03 of 2018.

Counsel submitted that the thrust of the basic structure doctrine is that it attempts to identify the philosophy upon which a constitution

is based. He explained that the Basic Structure doctrine has also been instrumental in shaping the constitutional jurisprudence of different countries across the world. Counsel relied on the case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC** where it was held as follows; **"According to the doctrine, the amendment power of Parliament is not unlimited; rather it does not include the power to abrogate or change the identity of the constitution or its basic features."** The other case is **Minerva Mills v. Union of India, AIR 1980 SC 1789,** where court unanimously held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a Constitution.

He further quoted a case in Taiwan, the Council of Grand Justices of Taiwan announced interpretation No. 499 and stated that; **"Although the amendment of the Constitution has equal status with the Constitutional provisions, any amendment that alters the existing constitution concerning governing norms and order, and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the constitution itself. As a result such amendment shall be deemed improper."**

Bangladesh, in the case of **Anwar Hossain Chowdhury vs Bangladesh 10 41 DLR 1989 App Div 169**, the supreme court held:- **"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament… Because the amending power is power given by the Constitution to Parliament and nevertheless it is a power within and not outside the Constitution".**

In South Africa, the South African Constitutional Court in the case of **Executive Council of Western Cape Legislature Vs The President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995)** while discussing the applicability of the basic structure doctrine noted as follows:- **"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case; could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."**

In Kenya, the court of Appeal in the case of **Njoya vs Attorney General and Others (2004) AHRLR 157** held that:- "Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity or the existence of the Constitution attained."(Sic)

Counsel contended that the learned justices of the Constitutional Court misconstrued the application of the basic structure doctrine when they held that the qualifications of the President or Chairpersons of the District Local Government do not form part of the basic structure doctrine and as such Sections 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. He submitted that the learned Justices accorded the basic structure doctrine a narrow and restrictive application when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of parliament and not to the age limit

Counsel for the appellant further associated himself with the finding of **Kakuru JCC** that the question of whether or not the doctrine of basic structure applies, depends on the constitutional history and the Constitutional structure of each country. He relied on the **dissenting judgment of Kasule, JA in Saleh Kamba & others Vs. Attorney General & others; Constitutional Petition No. 16 of 2013** wherein the learned Justice held that in interpreting a constitution, court ought to take into account the history of a given country.

He further urged this court to adopt the observations of Justice Kakuru JCC on what constitutes the basic structure of the 1995 Constitution.

Counsel argued that the majority justices of the constitutional Court overlooked the pillars of the 1995 Constitution which are reflected in the preamble to the constitution. He submitted that courts in various jurisdictions relied on the preamble of the various constitutions to determine the basic structure of the constitutions. He cited cases

such as **British Caribbean Bank v The Attorney of Belize Claim No. 597/2011**, **Kesavananda case(supra)** and **Minerva case(supra)** inter alia.

Counsel therefore invited this honourable court to take cognizance of the fact that the framers of the 1995 constitution deemed it necessary to enshrine within the text of the constitution such provisions as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well as in the National Objectives and Directive Principles of State Policy. He added that age limit was among the provisions designed to guarantee orderly succession to power therefore its amendment/ removal destroyed the basic features of the 1995 Constitution.

Counsel submitted that aside from being part of the basic structure of the 1995 constitution, Article 102 (b) was also intended to place the destiny of this country in the hands of a mature but not very old president; one who falls within the bracket of 35 to 75 years. That the framers recognized the dangers of entrusting the state structure in the hands of a teenager of, say, 18 years or a frail elder of, say, 90 years as the Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour.

Finally on this issue counsel prayed that this honourable court be pleased to answer issue 1 in the affirmative.

Respondent's submission.

Counsel submitted that the learned Justices of the Constitutional
7 Court correctly found that sections 3 and 7 of the impugned Act do not derogate from the Basic Structure of the 1995 Constitution.

Counsel argued that the doctrine was defined in the case of **Kesavananda Bharati vs. The State of Kerala Petition (Civil) 135 of 1970;(A.I.R 1973 SC 1461) Vol 5 Tab DD page 64,** where **S.M. Sikri, C. J** defined the Basic Structure in the following terms:

"The basic structure may be said to consist of the following features:

14 *1. Supremacy of the Constitution;*

2. Republican and Democratic form of Government;

3. Secular character of the Constitution;

4. Separation of Powers between the Executive;

5. Federal character of the Constitution;

Counsel contended that the Constitutional Court unanimously found that the framers of the 1995 Constitution clearly identified provisions
21 of the Constitution which are fundamental and form part of the Basic Structure of the 1995 Constitution. He explained that the framers carefully entrenched these provisions by various safeguards for protection against the risk of abuse of the Constitution by irresponsible amendment of those provisions.

According to counsel, the Safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament,

and a referendum, in fulfilment of the provisions of Articles 260 and 261 of the Constitution.

7 Counsel contended that Articles 69, 74(1), 75, 260 and 261 of the 1995 Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. That only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

He argued that the Constituent Assembly that took a considerable
14 amount of time to debate and eventually include the peoples' views in what eventually became the 1995 Constitution, was alive to the fact that our society is not static but dynamic and over the years, there would arise a need to amend the Constitution to reflect the changing times.

He further contended that Article 79 of the 1995 Constitution primarily gives Parliament the power to make laws that promote
21 peace, order, development and good governance in Uganda.

He further stated that Article 259 of the Constitution empowers the parliament to amend the Constitution in accordance with the procedure laid down in Chapter Eighteen.

Counsel submitted that it was therefore within the powers of Parliament to enact sections 3 and 7 of the Constitutional Amendment Act 1/2018 into law and this did not in any way
28 contravene the basic structure of the Constitution neither was it inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

Counsel submitted that no wonder the majority justices of the Constitutional court held that Sections 1, 3 and 7 of the impugned Act were enacted within the reach of the amending powers of the parliament.

In conclusion, counsel prayed that this court upholds the majority justices' observation that Article 102(b) does not form part of the basic structure of the i995 constitution.

Court's Considerations.

The gist of this issue and question for this court to answer is whether Article 102(b) of the Constitution forms part of the basic structure of the 1995 constitution of the republic of Uganda. The basic structure doctrine is well laid in the locus classicus case of **Kesavananda Bharati Versus State of Kerala, AIR 1973 SC** where court observed as follows;

"According to the doctrine, the amendment power of Parliament is not unlimited; <u>rather it does not include the power to abrogate or change the identity of the constitution or its basic features</u>."

The basic structure of a Constitution was said by court in that case to include the following;

1. **Supremacy of the Constitution;**
2. **Republican and Democratic form of Government;**
3. **Secular character of the Constitution;**
4. **Separation of Powers between the Executive;**
5. **Federal character of the Constitution;**

Basic structure is to the effect that an amendment of the constitution should not alter or destroy the foundation upon which the constitution lies and that parliament has to operate within its powers from within the constitution. Such features that form the foundation of the constitution are so fundamental that even if parliament followed the right procedures of conduct, it just cannot amend them. A basic structure feature is one such that its amendment could be like redrafting the constitution. I associate with the observations of Justice Chowdhury in the case of ***Anwar Hossain Chowdry*** case (supra) where he stated thus:

"Call it by any name- 'basic feature' or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself – namely the Parliament ... Because the amending power is but a power given by the Constitution to Parliament, it is a higher power than any other given by the Constitution to Parliament, but nevertheless it is a power within and not outside the Constitution.

The Basic structure doctrine is basically the identity of the constitution. Courts are the guardians and interpreters of the Constitution and are the arbiters of all the amendments made by Parliament. Amendment of the constitution was/is provided for in the constitution to enable the people overcome the difficulties which may be encountered in future. Times change with the variance in the social, economic and political conditions of the people thereby requiring an amendment to carter for the changing needs. The powers to amend the constitution are a strict preserve of the legislature however, the constitution has features that can never be

amended by the parliament. Courts have the mandate to strike down constitutional amendments and Acts of parliament enacted by the Parliament which seek to alter the basic structure of the constitution.

Findings of the lower court.

Kakuru JCC made a finding that;

In this regard therefore, I find that the basic structure doctrine applies to Uganda's Constitutional order having been deliberately enshrined in the Constitution by the people themselves. My view expressed above is fortified by the following provisions of the Constitution.

Articles 1 and 2: These Articles establish the foundation of the Constitution upon which all other Articles are anchored therefore in my view cannot be amended, not even by a referendum. Doing so would offend Article 3(4).

Article 3. This article is really unique, and I have not seen or known of any other Constitution with a similar Article, which effectively renders inapplicable to Uganda the Kelsen Theory of pure law. Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been enacted through a flawless procedure. I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the constitutionality test."

Justice Owiny Dollo observed that:

"…Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the

Constitution, I am unable to fault it for the process it took to effect these amendments.

Justice Remmy Kasule held that;

"…The framers of the 1995 Constitution that is the Constituent Assembly, in their wisdom saw it fit to have the age limits of one who is to stand for election as President of Uganda, under the category of the qualifications of the President. They provided for these qualifications under Article 102 of the Constitution. They did not put this Article 102 amongst those Articles that have to be amended after first getting the approval of Ugandans through a referendum.'' (N.B: This decision is reflected in issue 5)

Justice Elizabeth Musoke held that;

"….I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 181 are not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution.

Justice Cheborion Barishaki also held that those section the amended

Article 102 is not part of the basic structure of the constitution.

I associate with Justice Kakuru's observation as to what constitutes the basic structure of the constitution of the republic of Uganda. He observed as inter alia as follows;

"1. **The sovereignty of the people of Uganda and their inalienable right to determine the form of governance for the Country.**

2) The Supremacy of the Constitution as an embodiment of the sovereign will of the people, through regular free and fair elections at all levels of political leadership.

3) Political order through adherence to a popular and durable Constitution.

4) Political and constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation.

5) Arising from 4 above, Rule of law, observance of human rights, regular free and fair elections, public participation in decision making at all levels, separation of powers and accountability of the government to the people.

6) Non-derogable rights and freedoms and other rights set out in the extended and expanded Bill of Rights and the recognition of the fact that fundamental Rights and Freedoms are inherent and not granted by the State.

7) Land belongs to the people and not to the government and as such government cannot deprive people of their land without their consent.

8) Natural Resources are held by government in trust for the people and do not belong to government.

9) Duty of every citizen to defend the Constitution from being suspended, overthrown, abrogated or amended contrary to its provisions.

10) Parliament cannot make a law legalizing a one-party state or reversing a decision of a Court of law as to deprive a party."

Article 102(b) provides that

Qualifications of the President;

A Person **is not qualified from elections as a president** unless that person is;

a) A citizen of Uganda by birth.

b) Not less than thirty five years and not more that seventy five years of Age.

c) A person qualified to become a Member of Parliament.

(Emphasis mine)

This article was meant to provide for the minimum and the maximum age within which one can qualify to become president of Uganda. The appellants submitted that court should read Article 102(b) in line with the preamble of our constitution. The preamble reads as follows;

The Preamble.

WE THE PEOPLE OF UGANDA:

RECALLING our history which has been characterised by political and constitutional instability;

RECOGNISING our struggles against the forces of tyranny, oppression and exploitation;

COMMITTED to building a better future by establishing a socio-economic and political order through a popular and durable

national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;

EXERCISING our sovereign and inalienable right to determine the form of governance for our country, and having fully participated in the Constitution-making process;

NOTING that a Constituent Assembly was established to represent us and to debate the Draft Constitution prepared by the Uganda Constitutional Commission and to adopt and enact a Constitution for Uganda:

DO HEREBY, in and through this Constituent Assembly solemnly adopt, enact and give to ourselves and our posterity, this Constitution of the Republic of Uganda, this 22nd day of September, in the year 1995.

FOR GOD AND MY COUNTRY."

I agree that preamble expounds on what the basic structure of this constitution is by highlighting the struggles Uganda has been through in the past due to the various undemocratic governments that were subjected to its people. I however observe that the Article 102(b) doesn't constitute a salient feature of our constitution. I believe that the scrapping of the age limits from the constitution created desperation from the people to hang on to Article 102(b) as a ray of hope to prevent the history that was tainted with leaders for life repeating itself. Be that as it may, the framers of the Constitution constructed the provision to gauge the age appropriate for one to be entrusted with the office of the presidency of this great nation and not as a safeguard of against impunity of leaders or a determinant in the form of governance of this country.

I agree with majority of the lower court justices that the Articles that cannot be amended by the Parliament were entrenched under Article 260 of the Constitution and that Article 102(b) was not part of them.

I do not agree that with the contention that removing the age limit would put this country at the risk of having leaders who would be either too young or too old to rule. The rail guard is Article 2 which grants power to choose leaders on the people of Uganda. In any case, our historical problems have not been that to past leaders have been either too young or too old.

I therefore hold that Section 3 of the Constitutional Amendment Act No.1 of 2018 does not constitute the basic structure of the 1995 constitution of the Republic of Uganda. The issue is hereby answered in the negative.

Issue Two

- **Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing , consulting , debating and enactment of Constitutional (Amendment Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament.**

Appellants' submissions on issue two;

Counsel submitted that the procedure and manner of passing the entire Constitution (Amendment) Act No. 1 of 2018 was flawed and/or tainted with illegalities, procedural impropriety in violation of

Articles 28, 42, 44, 79, 91, 92 and 259 of the Constitution and the Rules of Procedure of Parliament.

7 Further that Parliament breached its duty under Article 94 to follow the provisions of the Constitution and its own Rules of procedure. He cited the case of **Oloka Onyango & 9 Ors vs Attorney General [2014] UGCC 14** and **Law Society of Kenya vs Attorney General & Anor [2016] eKLR** where court emphasised that when any of the stages in the procedure of enactment of a law is flawed, then that vitiates the entire process and the laws that emerge therefrom.

14 The parties highlighted the procedural irregularities in contention and submitted on them separately as follows;

Charge on the Consolidated Fund contrary to Article 93 of the Constitution

<u>Appellants' submissions</u>

The appellant's main contention was that it was erroneous for the Constitutional Court after making a finding that the impugned Act
21 violated the provisions of Article 93 of the constitution and later declined to nullify the entire Act on ground that the non-compliance only affected Sections 2, 6, 8 and 10 of the impugned Act. Counsel stated that the said Sections which were introduced by way of amendments imposed a charge on the consolidated fund.

Counsel submitted that having found some of the provisions in the challenged Act contravened Article 93 of the Constitution, the
28 Constitutional Court would have come to no other conclusion than nullifying the whole Act.

He explained that the words "**Parliament shall not proceed**" contained in Article 93 of the constitution should be given their ordinary meaning that they simply prohibit Parliament from proceeding on a Bill or motion. That the words in their ordinary interpretation mean "**to Stop, Do not go forward".** Parliament proceeded with debating the Bill, voted on the bill and passed it and the same Bill was then sent to the President for assent.

Counsel argued that whether the offending provisions are later found to be unconstitutional does not change the fact that Parliament proceeded with the Bill and motion in contravention of the Constitution.

Counsel contended that the provisions of the Constitution deal with a Bill. The Speaker was required under Rule 113 (2012 Rules) to make a ruling. That it was the responsibility of the Speaker to decide whether a bill contravened Article 93 to which she ruled that Article 93 was not applicable because the House was dealing with a committee report and not the Bill. Counsel submitted that at that moment, the house was proceeding under a motion for second reading and as such Article 93(b) was applicable.

That the House debated the motion and the Speaker reminded members that she had earlier put the question that the bill be read for the second time and called for a vote and the members voted. Counsel argued that that amounted to proceeding and making a decision on a motion. Counsel submitted that when Hon. Tusiime brought in the amendments to enlarge the terms of both parliament and local councils, the Speaker ought to have made a ruling striking those amendments out and informing the House that the hands of

Parliament were tied by the Constitution and they could not proceed with debate in respect of the motions introduced by Hon. Tumusime. Instead, the Speaker allowed the matter to proceed to debate and at the end she put the question and members voted on a motion which created a charge on the Consolidated Fund.

Furthermore, counsel argued that the report of the committee of the whole House contained the provisions which created a charge on the Consolidated Fund. Hon. Magyezi moved a motion for adoption of the report.

Counsel also faulted the Constitutional Court for not addressing its mind to the provisions of the Constitution and the Public Finance Management Act and thereby came to the wrong conclusion that section 3 of the impugned Act did not create a charge on the consolidated fund.

He stated that Section **76** of the **Public Finance Management Act** requires every Bill introduced in Parliament to be accompanied by a certificate of financial implications which indicates the estimates of revenue and expenditure over a period of two years after coming into effect of the Bill when passed into law.

He explained that the Certificate of Financial Implications in respect of the Bill states that the planned expenditure will be accommodated within the medium term expenditure framework for ministries, departments and agencies concerned. In so stating, the minister appears to concede that the Bill will have some sort of expenditure. The Minister then states whether there are no additional financial obligations beyond what is provided in the

medium term. Expenditure framework "medium term" is defined in the Act as a period of three to five years.

Counsel submitted that a medium term expenditure framework is a primary document which contains the consensus on policies, reform measures, projects and programmes that Government is committed to implementing during a specific period of between three and five years. It draws on a larger objective such as vision 2025. It may identify priority areas scheduled for implementation during the period, specify economic growth percentage, expected policy goals, project sources of financing etc. In short, it is just a plan.

Counsel stated that the Consolidated Fund is provided for in **Article 153** of the **Constitution** and **Section 2** of the **Interpretation Act**.

Counsel submitted that Section 76 of the **Public Finance Management Act** was ignored and not used to determine whether the Bill created a charge on the Consolidated Fund under Article 93 of the Constitution. That therefore the court erred when it whole heartedly embraced the Certificate of Financial Implication as the test of whether the Bill created a charge on the Consolidated Fund.

In respect to the 29 million facilitation, counsel argued that **Article 156** of the **Constitution** requires Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill "which shall be introduced into Parliament to provide for issue from the Consolidated Fund of the sums necessary to meet that expenditure ...."

Article 154 of the **Constitution** also provides that no monies shall be withdrawn from the Consolidated Fund except….where the issue of those monies has been authorized by an Appropriation Act."

That the Appropriation Act is in this respect a conduit from the Consolidated Fund. Counsel submitted that it was erroneous for the Constitutional Court to hold that the 29 million did not come from the Consolidated Fund but the account of Parliament. The decision to pay that money was a result of the Motions for the 1st and 2nd second reading of the Bill. Those Motions therefore had the effect of removing 29 million shillings from the Consolidated Fund albeit unconstitutionally.

Counsel further stated that to hold otherwise would mean that expenditure on Magyezi bill was provided for in the 2016/17 Budget since it was introduced in September 2017. That it would mean that at the time of preparing the budget estimates in 2016 Parliament was aware of this bill and made provision for it which does not seem logical. The logical conclusion is that the Ministry of Finance provided the money. If it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act. The burden to do so lay with the Respondent but it failed to do so.

Counsel invited this Court to make a finding that this exgratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

Respondent's submissions.

The Attorney General begun by pointing out that Article 93 of the Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill, except when introduced on behalf of the or by Government, that had financial implications as provided therein.

The Attorney General pointed out that the above notwithstanding, Article 94 of the Constitution guaranteed the right of a Member of Parliament to move a private member's bill. Relying on the decision of this Court in **P.K. Ssemwogerere & Anor Vs Attorney General, Constitutional Appeal No. 1 of 2002**, the Attorney General submitted that the above two provisions of the Constitution had to be construed harmoniously with each sustaining the other and not destroying the other.

The Attorney General submitted that pursuant to Article 94 of the Constitution, Parliament made Rules of procedure governing the way it conducted business. Referring this Court to Rule 117 of the Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial Implication. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implication and did not contravene Article 93 of the Constitution.

The Attorney General further contended that Rule 117 of the Rules of Procedure of Parliament was in *pari materia* with Section 76 of the Public Finance Management Act, 2015.

Having laid out the legal provisions above, the Attorney General submitted that the evidence on record [at page 601 para 8 Vol 1] shows that on 27th September 2017, the Hon. Raphael Magyezi, a Member of Parliament representing Igara County West constituency, tabled in Parliament a motion for leave to introduce a private Members' Bill titled The Constitution (Amendment) (No. 2) Bill of 2017.

The Attorney General further submitted that evidence [at page 613 para 26 Vol 1 of the record] shows that the Hon. Raphael Magyezi moved the House so that the bill could be read for the first time and the same was seconded and laid on the table of Parliament, accompanied by a Certificate of Financial Implications as required under section 76 of the Public Finance Management Act, 2015 and the Rules of Procedure of Parliament.

The Attorney General was emphatic that Parliament only proceeded with the bill presented by the Hon. Raphael Magyezi after the Rt. Hon. Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that this position was confirmed by the Constitutional Court. The Attorney General referred this Court to the Judgment of Kasule, JCC and quoted the learned Justices holding thus:

> *"This Court accepts this Certificate of Financial Implications as being valid in law as a correct certification by Government, through the Ministry of Finance, that the proposed amendments in the original Bill satisfied the provision of Article 93 of the Constitution, the Public Finance Management Act and the appropriate Rules of Parliament."*

The Attorney General further referred to the same Judgment of Kasule, JCC at page 257 para 1738 of the record, were his lordship observed as follows:

> *"Article 93 of the Constitution and Section 76 (1) of the Public Finance Management Act, 2015 compulsorily require every Bill presented to Parliament to be accompanied by a certificate of financial implications from the Minister of Finance.*

The Attorney General also referred us to the Judgment of Cheborion, JCC [at page 614 para 21 of the record/ where his lordship held thus:

> *"As a consequence, I find that the Bill which was introduced by Hon. Magyezi in respect of amendment of Article 61, 102, 104 complied with the requirements of Article 93 of the Constitution and section 76 of the Public Finance and Management Act 2015 while the amendments introduced by Hon. Nandala Mafabi and Hon. Tusiime did not comply."*

Lastly, the Attorney General referred this Court to the Judgment of Kakuru, JCC [at page 458 para 12 Vol 4 of the record] where his Lordship held as follows:

> *"None of the Petitioners presented any serious challenge to the constitutionality of the original Bill as first presented. I have already found that it was not in contravention of or inconsistent with Article 1, 2 and 8A of the Constitution. There was evidence that a Certificate of Financial Implications was properly obtained and was indeed available before the motion to introduce the said bill was proceeded with upon in Parliament."*

The Attorney General also pointed out that a similar position was reached by Musoke, JCC in her judgment [at page 707 para 1401 Vol. 4 of the Record of Appeal.]

Having highlighted the findings of the Constitutional Court as indicted above, the Attorney General submitted that the Justices of the Constitutional Court were right to strike out the provisions of the impugned Act that did not comply with the Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of severance.

The Attorney General invited this Court to uphold the decision of the Constitutional Court that the Bill presented by Hon. Magyezi did not contravene Article 93 of the Constitution.

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination [at pages 309 Vol. 3 of the Record], the Clerk to Parliament ably pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that the said facilitation to Members of Parliament did not make the enactment of the impugned Act inconsistent with Article 93 of the Constitution

In conclusion, the Attorney General submitted that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government that made provision for financial implications. In his view, the Article did not concern itself

with the money used in processing the bill, allowances/facilitations that was paid out to the Members of Parliament to process the Bills.

7 The Attorney General invited this Court to uphold the learned majority Justices' decision that the money given to members of Parliament as facilitation did not contravene Article 93 of the Constitution.

Court's consideration

Article 93 of the Constitution reads as follows;

Restriction on financial matters.

14 **Parliament shall not, unless the bill or the motion is introduced on behalf of the Government;**

(a) Proceed upon a bill , including an amendment bill, that makes provision of the following;

(i) ……..

(ii)The imposition of a charge on the consolidated fund or other public fund of Uganda or the alteration of any such charge

21 **otherwise than by reduction.**

(iii) ……

(iv) ……

(b) Proceed upon a motion, including an amendment to the motion, the effect of which would make provision for any of the purposes specified in paragraph (a) of the article.

Section 76 of the Public Finance Management Act provides for cost

28 estimates of Bills introduced in Parliament. It is emphatic that every bill introduced in Parliament shall be accompanied by a Certificate

of Financial Implications issued by the Minister. The requirement of a Certificate of Financial Implications is also stated in the Rules of Procedure of Parliament of Uganda. See Rule 107 of the Rules.

From the submissions above and in due consideration of the holdings of the Constitutional court on the same, i shall proceed as follows. Both parties are aware of the financial limitations paused by the constitution in regards to bills introduced by private members. The appellants claim that the constitutional court having held that the amendments created a charge on the consolidated fund by reduction could not have held that it is only the offending sections of the bill that are unconstitutional. The constitutional court relied on the doctrine of severance to separate the parts of the Act which offended Article 93 and saved the remaining parts of the Act. A detailed analysis on severance is in my considerations on issues 5 and 8. Be that as it may, I believe that the question here is whether at the time of the introduction of the bill it offended the Constitution.

The records show that on 3/10/2017, Hon. Rapheal Magyezi laid on the table the Constitution amendment No. 2 bill of 2017. The same was duly accompanied by a Certificate of Financial Implications from the Minister as required by law. The Certificate was issued on 28/9/2017.

The Magyezi bill had the following objectives:-

1. To amend the Constitution of the Republic of Uganda with Articles 259 and 262of the Constitution.

a) To provide for the time within which to hold Presidential, Parliamentary and Local Government Council Elections under Article 1.
b) To provide for eligibility requirements for a person to be elected as President or District Chairperson under Article 102 (b) and 183 (2) (b),
c) To increase the no of days within which to file and determine a Presidential Election under Article 104 (2) 8 (3);
d) To increase the number of days within which the electoral Commission is required to hold a fresh Elections where a Presidential Election is annulled under Article 104 (6); and
e) For related motion introducing the above bill was seconded and justified and accordingly brought for 1st reading.

It is not in dispute that on 29/9/2017 the proposed bill was published in the Gazette and on the same day a Certificate of Financial Implication was issued by the Hon. Minister of Finance. After 2nd reading the bill proceeded to the Committee of the whole House where each clause was debated.

It was at this stage that new clauses were introduced which related to extension of two years and also the extension of the term of Local Government by two years and the reintroduction of Presidential term limits.

From the above analogy, I find that the majority of the Justices of the Constitutional Court were right to hold that at the time of proceeding with the Bill tabled by Hon, Magyegi, the same did not offend the Article S 79 of Act Financial Management Act and the Rules of Procedure of Parliament.

The provision that created a change on the consolidated fund were introduced much later and did not amount to an amendment of the Bill. The term amendment implies such an addition or change within the lines of the original instrument as will affect an improvement or better carry out the purpose for which it was framed, see Anwar Hossain (supra).

In my view, the Constitutional Court was right to sever the above provisions as they were strangers to the Magyezi's bill.

With regard to the 29,000,000/= I entirely agree with the Attorney General the same did not amount to a fresh charge on the Consolidated Fund Evidence adduced by the Secretary to the Treasury and the Clerk to Parliament was to the effect that the above sum had already been appropriated for use by the Parliament. It was now drawn from the Consolidated Fund.

Act 93 of the Constitution does not concrn itself with money used in processing the bill like allowances/facilitations paid to members of Parliament to process the Bills.

In conclusion, I find that the learned Justices of the Constitutional Court were right to conclude that the original bill by Hon. Magyezi was not inconsistent with Article 93 of the Constitution, Section 79 of FMA and Rule 107 of the Rules of Parliament.

Suspension of MPs

Appellants' submissions

On the Suspension of some members of parliament and other illegalities committed by the speaker during the Parliamentary sitting of 18th December 2017, counsel submitted that on the 18th December 2017 when parliament convened to consider the report of the legal and parliamentary affairs committee, three honourable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling and instead arbitrarily suspended the 1st, 2nd, 3rd, 4th and 5th Appellants and other Members of Parliament from parliament in contravention of Article 1, 28(1), 42, 44 (c) and 94 of the Constitution.

He argued that the Hansard clearly showed that Hon Theodore Sekikuubo brought to the attention of the speaker the fact that the report of the Committee on Legal and Parliamentary affairs was fatally defective since non Members to wit; Hon. Akampurira Prossy Mbabazi and Hon. Lilly Akello, who both sat on the committee of Defence and Internal Affairs had signed it. Whereas Hon. Ssentamu Robert and Hon. Betty Amongi raised another point of procedure that the matter concerning the impugned Bill was before the East African Court of Justice and that proceeding with the same would amount to breach of the subjudice rule, however the Rt. Hon. Speaker declined to pronounce herself on the matter and instead adjourned the proceedings. Before Members could leave the chambers, the Speaker made an arbitrary order suspending the 1st to 5th Appellants together with another MP without assigning any

reason whatsoever as required under the Rules nor did she state the offences committed.

Counsel argued that these illegalities were elaborately presented before the Constitutional Court but the court held that the participation of the new members that were added to the Committee, even if irregular, cannot invalidate the Committee report because even if their number was deducted, the majority report still had enough signatures to pass it and that the action taken by the Speaker to suspend certain Members of the House from participating in the proceedings in the House was due to the fact that the suspended members had defied the Speaker and disrupted the proceedings in the House; thus provoking the wrath of the Speaker.

Counsel submitted that the learned Justices of the Constitutional Court misdirected themselves on matters of law and fact. The Speaker grossly violated the Rules of Procedure of Parliament and that she did not accord the said MPs a fair hearing before suspending them; she did not assign any reason for their said suspension; and that she acted ultra vires since she was functus officio at the time she pronounced her arbitrary decision suspending the said MPs. Counsel submitted further that by virtue of the illegal suspension of the MPs, the speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

Respondent's case

The Attorney General contended that Rule 7 of the Rules of
7 Procedure of Parliament provided for the general power of the Speaker. He argued that under Rule 7(2), the Speaker had an obligation to preserve order and decorum of the House. Further that Rules 77 and 79(2) give the Speaker powers to order any members whose conduct is grossly disorderly to withdraw from the house. Furthermore that under Rule 80, the Speaker is permitted to name the member who is misbehaving and that under Rule 82 the Speaker
14 has power to suspend the member from the service of the House.

The Attorney General pointed out that the matter of suspension of the Members of Parliament was ably canvassed in the Affidavit of the Clerk to Parliament [at Paragraphs 17- 23, page 612-613 record].

Relying on the Judgments of Musoke, JCC [at page 737]; Owiny Dollo, DCJ [at Page 171-172]; Cheborion, JCC [at page 632] and Kasule, JCC [at pages 263-264], the Attorney General submitted that
21 the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and disruptive to withdraw from Parliament and the Speaker properly did so.

The Attorney General further pointed out that once a Member who conducted him/herself in a disorderly manner was suspended, Rule 89 required that such a member had to immediately withdraw from
28 the precincts of the House until the end of the suspension period. The Attorney General also argued that Rule 88 (4) gives guidance on the period of suspension of a member and that it requires that a

Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. The Attorney General placing reliance on Rule 88(4) argued that the 3 sittings for which the member was suspended started running from computed from the next sitting of Parliament.

In light of his submission, the Attorney General submitted that the Appellant misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances in this case. He argued that going by the Appellant's arguments, it would be absurd that a Member who was found by the Speaker to have conducted himself in a disorderly manner in the House and is therefore suspended from the services of the House, is then allowed to remain in the House for the day's sitting.

As far as the right to fair hearing was concerned, the Attorney General submitted that Rule 86(2) of the Rules of Procedure of parliament provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the house, except upon a substantive motion made after notice which in the instant case was not made by the suspended Members.

Regarding the contention that the speaker while suspending the Members was out of her chair, the Attorney General submitted that this was not true. In support of his contention, he referred to the hansard of 18th December 2017 [at page 726 of the record] of appeal where the speaker said

> "... I suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended…"

The Attorney General further submitted that the reason for suspension was at page 731 of the record of appeal.

7 The Attorney General submitted that under Article 257 (a) of the Constitution as well as under Rule 2(1) of the Rules of procedure of Parliament, '*sitting'* is defined to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee. Furthermore, that Rule 20 of the rules of Procedure of Parliament provides that the Speaker may at any time suspend a sitting or adjourn the house.

14 In light of this, the Attorney General contended that the Speaker only suspended the sitting to 2.00 O' clock and did not adjourn the house, hence there was a continuous sitting and therefore she was not functus officio.

In conclusion on this point, the Attorney General submitted that the Speaker properly acted within her mandate to suspend Members of Parliament for their unparliamentarily conduct. Further , that there is
21 no evidence to show that the suspended Members of Parliament moved a substantive motion challenging their suspension. He prayed that the findings of the Justices of the Constitutional Court be confirmed.

Court's considerations

The contention is the legality of the suspension. The speaker suspended the MPs on the basis of the powers conferred upon her in
28 Rules 7(1) and 2, 77,79,80,86 and 88.

Rule 82(1) c of the Rules of Procedure of Parliament provide that;

"While a Member is speaking, all other Members shall be silent and shall not make unseemly interruptions."

Further, Rule 84 is to the effect that in all other matters, the behaviour of members shall be guided by the code of conduct of members of parliament prescribed in appendix F. Rules 87, 88 and 89 provide for circumstances under which a member may be suspended from the House and the procedure to be adopted by the speaker.

The speaker has the obligation to ensure decorum and orderly proceedings in the House. The hansards reflect the situation in the House on the fateful day. Tempers were so high and many members were acting contrary to their expected manner in the House and it is my view that the speaker did suspend some members in accordance with the Rules mentioned herein. Once the conduct of a member is disruptive of the proceedings and is deemed to offend the decorum of the House, the Speaker has the authority to suspend the said Members.

It is trite that Members of Parliament are expected to behave in a Honourable manner to the House and themselves. This was observed by the Constitutional Court in **Severino Twinobusingye VS Attorney General, Constitutional Petition No. 47 of 2011**.

…….although members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their powers and privileges with restraint and decorum and in a manner that gives honour and administration not only to the Institution of Parliament but also to those who, inter-alia elected is the fountain of Constitutionalism and therefore, the Honurable Members of Parliament are enjoined by virtue adhere to the basic tenets of the Constitution in their

deliberations and action……Parliament should avoid acts which are a kin to mob justice because such acts undermine the respect and integrity of the National Parliament.

Records shows that Honurable Members were intolerant and very defiant to the authority of the Speaker despite being cautioned and reminded of the Rules of Procedure of Parliament, I therefore find that the Speaker was right to suspend those members of Parliament who misbehaved in Parliament. Because they acted definatly and knowingly, they could not accuse the Speaker for not giving them a fair hearing. Record shows that the Speaker shouted for ORDER invain, meaning there was sheer contempt of the authority of the Speaker. I accordingly agree with the Justices of the Constitutional Court that the Speaker of Parliament Acted firmly and properly in suspending the said members of parliament for contempt in the House. The Right Hon. Speaker was not ultra-vines her powers when she suspended the MPS because she was in the course of proceedings.

Failure to close doors to the chambers at the time of voting the Bill.

On the Failure to close the doors to the chambers at the time of voting on the bill, counsel submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament before voting on the 2nd reading of the Bill and during voting was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution and rule 98(4) of the Rules of Parliament which fact was also admitted by the clerk to Parliament in her affidavit. According to counsel the rationale of this Rule 98 (4) is to bar Members who had not participated in the debate to enter parliament and participate in decision making. The speaker however

not only left the doors wide open but called for members who were outside the chambers during the time of debate to enter and vote.

7 Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how failing to close all the doors during voting made the enactment of the Act to be unconstitutional and that the rules of procedure were not made in vain. They must at all material times be obeyed and respected save where they have been duly suspended and that noncompliance renders the entire process and the outcome thereof
14 illegal.

He argued that closing the doors was not at the speaker's discretion as the majority justices held looking at the provisions of Article 89(1) of the Constitution which requires "voting in a manner prescribed by rules of procedure made by Parliament under Article 94 of this Constitution.

Respondent's case;

21 The Attorney General submitted that Rule 98(4) of the Rules of Procedure of Parliament provide that the Speaker shall direct the doors to be locked and the bar drawn until after the roll call vote has taken place. Further that the Speaker in not doing stated [at pages 373 of the record citing Hansard dated Wednesday 20th December 2017] that:

> *"…ideally I was supposed to have closed the doors under Rule*
> 28 *98(4). However that exists in a situation where all members have got seats. Therefore it is not possible to lock them out and that is why I did not lock the doors….."*

According to the Attorney General, this action by the Speaker was validated by Rule 8(1) where the Speaker can make a decision on any matter "*having regard to the practices of the House...*"

The Attorney General further pointed out that under Rule 8 (2) of the Rules of Procedure of Parliament the Speaker's ruling under sub rule (1) becomes part of the Rules of Procedure of Parliament until such a time, when a substantive amendment to these rules is made in respect to the ruling. The Attorney General contended that the action taken by the Speaker not to close the doors of the House during voting was within the ambit of these powers. The Respondent therefore submits that the court properly arrived at the decision they made.

Court's considerations.

I agree that the Rules dictate that the House doors have to be closed during the voting process. It is evident from the hansards that the speaker was alive to this rule however since it is also on record that the House was full and some members were outside, this was not their fault and therefore could not be denied a chance of participate in the voting process.

I find that the failure to close doors during voting did not contravene the constitution or vitiate the process. The Speaker was alive to the Rule and did advance valid reasons for not closing the door. I find that Constitutional Court was right to hold the way they did.

Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill.

7 On the Discrepancies in the speaker's certificate of compliance and the Constitutional (Amendment) Bill, counsel contended that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill.

14 Counsel submitted that the Speaker's certificate of compliance was materially defective, ineffectual and it rendered the presidential assent a nullity. The requirement of a valid certificate of compliance under Article 263 (2) of the Constitution is couched in mandatory terms.

It was apparent that the speaker's certificate of compliance which accompanied the impugned Bill was but full of glaring
21 inconsistencies and discrepancies. Whereas the certificate clearly indicated that the impugned bill not only amended Articles 61, 102, 104 and 183 of the Constitution, the bill itself indicated that parliament had amended in addition to the said provisions; Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel for the appellants vehemently averred that the discrepancies and variations which appeared between the
28 speaker's certificate of compliance and the constitutional (amendment) bill were gross both in content and form; thus in contravention of Article 263 (2) of the Constitution and S.16 of the

Acts of Parliament Act and rendered not only the presidential assent to the bill a nullity but even the resultant Act.

7 However the Constitutional court reached a wrong conclusion that the discrepancies only affected those provisions forming part of the Constitution (Amendment) (No. 2) Bill, 2017 amending Articles 77, 105, 181, 289, 289A, and 291 of the Constitution which were not included in the speaker's certificate; and, not the entire Act.

Counsel submitted that the Constitutional Court misdirected itself on the legality of the speaker's certificate of compliance in light of the
14 Supreme Court authority of **Ssemwogerere & Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002** where court held that:

"In the case of amendment and repeal of the constitution, the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent to the provision is and remains, even though it receives the Royal Assent,
21 *invalid and ultra vires*."

While citing the foregoing position in the instant matter, Owiny – Dollo DCJ, held that:

"This requirement, in my view, is not only about the issuance of a certificate of compliance; but is equally about its content, as is provided for in the Format for such certificate in the Schedule to the Acts of Parliament Act"

28 Counsel averred that the highlighted inconsistencies were deliberate and intended to subvert and fraudulently circumvent constitutional

provisions which required for a referendum for the amendment to be valid under Article 263 (1) of the constitution.

Illegal assent to the Bill by the President

On the Illegal assent to the bill by the President, counsel submitted that the act of the President assenting to the bill without scrutinizing the same to ascertain its propriety was in contravention of Articles 91(1) (2) and (3), and 263 of the Constitution and Section 9 of the Acts of Parliament Act. He also relied on the decision of the Supreme Court in the **Ssemwogerere case (supra)** where court held that;

"The presidential assent is an integral part of law making process. Under Article 262(2), the Constitution commands the President, to assent only if the specified conditions are satisfied. The command is mandatory, not discretionary. It does not allow for discretion in the President to assent without the Speaker's certificate of compliance."

He therefore submitted that the constitutional duty imposed on the President requires him to scrutinize the certificate of compliance and the accompanying Bill as to their regularity before appending his signature.

Respondent's case

The Attorney General refuted the appellant's contention that the learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent. He further refuted the Appellant's contention that the

Speaker's Certificate of compliance was materially defective, ineffectual and that this rendered the presidential assent a nullity.

7 The Attorney General submitted that the Constitutional Court came to the right finding in holding that the validity of the entire impugned Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent.

The Attorney General submitted that the learned Justices of the Constitutional Court individually dealt with the discrepancy and
14 variances between the Speaker's certificate of compliance and found that the discrepancies were not fatal. In the Attorney General's view, the majority learned Justices came to the right conclusion in holding that the discrepancy in the Speaker's certificate of compliance and the Bill was not fatal.

The Attorney General concluded that it was not in dispute that the Bill that was sent to the President for assent was accompanied by a
21 certificate of compliance as required in Article 263 (2) (a) of the Constitution. He further argued that The Certificate however indicated that four (4) Articles of the Constitution were being amended and yet ten (10) Articles of the Constitution were amended. He noted that the Articles that were indicated in the Certificate were Articles 61, 102, 104 and 183 while the Articles that had been amended but excluded were Articles 77,105,181,289 and
28 291.

The Attorney General submitted that that the decision of the majority Justices in upholding the validity of the certificate of the Speaker

was a recognition that the certificate complied with the form prescribed in section 16 (2) and Part VI of the second schedule of the Acts of Parliament Act Cap 2 since the Articles that were being amended were enumerated thereunder.

The Attorney General further submitted that in holding that the other Articles that had been amended but not included in the Speaker's Certificate to be unconstitutional, the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution.

The Attorney General invited Court to reject the assertion by the Appellants and uphold the findings of the majority justices that the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent was not fatal to the Bill.

Court's considerations;

The exclusion by the Speaker, of Articles 77,105,181,289 and 291, from the Certificate of Compliance accompanying the Constitution (Amendment) Bill sent for presidential assent was not fatal. A Certificate of compliance is provided for in **Article 263(2)(a)** which states as follows;

A bill for the amendment of this constitution which has been passed in accordance with this Chapter shall be assented to by the President only if;

(a) **It is accompanied by a certificate of the speaker that the provisions of this chapter have been complied with in relation to it.**

In the case of **Paul Semwogerere & Others vs Attorney General (supra), Justice Oder** held that;

7 **"It is my view that the Constitutional procedural requirements for the enactment of legislation for amendment of the Constitution are mandatory conditions, which cannot be waived by Parliament as mere procedural or administrative requirements. They are conditions to be complied with. <u>Mandatory Constitutional requirements cannot simply be waived by Parliament under its own procedural rules".</u>**

The certificate sent to the President accompanying the Bill had some
14 Articles and excluded other articles contained in the Bill. It is my opinion that the contents of the certificate have to rhyme with the contents of the Bill which was lawfully passed. I therefore agree with the learned Justices of the Constitutional court that the effect of such a certificate is that only the mentioned provisions complied with the provisions of chapter eighteen. These copies were sent for the presidential assent to which he assented.

21

My considered view is that the Speaker's Certificate was not defective as it applied to the parts of the Bill which was lawfully passed. Article 263 (2) provides assurance that the Bill was passed in accordance with the law. I find that the Presidential assent of the Bill which contained provisions which were excluded in the Certificate of Compliance nullity and of no consequence.

28

Failure to comply with the 14 days sitting between the 1st reading and the 2nd reading.

Appellants' case;

Appellants fault the majority learned Justices for finding that the passing of the Act without observing the 14 days between the 2nd and 3rd reading contravened the Constitution but did not find the contravention fatal. They argued that that was not a correct approach. That when the clauses in the Bill requiring 14 days separation were passed at third reading they became part of the Act. However Article 260(1) states that such Bill shall not be taken as passed unless the votes at the second and third reading is by fourteen days.

They argued that the ordinary meaning of the words "a bill shall not be taken as passed, means that the Bill will not make it to 3rd reading where the House does not comply with the 14 days.

Appellants submitted that each of the two arms of government namely the Judiciary and the Legislature has its own functions and responsibilities. That it is the duty of the legislature is to ensure that there is a 14 days separation of the two votes and therefore cannot sit back and say, "*These provisions will be struck down by the Constitutional Court; there is therefore no need for us to separate the two sittings with 14 days*". They submitted that constitutional provisions must be complied with and cannot be left to speculation what will happen in future.

They stated that the motions of passing it at third reading and sending it to the President for assent was all in vain. That the bill

remained and remains what it was- a Bill. Counsel prayed court to give effect to the words "shall not be taken as passed" and hold that the failure to separate the two sittings is fatal to the Act. That the Act cannot be validated and given Constitutional cover when it never passed. That means validating a constitutional illegality.

Respondent's case;

The Attorney General refuted the appellant's contention that the Constitutional Court erred in holding that the failure to separate the second and third seating by 14 days was not fatal. He further refuted the appellant's submissions that the failure to submit a Certificate of the Electoral Commission envisaged in Article 263 (2) (b) invalidated the whole Act.

The Attorney General submitted that the issues of observance of the 14 days sitting between the second and third reading as well as the failure to submit a certificate of the Electoral Commission were ably determined by the Constitutional Court. In support of his contention he relied on the Judgments of Cheborion, JCC [at pages 2773 to 2774], Owiny-Dollo, DCJ [at pages 2426-2427.]

He submitted that the majority learned Justices came to the right conclusion in holding that the non-observance of the 14 days sitting as well as the failure to accompany the Speaker's certificate of compliance and the Bill with a certificate from the electoral commission was not fatal.

He further argued that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14

days. Further that in the same vein, the Bill did not contain any provision the amendment of which required its ratification by the people of Uganda through a referendum, thereby necessitating the issuance of a certificate of the Electoral Commission.

He pointed out that his submission above was supported by the findings of the Learned Justices of the Constitutional Court at pages 2385 and 2773. He further pointed out that as the learned Justices found, it is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution. Thus, that having found that the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution and therefore null and void, the learned Justices were right to apply the severance principle and severed those Articles that offended the Constitution from those whose enactment would not require the separation of the second and third reading by 14 days as well as those ratification of such a decision through a referendum.

He invited Court to reject the assertion by the Appellant and uphold the findings of the majority Justices.

In light of his submissions above, the Attorney General submitted that the majority learned Justices of the Constitutional Court did not err in law and fact when they held that entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda (and the Rules of Procedure of Parliament) and pray that court finds as such.

Court's considerations

My view is that the amendments were adopted in the bill did not became part and parcel of the bill. The said amendments of the bill contained sections which required a space of 14 days between the 2nd and 3rd readings of the bill in Parliament. This is because the amendments created a charge on the consolidated fund. The original Magyezi Bill did not create a charge. Therefore, there was no need to separate the same by 14 days.

Denial of public access to the Gallery

Mr. Mabirizi submitted that being denied access to parliament was not refuted by the respondent. That according to **Section 57 of the Evidence Act, Order 8 rule 3 of the Civil Procedure Rules**, **MBABAZI V. MUSEVENI & 2 ORS**, the absence of any evidence in rebuttal to an allegation stands. Therefore, the finding of Barishaki, JCC stating that no other person saw Mabirizi being chased from parliament did not prove the allegation was erroneous.

Respondent's case

The Attorney General reiterated his submissions in the Constitutional Court [at pages 2154-2159 Vol K, of the record]. He added that Rule 230 of the Rules of Procedure of Parliament vests in the Speaker power to control the admission of the public to Parliament premises so as to ensure law and order as well as the decorum and dignity of parliament.

The Attorney General also refuted the appellants' contention that the proceedings of Parliament were not public and that the court

misapplied Rule 230 of the Rules of Procedure of Parliament. The Attorney General submitted that the Constitutional Court, after
7 reviewing the evidence on record, the powers of the Speaker as provided in the Rules and the effect of the Appellant's non admission, properly found that the Speaker and the parliamentary staff and security acted properly and within the constitution in making the orders they made as regards admission of the public to the parliamentary gallery.

Court's considerations

14 I agree that open participation of the public is provided for in the rules of procedure of parliament however it is subject to the speakers discretion provided for in Rule 230(3) to control the admission of members of the public into the House. While Rule 230 (1) provides for the admission of the Public into the house, Rule 230 (B) provides for restriction of admission.

21 The philosophy behind public access to Parliament is that since Parliament legislate on behalf of the people, it is prudent to allow members of the public to know this power is being accounted by Parliament. This principle was discussed by the Constitutional Court of South Africa in Doctors for Life International vs The Speaker of the National Assembly and 11 others, Case CCT 12 of 2005.

28 "Public access to Parliament is a fundamental part of public involvement in the law making process. It allows the public to be present when laws and debated and made. It enable members of the public to familiarise themselves with the law-making process and then be able to participate in the future".

Therefore while it is true that members of the public are guaranteed access to Parliamentary Proceedings, there are cetain circumstances where they are denied access as per Rules of Parliament. The Speaker is vested with discretion to control the admission of the public to the House to ensure Law and Order as well as the decorum and dignity of Parliament.

In the instant case, there was evidence that during the debate, there was a lot of tension and disorder in the House which necessitated caution. The Constitutional Court was therefore right to find that the Speaker and the Parliamentary Staff and the Security acted properly and within the Constitution in making the orders they made as regards admission of the public to the Parliamentary gallery

Debating in absence of the leader of opposition

Mr. Mabirizi contended that the absence of leader of the opposition, opposition chief whip & other opposition members & allowing ruling party members to sit on opposition side was well pleaded without any rebuttal That parliament was not properly constituted in absence of the leader in opposition.

Mr. Mabirizi argued that the reasons given by the Constitutional Court for justification of proceeding without opposition have no constitutional basis since the fear that parliament may be taken at ransom by opposition when a decision is made that it is not properly constituted is without any legal basis. That it actually goes against the very purpose of multi-party democracy which is to promote

tolerance of divergent minority views as opposed to a single party system which

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Court's considerations

The evidence on record shows that the leader of opposition voluntarily exited the House well knowing that the majority Committee Report was to be presented by the Chairperson of the Legal Affairs Committee.

14 Be that as it may, business in the House is predicated on quorum not on category of members of Parliament. In the instant case, there was no question of quorum. The Leader of Opposition and other members of Parliament simply walked away in protest. The Constitutional Court was right to hold that this kind of conduct tantamounted to holding Parliament at ransom.

21 Further, it is on record that the leader of opposition actually came back into the House shortly afterwards and was present during the presentation of the Majority Committee Report.

There is no merit in this ground.

Signing of the Report by Non committee members

Appellants' case

28 Mr. Mabirizi submitted that there was ample evidence that members who did not participate in committee proceedings signed the report. That the majority justices misconstrued the law & acted casually in failing to nullify the report signed by members who never participated in the proceedings of the committee. Rule 187(2) of the

Rules of Procedure relied on by Barishaki JCC to find that the committee had quorum does not apply because the Legal and Parliamentary Affairs Committee is not a select committee. Select committees are set up under Rule186 and they are temporary Committees. That the legal and parliamentary Affairs Committee is a sectorial Committee established under Rule 183(1) & 2(g). Contrary to the justices stated 5 members' minimum, under Rule 184(1), the minimum number for a sectoral committee is 15. Had the justices keenly looked at Article 90(2) & (3) of The Constitution, they would not have treated the matter the way they did.

The appellant submitted that the majority justices erred in relying on Article 94(3) which does not apply to committees of parliament because Article 94(3) deals with the entire Parliament and not Committees which are provided for under Article 90. Article 257(1)(u) provides "Parliament" means the Parliament of Uganda;" and does not include committees

He further submitted that the majority justices defied the Supreme Court decision of HAMID V. ROKO CONSTRUCTION LTD, SCCA No.1/13 which if followed would nullify the report signed by strangers where inter alia court made it clear that the validity is not on numbers. MUSOKE, JCC'S finding that strangers had been briefed about the committee proceedings was without evidence & bad in law for promoting hearsay and legislators' reckless signing of legal documents. That the strangers could not sign a report after expiry of the maximum 45 days with which the report was required.

Respondent's case

On this point, the Attorney General submitted that the Committees
7 of Parliament are provided for under Article 90 of the Constitution and Rule 183(1) of the Rules of Procedure of Parliament. Further, that Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not by itself invalidate those proceedings. Furthermore, that Rule 184 (1) of the Rules of Procedure of Parliament provides that each Sectorial Committee of Parliament
14 shall consist of not less than fifteen Members not more than thirty Members selected from among Members of Parliament.

The Attorney General further relied on Rule 201 (1) of the Rules of Procedure of Parliament which provides that a report of the Committee shall be signed and initiated by at least one third of all the Members of the Committee. The Attorney General argued that the Members who constituted the Legal and Parliamentary Affairs
21 Committee were listed in the report of the Legal and Parliamentary Affairs Committee and were 26 members.

In light of his submissions above, he contended that the requirement of the law in regard to quorum and non-validation of the report were considered and correctly adjudicated by the Constitutional Court and prayed that this Court upholds the same.

Court's considerations

28 I agree with the appellants that inclusion of non-members in the report was irregular however, be that as it may, I uphold the majority justices' holding that the quorum was met even if such strangers

were to be removed. It is true that the signing of the report by strangers was brought to the attention of the House by Hon. Sekiikuubo. These members were redeployed to the Legal and Parliamentary Committee when the Committee had already commenced it work. It was irregular for them to have signed the report. They could have signed out of ignorance.

In my view this could not vitiate the report because by the time the report was signed, the committee had the necessary quorum.

Further more I agree with the Justices of the Constitutional Court that under Article 94 (3) of the Constitution, the presence or participating of a person not entitled to present or to participate in the proceedings of Parliament shall not in itself, invalidate those proceedings. I accordingly find no merit in this issue.

Crossing of the floor by ruling party Members to the opposition side.

It is important to note that at the particular time, members of opposition had walked out of the House and their seats were free. I believe that the speaker simply told the Members of Parliament to fill up the empty seats during the proceedings and this did not amount to crossing of the floor.

It must be noted that crossing the floor is not merely switching seats. In **Theodore Ssekikuubo v Attorney General, Constitutional Appeal No. 1 of 2015**, this Court held that the term meant abandoning one's party on whose ticket a member is elected to Parliament and joining or becoming an independent members.

In the instant case, that did not happen, what took place was that during the debate on the bill many opposition members got

disgruntled and walked out of the House. The remaining ruling members who remained in the House took over the seats on the opposition side upon being advised by the Speaker of Parliament.

That could not amount to crossing the floor of Parliament as envisaged in law.

It is within the powers of the Speaker, depending on the circumstances obtaining at a particular moment, to permit Members of Parliament to sit at particular places in the Chamber of Parliament. This Court received no credible evidence to the effect that the Hon. Speaker prejudiced any Member of Parliament, by the way she permitted members to sit in Parliament during the debate of this Bill.

Proceeding on the bill in absence of the leader of opposition and other opposition members

Business of Parliament can go on in the absence of the leader of the opposition, opposition chief whip and opposition members of parliament as long as there is the requisite quorum in Parliament. Indeed under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

The Leader of the Opposition, Opposition Chief Whip and other opposition members walked out voluntarily when the impugned Bill was tabled for debate. Further, in the course of debating the Bill, the Leader of Opposition and the other Honourable Members returned to parliament and participated in the debate of the Bill.

Smuggling of the motion to introduce the impugned Bill onto the order paper

7 **Appellants**

Regarding the issue of Smuggling of the motion to introduce the impugned Bill onto the order paper, counsel submitted that the Bill leading to the enactment of the impugned Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure by virtue of the fact that the same was smuggled onto the order paper.

14 That in his lead judgment on this issue, Owiny Dollo, DCJ held that the Speaker enjoyed wide, and almost unfettered, discretionary powers to determine the Order of Business in the House and as such no wrong was committed by the Speaker in amending the order paper to include the motion seeking leave to introduce a private member's Bill.

Counsel submitted that the above finding of Owiny Dollo, DCJ was
21 an erroneous conclusion which is at variance with the express Rules of Procedure of Parliament. He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. In the proviso to the said rule the Speaker is only given a prerogative to determine the order of business in Parliament.

He contended that the evidence on record specifically under
28 paragraphs 12, 13, 14, 15 and 16 of Hon. Semujju Nganda's affidavit in support of the petition demonstrates that on 19th September 2017 the Rt. Hon. Deputy Speaker assured the house that there was not

going to be any ambush to MPs as far as handling the impugned Amendment Bill was concerned because there was a lot of anxiety and that the order paper will reflect the day's business. On 20th September 2017 the Rt. Hon. Deputy Speaker repeated the same thing and assured Members that nothing would be done in secrecy since all business has to go through the Business Committee under Rule 174. However, the bill was never presented in the Business Committee for appropriate action and consideration.

He therefore argued that the Members of Parliament were taken by surprise on the 26th day of September 2017 when Rt. Hon. Speaker amended the order paper on the floor of the house to include a motion by Hon. Magezi that sought leave to introduce a private member's Bill to amend the constitution. Efforts made by the shadow Minister of Justice and Constitutional Affairs, Hon. Medard Sseggona MP Busiro East and other MPs to raise procedural matters specifically the fact that there were other motions which had preceded this one were futile.

Counsel contended that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. In Rule 29 that there must be a weekly order paper including relevant documents that shall be distributed to every Member through his/her pigeonhole and where possible, electronically. All these Rules were flagrantly violated.

Respondent's case

The Attorney General refuted the appellants' contention that the Bill from which the impugned Act emerged was smuggled into the House. He submitted that in the exercise of its legislative powers set out in Art. 91, Parliament has power to make law. Further that under Article 94(1), it had powers to make rules to regulate its own procedure, including the procedure of its committees.

The Attorney General further pointed out that under Article 94(4) the Speaker had powers to determine the order of business in parliament; and that a Member of Parliament had a right to move a private members Bill.

The Attorney General contended further that on 27th September 2017, in exercising his powers under Article 94(4), the Hon. Raphael Magyezi tabled in Parliament a motion for leave to introduce a private Members' Bill entitled, The Constitution (Amendment)(No. 2) Bill, 2017. The Attorney General submitted that the inception, notice of motion and tabling of the motion was undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill as alleged by the appellant.

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25) wherein she had power to set the order of business and that under Rule 7 she presides at any sitting of the house and decides on questions of order and practice. Furthermore, that while doing this, the Speaker made a ruling on the various motions before her including the motion by Hon Nsamba. In

the Attorney General's view, the Speaker was aware of Rule 25(s) old and 24(q) new that provides for an Order of precedence and therein the Private Members Bills come before all others.

The Attorney General also asserted that the Magyezi Bill met the test mandated by Rule 121 and was lawful as Rule 120 (1) allows for every Member to move a Private Members Bill. He pointed out that the bill It was introduced by way of a Motion to which was attached the Proposed Bill noting that the other two Bills, that is the Nsamba and Lyomoki Bills had no attachments and one was a mere Resolution.

The Attorney General further contended that the Speaker had [under Rule (47 old) 55 new] been given written Notice of this Motion three days prior. In his view, the Speaker as the Custodian of what gets onto the Order Paper under Rule 24(Old) Rules gave a go ahead to the Magyezi Bill.

In conclusion, the Attorney General submitted that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the Constitutional Court finding that the Bill required procedure, up to its enactment.

Court's considerations,

Article 94 of the constitution provides that ;

"Subject to the provisions of this constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees.

Clause (4) of the same is to the effect that the speaker shall determine the order of business in Parliament and shall give priority
7 to government business. **Rule 25** re echoes the above provision. It further provides in **sub rule (2)** that the business for each sitting as arranged by the business committee shall be set out in the order paper subject to the speakers overall owners to determine business for the day.

It follows therefore that the speaker has the key powers to determine the business on the order paper. I find no irregularity.

14 **Waiver of Rule 201**

there is no dispute that Parliament has the right to suspend its own rules if the motion to do so is seconded under rule 16 of the Rules of Procedure. Although it is true that the motion to suspend rule 201(2) was not seconded, this was not fatal to the subsequent legislative process.

21 The proceedings in the exhibited Hansard of Parliament indicate that the Speaker pointed out to the members that they had received copies of the report on their ipads four days prior to the sitting in question. Although the electronic transmission of the committee report to the Members of Parliament does not adequately satisfy the requirements of Rule 201(2), I am of the view that the spirit of the rule was complied with.

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The purpose of the rule is clearly, to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament. The

Members of Parliament obtained copies of the Report in issue four days before debating the same. Consequently, the purpose of rule 201(2) was achieved.

The requirement for secondment in the said rule is merely directory and not mandatory given the purpose of "secondment" as I will briefly explain.

The motion moved by the Deputy Attorney General, to suspend the operation of rule 201(2) was carried through since it was never objected to by any one and the house proceeded to act on the same by commencing debate of the Committee Report.

The bone of contention is whether the debate could continue without the motion being seconded. The motion was moved when the Parliament was sitting as a committee of the Whole House and under Rule 59(2) of the rules of Parliament, there is no requirement for secondment of motions moved in committee meetings.

I have perused Article 79 (1) (2) which empowers Parliament to make laws in Uganda. I have also considered Article 262 that allows Parliament to amend provisions of the Constitution, as well as the Rules of Procedure of Parliament that regulate debate and proceedings in Parliament. I have not come across any specific provision, and none was cited to us as making it a mandatory requirement that for any constitutional amendment Bill to be enacted into law, deliberations must be received from each and every Member or majority of the Members of Parliament. In my view,

the only condition precedent set under Article 262 is the requirement for the Bill to be supported by 2/3 of all the Members of Parliament.

Be that as it may, from the Hansard, 124 Members of Parliament had contributed before the Speaker closed the debate. The Leader of opposition raised her concern about being denied an opportunity to give the views of her people. In reply, the Speaker blamed her for wasting time that should have been used for more Members to debate.

I find that the Leader of Opposition equally frustrated the Speaker's effort to have more members contribute to the debate. This however, did not adversely affect the passing of the Act.

ISSUE 3:

"Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda?"

Appellant's submissions;

Violence within the chambers of parliament.

The appellants contended that the incumbent used force, violence and unlawful means to amend the constitution contrary to article 3(2) of the Constitution which prohibits the use of violence and unlawful means to amend or overthrow the Constitution and that the

forceful removal of the MPs on the 27th September, 2017 amounted to a treasonous act under Article 3(2) of the 1995 Constitution.

7 They faulted the Constitutional Court for failing to make specific findings on whether the acts of violence against the Members of Parliament and the public had a chilling effect on those who wished to participate in the consultations and eventually on the way members of parliament who would otherwise have voted against the amendment voted for fear of being harmed.

They further contended that the constitutional court erred when it
14 found that the affected members of parliament misbehavior led to the loss of the right to personal liberty, and that had they found that the members of parliament had not misbehaved, they would have reached a different conclusion.

They submitted that the constitutional court's finding that the invitation of the security backup from the police was unnecessary and unfounded.

21 Counsel submitted that the learned trial Justices of the Constitutional Court erred in law and fact when they held that the violence inside and outside Parliament during the enactment of the Constitution (Amendment) Act did not contravene nor was it inconsistent with the Constitution.

Counsel for the 3rd appellants faulted the Constitutional Court for its failure to make specific findings on the contravention of articles 23,
28 24 and 29 of the constitution therefore leading to the lack of any declarations or redress as required by Article 137 of the Constitution

for the contraventions. He argued that the 3rd appellant specifically made pleadings and adduced evidence to that effect. He referred this court to Constitutional Petition No. 3 of 2018 paragraph 1(f) of the petition in which it was averred that the acts of security forces in entering Parliament assaulting, arresting and detaining members of Parliament was inconsistent with Articles 23, 24 and 29 of the Constitution which guarantee freedom from inhuman and degrading treatment and freedom of speech among others. He argued however that the respondent's answer did not traverse this averment.

He further argued that the violence inside Parliament included the arrest, assault ,detention of members of Parliament and their forceful exclusion from representing the Constituents and that the actions complained of violated several provisions of the Constitution. Appellants further argued that the respondent did not adduce any evidence to the contrary but merely denied that the actions of the security forces in entering Parliament and removing members of Parliament did not contravene Articles 23, 24 and 29 of the Constitution.

He contended that the respondent did not lead any evidence to the contrary and that the appellant's evidence remained unchallenged which required the court's pronunciation on the matter.

The appellants contended that the Constitutional Court erred when it failed to find that the actions of the security forces against the members of parliament contravened Article 24 which deals with

respect for human dignity and protection from inhuman treatment and that the MPs immunities and privileges as guaranteed under Article 97 were taken away and that had the learned justices in the lower Court addressed themselves to the pleadings and affidavits they would have held that there was contravention of Article 24 and would have made a declaration to the effect and given redress.

He contended that although majority justices accepted that there was evidence of the contraventions complained of, they wrongly justified the violations as being justified under Article 43 which permits certain limitations of rights in specific circumstances.

The appellants opposed the court's reliance on article 43 as justifications for the contraventions arguing that entry into Parliament by security officers, arresting, assaulting and detaining members does not fall under the circumstances under which a person's right to personal liberty is permitted especially since members were not only evicted but held without charge in places of detention. He cited the case of **Onyango Obbo and Anor vs. Attorney General** for the limitations permitted under article 43 of the constitution. He further argued that the onus was upon the respondent to show that the limitation to liberty was necessary in order to protect the fundamental rights of others or in public interest and that the limitations met the standard of being demonstrably justifiable in a free and democratic society and that the respondent failed to discharge this burden.

Suman Mugenyi circular.

Counsel for the appellants contended that the directive issued by AIGP Asumani Mugenyi to all the police forces countrywide stopping opposition MPs from consulting and that the said directive was complied with by all police personnel. The Police in blocking the said consultations invoked the directive of the Director of operations, Asuman Mugenyi, which directive was unanimously declared unlawful, arbitrary, obnoxious, unfortunate and unconstitutional. This was so because the effect of the said directive was to curtail and restrict the conduct of consultative meetings. The same was calculated and aimed at muzzling public participation and debate on the proposed amendment bill.

Counsel for the appellants specifically in Constitutional Appeal No. 3 of 2018 submitted that opposition members of Parliament were denied the opportunity and right to engage the people over the bill and specifically Article 102(b). He submitted that public gatherings for members who were perceived to be against the constitutional amendment especially opposition members of Parliament were blocked, and those that defiantly held these public gatherings were violently dispersed by the police and other security agencies. He further contended that Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment. He referred court to the affidavits of Hon. Winfred Kiiza, Hon. Odur Jonathan Hon. Karuhanga, Hon. Ssewanyana and Hon. Munyagwa, Hon. Betty Nambooze volume 1 of the record of Appeal). These affidavits were all to the effect that the police disrupted the joint consultative meetings on the Constitution

(Amendment) Bill, 2017 citing the directive issued by Asuman Mugyenyi, the Head of Operations, Uganda Police Force.

He contended that whereas the Constitutional Court unanimously correctly declared unconstitutional and unlawful, the directive by Asuman Mugenyi, the same court erred when it found that there was no evidence to demonstrate that the directive was ever implemented and that it had adversely affected the entire consultation process.

Respondent's submissions.

The learned Attorney General on the other hand supported the decision of the Learned Justices of the Constitutional Court who found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act, 2018 did not amount to a breach of the 1995 Constitution of the Republic of Uganda sufficient to justify a declaration of the whole process as unconstitutional.

The respondent firstly argued that this issue raised by the appellants about Article 3(2) was never raised in the Constitutional Court and therefore offends rule 82 (1) of the Judicature (Supreme Court Rules) Directions having not been raised at the Constitutional Court level. In the alternative, he argued that the Constitution was amended in accordance with the law contrary to the allegations of the appellants and that the said amendment was done with the full participation of the Members of Parliament after consultation and this contention should be dismissed. He thus prayed Court to find

that the appellants misconstrued the application of Article 3 (2) of the Constitution as the expulsion of the Members of Parliament was not a singular event but was a result of their consistent misconduct during the debate of Constitutional Amendment Act No. 1 of 2018.

The Attorney General referred court to the evidence of Ms. Jane L. Kibirige, the Clerk to Parliament, Mr. Ahmed Kagoye, and the affidavit by Twinomugisha Lemmy and the Hansard of Parliament that clearly illustrates that the proceedings of Parliament on the 21st, 26th and 27th September 2017 were characterized by unprecedented chaos, disorder and misconduct from the Hon. Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House. He argued that it was the defiance of the speaker's orders to exit the parliamentary chamber that necessitated the intervention of the army and the Uganda Police Force.

He relied on rule 80, 85, 88(6) rule of Part XIV of the Rules of Procedure which requires that when the speaker of the Parliament of Uganda was enacted that provide for Order , and also requires the Sergeant at Arms to enforce the orders of the speaker. He argued that the appellants' submission that the suspension and eviction of the Members of parliament contravened the members' right to personal liberty and freedom of association and freedom from inhuman and degrading treatment is untenable because the said rights though guaranteed under the constitution are not absolute. He relied on Article 43 that prohibits enjoyment of guaranteed rights in a manner that is prejudicial to the rights and freedoms of others in public interest. He thus argued that in the

instant case the public interest was the much needed debate on the Constitutional (Amendment) Act No. 1 of 2018

7 He referred this Court to the Hansard of Parliament where the Rt. Hon. Speaker clearly explains the reason for the suspension of the twenty five (25) MPs. After issuance of the suspension order, the Members of Parliament chose to refuse to leave the House and this forced the Sergeant at Arms to order the security forces to forcibly remove them from the House.

The respondent argued that it is not true that the Justices of the
14 Constitutional Court failed to address the allegation that the violence had a chilling effect on members of the public that wished to participate and other members of Parliament which had the effect of vitiating the entire process of the enactment of the Constitution (Amendment) Act No. 1 of 2018. He contended that their lordships of the Constitutional Court considered the evidence of Mr. Frank Mwesigwa and other evidence on record regarding the
21 consultation process that shows that the consultation process was free from violence to reach the conclusion that although there was indeed violence, intimidation and restrictions imposed on Members of Parliament and the public during the process of enacting the impugned Act, there is no evidence that the entire process was vitiated as a result.

Respondent's submissions on violence.

28 The Respondent submitted that the Learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Constitution

(Amendment) Act, 2018 did not amount to a breach the 1995 Constitution of the Republic of Uganda sufficient to justify a declaration of the whole process as unconstitutional and therefore prayed this Honorable Court to uphold the decision of the Constitutional Court.

The learned Attorney General submitted that the evidence on record clearly illustrates that during the conduct of the debate of Constitutional (Amendment) Bill No. 2 of 2017 MPs behaved in a manner unbecoming of members of parliament and that these actions eventually culminated into the defiance to the orders of the Speaker to conduct the debate.

Resolution.

The appellant argued that the incumbent president used force and unlawful means to amend the constitution contrary to article 3(2) of the Constitution**.** The respondent argued that this issue was never raised in the Constitutional Court and that therefore it offends rule 82 (1) of the Judicature (Supreme Court Rules) Directions I having not been raised in the Constitutional Court.

I will first of all point out that the respondent's assertion that this point was not raised at the constitutional court is not true. Paragraph 15 of the affidavit in support of the petition of Ssewanyana Allan MP, Makindye West Constituency clearly covers this point.

I will now determine the issue as to whether violence was used in the enactment of constitutional (amendment) Act, No. 1 of 2018.

Article 3(2) of the Constitution states as follows;

"Any person who, singly or in concert with others, by any violent or other unlawful means, suspends, overthrows, abrogates or amends this constitution or any part of it or attempts to do any such act, commits the offence of treason and shall be punished according to law."

The appellants rightly submitted that a Member of Parliament is entitled to enjoy the rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and be accorded the privileges accruing to him or her as such under the 1995 Constitution.

Article 97 (1) that provides that;

"The speaker, deputy speaker, members of parliament and any other person participating or assisting in or acting in connection with or reporting the proceedings of parliament or any of its committees shall be entitled to such immunities and privileges as parliament shall by law prescribe."

Parliamentary Privilege is defined by **The Collins Dictionary** as the legal immunity allowing law makers to speak without being subject to the usual laws of slander.

The term privilege therefore does not mean any special benefits or entitlements enjoyed by members of parliament or state legislators. It is rather the immunity from ordinary law to enable legislators carry out their primary functions of legislating, debating and inquiring more freely, effectively and independently.

In the case of **Tejkiran Jain vs. N. Sanjeeva Reddy** (1970 (2) SCC 272, the Supreme Court of India in dealing with judicial immunity and privilege stated that the immunity is in respect of anything said in Parliament.

The appellants argued that the privilege and immunity of the members of parliament were breached when they were violently thrown out of the August house by security operatives under the watch of the sergeant arms.

I disagree with that submission. Immunity and privilege is limited to only speech and as such are not protected under article 97(1) of the Constitution. The events that transpired in Parliament during the proceedings of the 21st, 26th, and 27th September as captured in the affidavits of Jane Kibirige, the Clerk to Parliament and Ahmed Kagoye, the Sergeant at Arms and the affidavit evidence of Hon. Betty Nambooze, Hansard of Parliament evidence were on speech related. The Rt. Hon. Speaker of Parliament called upon members of parliament to maintain order and decorum and allow the debate process to proceed in vain. The speaker's powers during proceedings in Parliament are provided for in **Part XII of the Rules of Procedure of parliament** specifically **Rule 77 and 80(6)** provide for maintenance of decorum and discipline. They provide interalia that;

Whereas a Member of Parliament has a right to participate in proceedings of Parliament, to enable him or her express the will of the people he/she so represents, this right is not absolute. It is subject to limitations if his / her conduct is disruptive to parliamentary proceedings

Article 79(1) of the Constitution gives *Parliament power to make laws on any matter for the peace, order and development and good governance of Uganda.*

Article 94(1) provides that;

"Subject to the provisions of this Constitution, Parliament may make rules to regulate its own procedure, including the procedure of its committees."

Rule 85 provides that:

> ***"When the Speaker addresses the House, any Member then standing shall immediately resume his or her seat and the Speaker shall be heard in silence"***

Rule 88 (6) provides that;

"Where a Member who has been suspended under this rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force 83 is necessary in order to compel obedience to his or her direction, and the Sergeant At Arms shall be called upon to eject the Member from the House."

All the aforementioned laws were enacted that provide for Order in the House. The Hansards on page 4702 reflect the following events;

> **Speaker:** ***Honourable members, take your seats. Hon Ssemujju, take your seat. Honourable members, the word 'Parliament' comes from the French word***

'parle', which means a place where you speak. Therefore let us speak with our mouths, not fists. Please it is part of Parliamentary etiquette to listen to each other and I had invited the Minister to speak.

It is further indicated in the transcript of the 27th day of September, 2017, where the Speaker stated as follows;

"Speaker: At the sitting of yesterday, the unruly conduct of last week was repeated. The Speaker could not be heard in silence. Members were standing, climbing on chairs and tables, and they were dressed in a manner that violates Rule 73 of our Rules of Procedure. I made several calls to the Members to sit down and be orderly, but this was not adhered to. Some Members crossed from one side to the other in a menacing manner, contrary to Rule 74 of our Rules of Procedure. The Speaker could not address the House in silence as many Members were menacingly standing near the Speaker's Chair."

The Speaker invoked her powers under Rule 7(2), 77, 79(2) and 80 of the Rules of Procedure of Parliament to name and order the immediate withdrawal from the House of any member whose conduct is grossly disorderly, and to suspend any misbehaving member. She named 25 Members of Parliament and invited them to exit the House within 30 minutes. The Sergeant at Arms was instructed to ensure that the suspended members exit the chambers of parliament. In the process of execution of the order of the Rt. Hon. Speaker, there was a scuffle arising out of failure by the named Members of Parliament to exit the House, which caused their forceful

eviction by the staff of the Sergeant at Arms and security officers, who caused the Members of Parliament subsequent arrest and detention.

What happened during the eviction can be gleaned from the interjection of Hon. Winfred Kiiza who stated:-

> ***"Madam Speaker, I cannot just pretend that life is as usual. I cannot pretend that it is business as usual. What has just happened to Members in this Chamber, Madam Speaker, is something we should not just ignore. Members were brutally moved out of the Chamber by the SFC_ (interjections)."***

This court was invited to determine the constitutionality of the actions of the Sergeant at Arms together with the back-up security of the Uganda Police Force and Uganda People's Defence Forces in evicting the said Members of Parliament in light of Articles 1, 2, 3(2), 8A, 97, 208(2), and 211(3) of the 1995 Constitution.

The issue to be determined is whether the measures taken by the Sergeant at Arms and the security forces in implementing the order of the Rt. Hon. Speaker were 'acceptable and demonstrably justifiable' under Article 43(2) of the 1995 Constitution. **Charles Onyango Obbo and Andrew Mujuni Mwenda versus the Attorney General, Constitutional Petition No. 19/1997**, where it was held:-

> ***"To establish that a limit to rights and freedoms is reasonable and demonstrably justifiable in a free and democratic society, two criteria must be satisfied. First the objective that the measures responsible for the limit on a charter right or freedom***

are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

Secondly, once a sufficiently significant objective is recognized, then the party invoking must show that the means chosen are reasonably and demonstrably justified. This involves a form of proportionality test… Although the nature of the proportionality test will vary depending on the circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups."

The term "free and democratic" as envisaged in Article 43 (2) (c) of the Constitution was expounded in **Constitutional Petition No. 22/2006, Paul Kafeero & Anor vs. the Electoral Commission and Attorney General**. Kitumba JCC cited with approval a Canadian case at page 12 para 4, the Supreme Court in **The Queen Oakes [1987] (Const) 477 at 498-9** said:-

"The court must be guided by the values and principles essential to a free and democratic society which I believe embody to name but a few, respect for inherent dignity of human rights, commitment to social justice and equality, <u>accommodation of a wide variety of beliefs</u>, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individual and groups in society. The underlying value and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against

which a limit on a right or freedom must be shown, despite its effect to be reasonable and democratically justified".

7 The evidence led by the Sergeant at Arms and the Clerk to Parliament that on the 21st, 26th and 27th September 2017 the House experience unprecedented disorder and misconduct from the MPs that eventually led to the Speaker issuing an order of suspension that was not adhered to by the Hon. MPs.

The justices of the Constitutional Court rightly found that the Rt. Hon. Speaker is empowered to maintain order, discipline and decorum in
14 the House. Such powers obviously should include the power to exclude any member from Parliament for temporary periods, where the conduct of or actions of such a member is unbecoming. This is necessary for the smooth operation of the multiparty system of politics

The role of the Speaker as a pivot under Part XIII of the Rules of Procedure cannot be overemphasized for all matters parliamentary.
21 She is charged with maintaining internal order and discipline in its proceedings.

The Attorney General correctly cited the case of **Twinobusingye Severino vs. Attorney General Constitutional Petition No. 47/2011** @ 24 Court observed interalia that;

> *"We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say*
> 28 *anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint*

and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen, to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

Under the 1995 constitution, MPs enjoy rights enshrined in Article 1, 2, 3(2), 8A, 97 to debate and enjoy the privileges as enshrined in the 1995 Constitution. However, the enjoyment of such rights as illustrated above is valid only if it is done in a manner that is "***acceptable and demonstrably justifiable in a free and democratic society*"** as illustrated in Article 43(1):

"In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest."

Article 43(2)(c) defines ***public interest*** under this Article ***not to permit any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.***

The ambit of what is acceptable and demonstrably justifiable" under Article 43(2) of the 1995 Constitution was defined in the case

of **Charles Onyango Obbo & Andrew Mujuni Mwenda vs. Attorney General in C.P. 15/1997 @ 33.**

"To establish that a limit to rights and freedoms is reasonable and demonstrably justifiable in a free and democratic society, two criteria must be satisfied. First the objective that the measures responsible for the limit on a charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom….

Secondly, once a sufficiently significant objective is recognized, then the party invoking must show that the means chosen are reasonably and demonstrably justified. This involves a form of PROPOTIONALITY TEST…Although the nature of the proportionality test will vary depending on the circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups."

The orders of the Speaker to maintain decorum should have been adhered to by the offending Members of Parliament.

I will refer to the judgment of Her Lordship Justice Elizabeth Musoke where she states that;-

"It is clear from the available evidence that public interest was curtailed when a group of Members of Parliament by their conduct made it impossible for the debate process of the Bill to proceed peacefully. There was need for reasonable force to be used to ensure that order was restored within the precincts of Parliament."

The Respondent prayed court to invoke employ the principle of harmony and completeness in the interpreting the Constitutional provisions relating to this issue. He rightly relied on the case of **Hon. Lt. (Rtd) Kamba Saleh & Another Versus Attorney General & Four Others Consolidated Petitions Constitutional Petition No. 16 of 2013 where it was held that**.

"The entire constitution has to be read together as an integral whole and no particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness."

The immunity and privilege of members of parliament do not extend to disruption of other peoples' representatives right to debate and the disruption of the conduct of Parliamentary business.

The Rt. Hon. Speaker clearly had the powers that are derived from the 1995 Constitution to suspend the MPs who had participated in the violence in the chambers and the order was executed during the sitting of the House.

The Appellants misconstrued this *Article 3 (2) of the Constitution* as this was a singular event that came about due to the misconduct of the MPs whereas the debate, passing and eventual enactment of the Constitutional (Amendment) Act No. 1 of 2018 was a process.

The public interest was the debate in Constit*utional (Amendment) Bill No. 2 of 2017* which needed to be conducted in a manner that promoted debate by members across the political spectrum as the

matter were clearly of high national importance and so the speaker did as expected to maintain decorum in the house.

Violence outside the house.

Public participation is an essential and integral part of our Constitution as provided for under Article 1.

Article 1(1) provides interalia that;

"All power belongs to the people who shall exercise their sovereignty in accordance with the Constitution."

It is against this background that on the 3rd October, 2017, after the bill was presented for the 1st reading and later referred to the committee on Legal and Parliamentary Affairs, the Speaker of Parliament advised the members of the House to consult with the people in their respective constituencies in the process of enactment of the impugned.

However on the 16th October, 2017, Asuman Mugenyi sent out a circular to all police stations country wide which read as follows;

"…..DATE: 16 OCT 17

REF: OPS/234/214/01(.) CONSULTATIVE MEETINGS BY MPS ON ARTICLE 102(b) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA.

AS YOU ARE AWARE, THERE IS A PROPOSAL TO AMMEND ARTICLE 102(b) OF THE CONSTITUTION OF THE REPUBLIC OF UGANDA TO REMOVE PRESIDENTIAL AGE LIMITS (.) MPS ARE TO CONSULT IN THEIR RESPECTIVE CONSTITUENCIES TO SEEK THE VIEWS OF THE ELECTORATE (.)

DURING THE CONSULTATIVE MEETINGS ENSURE THE FOLLOWING; - (.)

1. *MPS SHOULD STRICTLY CONSULT IN THEIR CONSTITUENCIES*
2. *THOSE MPS MOVING OR INTENDING TO ,OVE IN ORDER TO SUPPORT COUNTERPARTS OR CONSULT OUTSIDE THEIR CONSTITUENCIES MUST BE STOPPED ® MUST BE STOPPED(.)…"*

The wording of the said circular is very clear and unambiguous. Members of parliament were to be confined to their respective constituencies in as far as consultation with the people on the Constitutional (Amendment) Bill 2 of 2017 was concerned.

The appellants led evidence to prove that the said directive was enforced especially against members of the opposition. Hon. Odur Jonathan, MP Erute County South in his affidavit in support stated that on the 24th October, 2017 a consultation gathering at Adyel Division in Lira District that was being attended by himself and Hon. Atim Joy Ongom, Woman MP Lira District, Hon. Abacacon Angiro Gutomoi Charles, MP Erute county North, Hon. Akello Sylvia, Woman MP Otuke District among others was violently dispersed by firing live bullets and tear gas.

The Uganda Police Force should be non-partisan and should also try as it might to avoid the perception of being partisan

However, despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of the members of Parliament, in the manner that came out in evidence, the evidence on record points to the fact that the ramifications of the interventions did not vitiate the process in Parliament that

resulted in the enactment of the Constitution (Amendment) Act in any way.

Hon Robert Kyagulanyi is on record as having traversed the whole country; whereas he established that the majority of the people wanted the Constitution to be left intact. Parliament continued with its business, apparently after realising the folly of turning weapons at each other. On the evidence, there was always a full House when the Speaker put the question for a vote.

Hon. Betty Nambooze deponed in paragraph 16 of her additional affidavit that she was intercepted by security personnel who pounced at her and dragged her towards the southern wing, violently threw her down and she landed on her back where they continued beating and kicking her. She had to undergo spinal surgery for Posterior spinal decompression and fusion L4-L5 for lumbar canal stenosis which was attributed to excessive force inflicted on her.

Counsel for the appellants argued that the violence had a chilling effect on the members of parliament and other persons who wished to participate in the proceedings. Much as I agree that this prevented some people in the affected constituencies from being consulted, appellants did not however lead any evidence to show the violence affected the way any of the opposition members of parliament voted. It is on record that all opposition members of parliament voted against the enactment of Constitutional (Amendment) Act No. 1 of 2018 and therefore this is proof that the said intimidation did not in any way affect their zeal.

In the end, I find that the violence though evidenced in some instances, it did not affect the enactment. The members of parliament such as Namboze Bakileke who were manhandled and tortured to the extent of sustaining grievous bodily harm were indeed violated against and therefore should seek redress under article 50 of the constitution which provides for enforcement of rights.

This ground must therefore fail.

Issue four

Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?

Appellant's case

The appellants submitted that under Article 137 of the Constitution, the constitutional court has no jurisdiction to apply the substantiality test. Counsel's argument was that the court is limited to determining whether the Act / act in question is in contravention with the provisions of the Constitution and not the extent of contravention nor whether the contravention affected the resultant action in a substantial manner.

He stated that the substantiality test applies in cases where it is expressly provided for by the law for example the Presidential Election Act and Parliamentary Election Act. He added that nowhere is it provided for in the Constitution.

Counsel further contended that substantiality cannot be applied because there was no legal and factual basis for not nullifying the entire process amidst several unanswered questions like why was the

bill introduced by a private member and not by the Government which is to be answered and determined by this court.

Counsel contended that that the constitution being the supreme law of the land provides no room for any form of violation. Counsel argued that the justices of the Constitutional Court breached their primary mandate of jealously guarding the constitution by creating room for certain individuals and agencies of government to violate the constitution with impunity. Counsel relied on the case of **Paul K. Semogerere & 2 Ors Vs Attorney General SCCA No. 1 of 2002** where it was held that the constitutional procedural requirements are mandatory.

Respondent's case

The respondent submitted that the constitutional court correctly applied substantiality test and in so doing reached a proper conclusion.

Counsel defined the term substantial in the **Black's Law Dictionary** as "Being significant or large or having substance."

He submitted that in the case of **Kiiza Besigye vs Yoweri Kaguta Museveni Election petition No. 1 of 2001** court relied on the substantiality test to determine whether the procedural irregularities and noncompliance's of the electoral commission had a substantial effect on the election results.

He further argued that the substantiality test is used as a tool of evaluation of evidence therefore faulting the court of applying the substantiality test is an absurdity as it would be barring them from using a tool of evaluation while determining a matter before it.

Counsel cited the case of **Nanjibhai Parabudas & Co. Ltd vs Standard Bank Ltd (1968) E.A 670** where court held that court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself nullity unless the incorrect act is of the most fundamental nature.

Counsel explained that there was general compliance with the constitutional requirements and procedure for the enactment of the impugned Act.

Counsel submitted that court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation was not sufficient to nullify the entire process.

He explained that the qualitative requirements appraise the entire legislative process prior to and during tabling motion for leave , tabling bill for first reading, consideration by the committee, debate, voting and assent to the Bill and thus there was substantial compliance.

Counsel stated that the two tests were expounded on in the cases of **Winnie Byanyuma vs Masiko Winnie Komuhangi & Ors HTC-OO-CV-EP-004-2001** where it was observed that;

"the quantitative test was said to be the most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair."

That dependant on that, the justices of the Constitutional court found that the few instances of irregularities did not adversely affect the process of passing the impugned Act.

Counsel further argued that the question for this court to determine is whether the court was wrong to use that test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

That the appellants did not adduce credible evidence to show that such violence and intimidation affected the validity of the impugned bill.

Counsel further argued that it is trite under common law that whoever alleges must prove therefore it is the appellants who bore the burden of proof to prove the alleged facts to a certain standard of proof.

Counsel contended further that the form of evidence that was presented in the constitutional court was both oral and affidavit evidence which evidence after thorough scrutiny did not support the appellants' several allegations neither did they disclose any profound irregularities in the management of the legislative process of the enactment of the said Act or that the participation of some members was gravely affected.

He concluded by inviting court to uphold the findings of the lower court that the alleged irregularities are mere technicalities.

Court's considerations

The appellant's case is that the substantiality test does not apply in
7 matters of constitutional interpretation. The constitutional Court used this test in various areas of resolution especially when evaluating the evidence regarding procedure and violence.

The Constitutional Court is a creature of the constitution and its jurisdiction is well laid in Article 137 of the Constitution and it provides that;

137; *Questions as to the interpretation of this constitution*.

14 **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**

(2) …….

(3) A person who alleges that;

(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

21 **(b) Any act or omission by any person or authority,**

Is inconsistent with or in contravention of a provision of this constitution may petition the constitutional court for a declaration to that effect, and for redress where appropriate.

(4) …….

(5) ……..

(6) ……..

28 The nature of jurisdiction embodied in Article 137 is rather plain. The function of the constitutional court is to hear a constitutional petition,

evaluate the evidence forwarded by both parties and make declarations as to whether the alleged provisions of the constitution were contravened or not.

The jurisdiction of the constitutional court is also encompassed in Article 2 of the Constitution which provides that if any other law or any custom is inconsistent with any of the provisions of the constitution, the constitution shall prevail and the other law or custom shall to the extent of the inconsistency be void. It follows that after the constitutional court has declared an Act or act unconstitutional, it shall be null and void. I agree with the submissions of the appellants that nowhere in the constitution does the constitutional court have powers to determine the substantiality of the contravention or how fatal the contravention is nor its effect.

The constitutional court is the custodian of the constitution and constitutionality. Its main duty is to ensure the rigidity of the Constitution and compliance with of laws and actions with the Constitution.

In exercising its duties the Constitutional Court is guided by Article 126 (2) € of the Constitution, which is to administer substantive justice Article 137 (3) and (4) outlines the jurisdiction of the Constitutional Court as follows:-

(3) Any person who alleges that

a) An Act of Parliament or any other law or anything in or done under the authority of any law; or

b) Any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this

Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of the article, the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may;

a) Grant an order of redress, or

b) Refer the matter to the High Court to investigate and determine the appropriate redress.

It is clear from the above provisions that once a petition is presented, the Court automatically grants a declaration. The court has discretion to grant or not to grant a declaration. The court also retains discretion whether to grant a redress or not. In exercising the above discretion, it is trite that Court looks at the evidence adduced by the petitioner to determine whether the same is substantial to warrant a declaration or redress sought. This is the essence of substantiality test. I agree with the learned Attorney General that substantiality was a tool of evaluation of evidence available to the Constitutional Court while determining the Constitutional Petition.

In the instant case, the Constitutional Court applied substantiality test and found that there wasn't sufficient evidence to prove that the scuffles and interferences affected the entire process of passing the impugned bill into law. The burden of proof was on the petitioners to adduce substantial evidence.

I do not agree with the contention of the petitioners that substantiality test only applies in election petitions and not in Constitutional Petitions. This is because both petitions require quantum and quality of evidence presented to satisfy court that what the Constitution envisaged was violated. See; **Amama Mbabazi v Yoweri Museveni & 2 others, Presidential Election No. 1 of 2016**.

In conclusion, I agree with the contention of the Attorney General that the evidence did not disclose any profound irregularity in the management of legislative process for the enactment of the impugned Act nor did it prove that the participation of some members of parliament was gravely affected, after applying the substantiality test. The parts that were so affected were rightly served by the Constitutional Court.

This issue is answered in the negative.

ISSUES 5

"Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?"

<u>Appellants' Submissions</u>

Counsel argued that despite the appellants' submissions in the lower court, the court did not consider the appellant's arguments that Section 3 of the impugned Act contravened Articles 8A and 38 of

the Constitution. Counsel submitted that if the court had considered the Appellant's case, it would have come to a different conclusion.

7 He explained that the aforementioned provisions are to effect orderly succession and peaceful transfer of power as a principle of democracy. He cited the case of Sekikubo vs Attorney General which deals with application of democratic principles.

Counsel further contended that the evidence on record proves that consultations were marred with violence, harassment, humiliation, assault and detention, all of which negate a conducive atmosphere
14 to genuinely seek the views of the people.

He contended that, had the Court held that orderly succession is one of the principles of democracy, it would have come to the conclusion that given our history, removal of the age limit is in conflict with orderly succession and peaceful transfer of power and therefore inconsistent with Articles 1 8A and 38 of the Constitution and hence nullify the Act.

21 Appellant submitted that the constitutional Amendment Act No.1 of 2018 is a constitutional replacement. He explained that what is at stake is the qualifications of a fountain of honour. He submitted that since the office of the presidents is vested with too much powers and functions, the office should not be held by a too young person or a very old person.

He argued that in Columbia, the president Alvaro Uribe instigated a
28 constitutional amendment with the purpose of making him eligible to run for president for the third time. The amendment was considered as re writing the constitution and therefore unconstitutional.

Mabirizi contended that Constitutional Amendment Act No.1 of 2018 was brought purposely to enable the president who by the next election will be 75 years and not eligible to be contest. He stated that it was an illegal intention and this court should not uphold an illegality.

He argued that Parliament lacked power to make the amendments removing the age-limit, a very essential component in our Constitution.

That majority justices justified their decision not to nullify removal of age-limits on the reasoning that the framers of the Constitution never treated the provisions of Article 102 on age limit for president as a fundamental feature of the Constitution. In this, they underestimate the decision of the framers to include it in the Constitution, hence weakening their basis of including the provision.

He concluded that, upholding of section 3 of the Act will disharmonise the constitution so as to render among others articles 51(3), 144(1)(a) & (b), 146(2)(a) & 163(11) unconstitutional, which is against the spirit of the Constitution and will open a flood-gate of private members' bills to amend those articles which have age restrictions.

Respondent's Submissions

Counsel submitted that it was not true that sections 3 and 7 of the impugned Act which scrapped the age limit qualification for election to the office of the President and district Chairperson amended Article 1 of the Constitution by infection. They further

contend that Parliament also amended Article 21(3) of the Constitution creating another form of discrimination to wit; age.

7 Counsel for the respondents contended that the Justices of the Constitutional Court correctly directed themselves to the law by holding that amendment of articles 102(b) and 183(2)(b) did not in any way infect Article 1 of the Constitution.

He cited Article 1 which states that, all power belongs to the people who shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair
14 elections of their representatives or through referenda.

That Parliament is enjoined to make laws under Article 79 and 259 and this power is exercised through bills passed by Parliament and assented to by the President.

Counsel submitted that the Justices of the Constitutional Court were unanimous and rightly held that this power extends to Articles 102 and 183. The Justices of the Constitutional Court rightly observed that
21 Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b).

He contended that, contrary to the appellants' argument in C.A No. 3/2018 that the amendment takes way the sovereignty of the people of Uganda enshrined under Article 1, the respondents agree with the finding of the Court that in amending Articles 102 (b) and
28 183 (2) (b), the sovereignty of the people is not infected at all.

In contrast, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to

the office of the president. According to counsel, the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

Counsel agreed with the finding of the Constitutional Court that the amendment of Article 102 (b) did not in way infect the provisions of Article 21 (3) of the Constitution.

Counsel submitted that the Justices of the Constitutional Court considered the evidence adduced and rightly came to the conclusion that amendment of articles 102 and 183 did not in any way contravene and or infect Article 21 (3) of the Constitution.

Counsel concurred with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. He averred that Article 102 (b) provides that; - a person is not qualified for election as President unless the person is not less than thirty-five years and not more than seventy-five years of age. According to counsel, the amendment of Article 102(b) did not undermine any of the 63 provisions of the Constitution cited by the petitioner or any other provision of the Constitution. Counsel contended that the learned Justices of the Constitutional Court rightly directed themselves to the law in holding that amendment of Article 102 (b) did not amount to Constitutional replacement of Article 1.

Counsel submitted that Article 1 (1), 1 (4) illustrates that power belongs to the people and is exercised through elections of their representatives. According to counsel, the Justices of the

Constitutional Court rightly observed that Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). He cited Article 259 of the Constitution which vests Parliament with powers to amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in Chapter Eighteen. That this power extends to Articles 102 and 183. Counsel entirely concurred with the Constitutional Court that the qualifications for election to the office of the President and Local Council V Chairpersons can and should be amended by the people's representatives where circumstances that necessitate the change arise. He added that the appellant's argument that upholding section 3 of the Amendment Act will disharmonize Articles 51(3), 144(1)(a) and (b), 146(2)(a) and 163(11) of the Constitution is speculative and lacks merit. He stated that upholding the appellant's argument would curtail the right of Members of Parliament to bring bills in accordance with Article 94 (4)(b) of the Constitution.

Counsel argued that the amendment of Article 102 (b) was not a Constitution making process that requires a Constituent Assembly. According to counsel, it was an amendment process which the peoples' representatives are empowered to do in accordance with Chapter Eighteen of the Constitution.

Counsel agreed with the finding of the Constitutional Court that the amendment of Article 102(b) and 183 did not contravene any provisions of the Constitution.

He further submitted that the 3rd appellant raised no grounds in reference to this particular issue and that therefore their submissions offend rule 82 of Judicature (supreme Court Rules) Directions which are mandatory. He prayed that the 3rd appellant's submission be disregarded by court.

Counsel submitted that without prejudice to the above, the appellants argued that had the Constitutional Court considered their submissions in regard to the infection of articles 8A and 38 of the Constitution by the amendment to Article 102 (b), Court would have come to a different conclusion.

Counsel emphasized that the Constitutional Court considered all the evidence and authorities that were adduced and made a finding that the enactment of section 3 was not inconsistent and or in contravention with Articles 1, 8A and 38 of the Constitution.
The appellants contended that parliament did not carry out consultation prior to enactment of the Constitutional Amendment Act No. 1 of 2018 which amounted to violation of the people's sovereignty under Article 1, 8A and 38.

Article 8A (1) provides that Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

Article 38 provides that every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law. It further provides that

every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organizations.

Counsel contented that, whereas there was no legal requirement for consultation prior to amendment of articles 102 and 183 but none the less, there is evidence on record that consultations were conducted throughout the country and that parliament sought the people's views prior to amending the said articles the Court considered all the evidence adduced in regard to the issue of consultation and participation of the people in the enactment of Constitutional Amendment Act No. 1 of 2018 and came to a conclusion that the Members of Parliament carried out consultations prior to enactment of sections 1, 3, 4 and 7 of the Act

He pointed out that the appellant conceded that indeed there was consultation in respect of the removal of age limit. He invited court to take notice of the appellants' agreement that indeed there was consultation in total compliance with articles 38 and 8A and uphold the Constitutional Court's decision on this issue.

Counsel submitted that court further held that the said consultations were adequate basing on the evidence adduced. That the Justices of the Constitutional Court were not convinced by the appellants argument that there was no adequate consultation and that the process of consultation was marred with interference and restrictions which hindered proper consultations. Court cited various incidents from the Hansard and the evidence adduced in court which proved that the Members of Parliament had held adequate consultations.

Counsel submitted that on the whole, circumstances permitted the honourable members of parliament to consult and provide an input in those amendments that were ultimately enacted into sections 1,3,4 and 7 of the Constitution Amendment Act No. 1 of 2018.

Counsel submitted that, contrary to the appellants' argument in C.A No. 3/2018 that the amendment of Article 102 (b) takes way the sovereignty of the people of Uganda enshrined under Article 1, the effect of this amendment is to open up space and widen the scope of persons who are eligible to stand for election to the office of the president. He argued that the amendment actually safeguards the sovereignty of the people as enshrined under Article 1 as well as articles 8A and 38 of the Constitution because the people of Uganda shall have a wider pool of leaders to choose from.

According to counsel, the amendment did not in any way take away the people's right to choose who leads them in free and fair elections held regularly every five years. That it is on this basis that the Constitutional Court found that the enactment of sections 3 and 7 of the Constitutional Amendment Act No. 1 0f 2018 did not infringe on the basic structure of the Constitution and therefore was not inconsistent with and or in contravention of the Constitution.

He asserted that there was enough evidence on the record that led the justices of the Constitutional court to the conclusion that adequate consultation was carried prior to enactment of sections 3 and 7 of the Constitutional Amendment Act No. 1 of 2018 and hence their enactment was not inconsistent with and did not contravene articles 1, 8A and 38 of the Constitution.

The respondent contended that the principle of applying democratic principles while interpreting the Constitution as laid down in Article 8A was considered by the constitutional court.

He argued further that the amendment of Article 102(b) is in line with orderly succession of government with every President strictly observing his own term.

He laid down relevant Articles to support his argument as follows;
Article 1 (1) of the 1995 Constitution of Uganda provides that; all power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.

Article 1 (4) provides; The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Article 17(1) (h) provides; It is the duty of every citizen of Uganda to register for electoral and other lawful purposes. Article 59 provides that every citizen of Uganda of eighteen years of age or above has a right to vote and that it is the duty of every citizen of Uganda of eighteen years of age or above to register as a voter for public elections and referenda.

Article 103(1) provides that the election of the president shall be by universal adult suffrage through a secret ballot. Under Article 103 (8), provides that a person elected President during the term of a President shall assume office within twenty-four hours after the

expiration of the term of the predecessor and in any other case, within twenty-four hours after being declared elected as President.

Article 105(1) a person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years. Clause (3) provides that the office of President shall become vacant on the expiration of the period specified in this article; or if the incumbent dies or resigns or ceases to hold office under Article 107 of this Constitution. Under Article 105 (4), the President may, by writing signed by him or her, and addressed to the Chief Justice, resign from office as President. Article 107 lays down circumstances and procedure of removal of President.

Counsel submitted that all the above articles provide for orderly succession and peaceful transfer of power and they were never part of the Constitution Amendment Act No.1 of 2018. Counsel argued that the power to decide who governs/rules the people remained with the people who exercise it through regular free and fair elections held every five years and that this power was not taken away by lifting the age limit.

He explained that citizens shall also get an unlimited opportunity to aspire for these offices. Counsel urged court to consider the holdings of Lady Justice Elizabeth Musoke and Justice Cheborion on this issue.

Counsel submitted that the amendment of Article 102(b) did not in any way affect orderly succession and peaceful transfer of power as a principle of democracy.

Court's considerations;

The Appellant's case is that the amendment on lifting of the age limit from qualifications of eligibility of presidency and District Chairpersons is unconstitutional. The parties in their submissions reemphasize arguments that were discussed in issues 1, 2 and 3 and just a few which are being raised for the first time which I shall now proceed to resolve.

Firstly I do not agree with the appellants as I stated in issue 1 that the Article 102(b) forms part of the Basic structure or is a constitutional replacement. In the same spirit, as already discussed above.
The appellants submitted that the amendment was enacted selfishly to benefit the incumbent president which is contrary to the principles of constitutionalism.

It is trite that the Constitution should not be amended for trivial or transient considerations. Such solemn action should be taken only when a matter sufficiently broad in principle is at stake to warrant the long and complex process that the framers envisioned for alterations in the basic document.

Room for amendment of the constitution was provided to cater for the variations of the needs of society. The mischief rule is the backdrop of constitutional amendments. The necessity for amendment of the constitution is made with the view of overcoming the difficulties that may be encountered in the future. The mischief rule of interpretation was first used in the land mark English case if **Heydon (1584) 76 ER 637.** According to this rule, while interpreting

statutes, first the problem or mischief that the statute was designed to remedy should be identified and then a construction that suppresses the problem and advances the remedy should be adopted.

A derivation from the mischief rule is the purposive approach of interpreting a statute. Here, courts use various resources to obtain the purpose of the legislation. In the case of **Berty Van Zyl (PTY) Ltd & Anor vs Minister for Safety and Security and 4 ors Case CCT 77/08 [2009] ZACC 11** court quoted with approval **Thornton in his works, Legislative Drafting 4th edn** at **155** that **"the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of the law."**

In the case **of Olum & Anor vs AG [2002] EA, court observed as follows;**

: "to determine the constitutionality of a section or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation……"

Further in the case of **The Queen vs Big Drugmart Ltd 1986 LRC (Const) 332, the Supreme Court of Canada observed as follows;**

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an

unconstitutional effect can invalidate legislation. All legislations are animated by an object the legislature intends to achieve. The object realised through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of legislation's object an ultimate impact, are clearly limited but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

In the instant case, the Hansards dated 27th September, 2017 at page 4741 reflect that Hon Magyezi in moving the motion stated interalia that;

".....CONCERNED FURTHER that the eligibility requirements for a person to be elected as president or district chairperson, being part of the necessary electoral reforms, must be reviewed as well to comply with Article 1 of the Constitution which gives power to the people that they have the absolute right to determine how they should be governed, and Articles 21 and 32 which prohibit any form of discrimination on the basis of age and other factors…

The purpose of amending Article 102(b) according to the Hon Magyezi was to resolve the discrimination based on age which is embodied in Article 102(b). I am persuaded by the principle in **Olum's case** (supra) that when determining the constitutionality of a provision, if its purpose does not infringe a right guaranteed by the constitution, the court has to go further and examine the effect of the implementation……."

I have carefully considered the submission of both parties on his issue. With greatest respect to the appellants, I do not agree with their contentions on this ground. It is far from truth that 102 and 183 infected Article 1 of the Constitution. The people of Uganda still have to choose who is to be their leader. The sovereign power of the people was therefore not usurped by the said amendment.

It is also not true that the said amendment was to benefit the incumbent who is allegedly about to clock 75 years thereby granting him indefinite eligibility to be President.

With greatest respect to the petitioners the above proposition does not recognise that the sovereign right to choose leaders is in the hands of the people of Uganda. Therefore it cannot be stated that the said amendment infected Article 1, 8A and 21 of the Constitution.

With regard that the amendment amounted to constitutional replacement, as indicated in the 1st ground on basic structure, Article 102 and 183 do not form the basic structure of our Constitution. Their amendments could not amount to Constitutional replacement. In any case there was no replacement since the offices of the President and the District Chairpersons were not abolished, neither were their qualifications. The effect of the amendment was to widen the choice of candidates for the people of Uganda to choose from.

In conclusion, I agree with the unanimous decisions of the Justice of the Constitutional Court and find no merit in this ground.

Issue Six

Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?

Appellants' Submissions

This issue was submitted on by only Mr. Mabirizi.

He contended that had the learned justices erred when they failed to harmonise Article 83(1)(b) with 102(b) of the constitution. He explained that had they done so, they would have found that the president elected in 2016 ceases to hold office on attaining 75 years of age.

He stated that the interpretation of Article 102(b) is that a president ceases to be qualified to hold office the moment he/she ceases to possess the qualifications which were the basis of his/her nomination.

Mr Mabirizi urged this court to harmonise the aforementioned articles which principle was laid in the case of **Semogerere vs AG (supra).**

Mabirizi submitted that the Constitution, sets similar qualifications for the holders of all national elected offices and Local council V chairman however the same are not repeated in every article. He stated that because of this, the provisions in Article 83 apply to all holders of public offices.

He submitted that given a proper interpretation, court cannot differentiate the qualifications and disqualifications of a president from those of a Member of Parliament, prime minister, minister or a

district chairperson, unless the constitution is explicit on that difference.

Mabirizi contended that the question for court to answer is "what provision of the Constitution applies to a situation where a leader ceases to hold such qualifications?" He stated that the answer to the above question can only be obtained by court looking at an article related to qualifications of a president in the Constitution. He further explained that since the president's qualifications are pegged on those of a member of Parliament, the best option is Article 83(1)(b) which provides that;

"A member of Parliament shall vacate his or her seat in Parliament— if such circumstances arise that if that person were not a member of Parliament would cause that person to be disqualified for election as a member of Parliament under article 80 of this Constitution;"

He prayed this issue be answered in affirmative.

Respondent's Submissions

Counsel submitted that Article 102 (b) of the Constitution before the amendment provided that; A person is not qualified for election as President unless that person is not less than thirty-five years and not more than seventy-five years of age.

He stated that the Constitutional Court rightly considered the provisions of Article 102 and unanimously found that the provisions therein purely relate to the qualifications prior to nomination for election and not during the person's term in office.

Counsel contended that when interpreting the Constitution, the basic principle to be followed is that where the words of the Constitution are clear and unambiguous, then they ought to be given their primary, plain, ordinary and natural meaning.

He explained that Article 102 is clearly provides for the qualifications for a person to be elected President.
He urged this court to uphold the observations of the Constitutional justices on the matter and answer this issue in the negative.

Court's considerations;

The appellant's case is that Article 102(b) read together with Article 83 of the Constitution requires the president to retire form the position upon attainment of 75 years of age in the light that had he not been president, he could not qualify to be.

Firstly I shall lay down the observation of the constitutional court regarding this issue. Justice Owiny Dollo (DCJ) found no merit in this ground which opinion was unanimously agreed on by all the justices. He observed as follows;

"We find the requirement of age as a qualification for being elected President is at the point of election; and not at the end or during the incumbency. A President who is elected on the day he or she attains the age of 74 years would be entitled to stay in office for the next five years. This means he or she can stay in office up to the age of 79 years!"

Article 102(b) has been reproduced in several parts of this judgement so I will not do it here. It is to the effect that a person to

be qualified for elections as president has to be between the age of 35 to 75 years.

The position of presidency is rather a very important one. Article 98 provides that the president is the Head of state, Head of Government, Commander –in-Chief of the Uganda Peoples' Defence Forces and the Fountain of Honour. Further, all the executive authority of Uganda vests in the President. On that background, the framers of the Constitution left nothing outside the box regarding the office of the presidency. I appreciate the submissions of Mr. Mabirizi in as far as his reliance on Article 83 however I disagree with his thoughts that Article 83 (1)b was meant to cater for the vacating of office of all officers in a public office including that of the President. The provisions pertaining how the president is nominated, elected, tenure, removal and resignation are well provided for in the relevant Articles in Chapter seventeen of the Constitution.

I agree with Mr. Mabirizi's submission that this court has a duty to harmonise provisions of the constitution and read it as a whole. This was well stated in the case if **Semogerere & Anor vs AG (Supra)** as follows;

"…It is not a question of construing one provision as against another but of giving effect to all the provisions of the Constitution. This is because each provision is an integral part of the Constitution and must be given meaning or effect in relation to others. Failure to do so will lead to an apparent conflict within the Constitution."

Be that as it may, the principle of harmonisation applies only when the provision in issue is unclear and needs an import of other provisions that touch the same issue to interpret it. It cannot apply in this instance because the vacating of the president from office is well provided for under Article 105.

Article 105(1) provides as follows;

"A person elected President under this Constitution shall, subject to clause (3) of this Article, hold office for a term of five years. (emphasis mine)

Clause (3) of the same provision provides that;

"the office of the President shall become vacant :

(a) On the expiration of the period specified in this Article; or

(b) If the incumbent dies or resigns or ceases to hold office under Article 107 of the Constitution. (emphasis mine)

Article 107 of the Constitution provide that;

Article 107 (1) provides that;

The president may be removed from the office in accordance with this Article on any of the following grounds;

(a) Abuse of office or wilful violation of the oath of allegiance and the presidential oath nor any provision of tis Constitution.

(b) Misconduct or misbehavior _

(i) that he / she has conducted himself or herself in a manner which brings or is likely to bring the office of the president into hatred , ridicule , contempt or disrepute; or

(ii)That he /she has dishonestly done any act or omission which is prejudicial or inimical to the economy or security of Uganda; or

(c) Physical or mental incapacity, namely that he or she is incapable of performing the functions of his or her office by reason of physical or mental incapacity.

I shall rely on the Ssemogerere case (supra) and hold that Articles 105 and 107 of the constitution that require harmonisation so as to ably interpret them to suit the framer's intentions. It is my humble view that the framers of the Constitution intended that once a person has been elected president, he shall hold the office for a period of five years and shall vacate the office when the five years lapse.

In that light, I disagree with the appellant's submission that Article 83(1) b read together with Article 102(b) provides for the vacating of the office of the president.

I therefore associate with the holdings of the Constitutional Court that Article 102(b) was meant to only provide for the age bracket for one to qualify to be a president of the republic of Uganda. I further hold that it doesn't matter whether during the five year term of service, the president clocks 75 years, he/she is still a valid president.

This issue is hereby determined in the negative.

Issue Seven

"*7a*. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?"

Appellant's case

The appellants submitted that their right to a fair hearing was compromised in a number of ways by the Constitutional Court. They argued that the right to a fair hearing was enshrined in Article 28 of the constitution and reechoed by courts in cases such as *Bakaluba Peter Mukasa versus Nambooze Bakireke Supreme Court Election Petition Appeal No. 04 of 2009.*

Counsel further stated that this right is highlighted as one of the non-derogable rights enshrined in Article 44 of the Constitution. That although the concept of fair trial or hearing is established by the Constitution, it is the Statutes and Rules or Regulations that establish the procedures that are meant to ensure fair hearings for the parties.

Counsel submitted that Judicial discretion must be exercised on fixed principles and that where there has been no improper exercise of discretion, the Judge's decision cannot normally be upset: **Devji Vs. Jinabhai(19341 1 E.A.C.A. 87** a: **Jetha Vs. Sigh (1931) 13L.R.K.1**.

The appellants argued that their right to a fair hearing was abused by the constitutional court in the following ways;

- Failure by the Constitutional court to invoke their powers under the law to summon key government officials and individuals who played a key role in the process leading to the enactment of the impugned Act to appear and testify on the same.

They submitted that under Rule 12 (3) of the Constitutional Court (Petitions and References) Rules, SI. 91 of 2005 is to the effect that Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.

Counsel relied on the observations of Justice Mulenga (RIP) in the case of **Ssemwogerere& Anor v Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002** who considered the nature and scope of inquiry and investigations which ought to be done by the Constitutional Court.

Counsel contended that it is apparent that the Constitutional Court had discretion and a daunting task of even investigating beyond the evidence adduced before it since constitutional matters are of great national importance, transcending rights of litigants before Court. That it was therefore injudicious on part of the Constitutional Court to decline to summon the Speaker of Parliament the Rt. Hon Kadaga Rebecca, without assigning any reason. That the Constitutional Court ought to have exercised its discretion to summon the following persons to testify on these matters where they played a central role;

a) The Speaker and the Deputy speaker to testify on their lead role in the enactment of the impugned Act, the discrepancies in the certificate of compliance, procedural irregularities, arbitrary suspension of the honourable Members of Parliament from Parliament, the unprecedented mayhem and violence that ensued in the precincts and chambers of Parliament, etc.

b) The Minister of finance to testify on the contradictory Certificates of Financial Implication which were issued from his Ministry in regard to the impugned Act.

c) The Hon. Magezi Raphael who was the architect, progenitor, midwife and sponsor of the impugned Act to inter alia testify on the conceptualization and mischief he intended to cure by moving Parliament to enact the said Act.

d) The President who assented to the Bill which was not accompanied with a valid certificate of compliance.

e) The Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee who processed the Bill at committee stage.

- That Justices of the Constitutional Court erred when they restricted the Appellants' and their counsel on what to be asked in cross examination of the witnesses limiting them to the scope to the averments in the affidavits for the respective witnesses. It was counsel's submission that this was in contravention of the basic principles of evidence law incorporated under Section 137 (2) of the Evidence Act which is to the effect that cross examination of a witness need not be confined to the facts to which the witness testified about

That the mode adopted for submission during the hearing of the petition was also materially defective for the following reasons;

a) The learned Justices of the Constitutional Court erroneously directed the Appellants' counsel to make submissions before the cross examining the relevant witnesses.

b) The learned Justices of the Constitutional Court erroneously denied the Appellants' counsel a right to a rejoinder after the representative of the Attorney had made their submissions in reply.

The Appellants contend further that the Learned Justices of the Constitutional Court erred in law and fact and unjudiciously exercised their discretion in awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which is manifestly meagre considering the nature and significance of the matter.

Mabirizi submitted that the court was duty bound to determine the petition expeditiously whose failure derogated the right to fair hearing. That Article 137(7) of The Constitution and Rule 10 & 11 of The Constitutional Court Rules place a duty on the Constitutional Court to determine a Constitutional Petition expeditiously. That the petition was filed in December 2017 and court only heard it in April 2018 and in a relaxed manner where it would break for weekends starting from Friday up to Tuesday, court adjourned from 12th April 2018-17th April 2018, a gap of 4 days, with no reason, which was illegal. He cited the case of **M/S Mfmy Industries Ltd-Pakistan (supra)**, where it was held that "justice delayed is justice denied". The courts must,… prevent any delays which are being caused at any level by any person whosoever…"

Mr. Mabirizi contended that failure to render judgment within 60 days from 19th April 2018 derogated the right to fair hearing, invalidating the decision. That Rule 33(2) of the Court of Appeal Rules provides that when judgment is not delivered there and then, it 'shall, in any case, be without delay." Also that the Uganda Judicial Code of Ethics, Paragraph 6.2 provides that"…Where a judgment is reserved, it should be delivered within 60 days, unless for good reason, it is not possible to do so."

Mr. Mabirizi argued that the Constitutional Court was duty bound to decide within the maximum being 60 days. However, hearing was

concluded on 19th April 2018 but judgment was only rendered on 26th July 2018, 97 days after hearing, with no single reason.

That the In **Chief Ifezue V. Mbadugha-Nigeria**(supra), the Justices declared the Judgment delivered out of the three months stated by law was null & void. ESO, JSC held that '…what is the sanction against a defaulting judge in regard thereto? The sanction is there! The case is taken away from him and assigned to a judge or panel of judges that will obey the Constitution. The defaulting judge if he makes it a habit becomes one that disobeys the Constitution, contrary to his oath. The consequences might lead justifiably to his removal from the exalted seat of being a judge over others…" and the case of **M/S Mfmy Industries Ltd-Pakistan**(supra), NISAR, J. held that '….Order 20 Rule 1(2), which reads as:- "the Court shall, after the case has been heard, pronounce judgment in open court, either at once or on some future day not exceeding thirty days,.."… without a sufficient cause i.e. a cause beyond the control of the Judge, the judgment is impaired in value if not invalid and disciplinary action can be taken against a Judge…"

Mr. Mabirizi prayed that court be persuaded to find that there was no valid judgment the court could give after expiry of the 60 days from 19th April 2018.

On the evicting the appellant from court seats was a derogation of the right to fair hearing & rules of natural justice. Mr. Mabirizi contended that it was Kakuru JCC who first asked why he was sitting where he was and on responding that he was representing myself, Justice Kakuru responded that they don't think they can allow a stranger" from which Mr. Rukutana stated "Mr. Mabirizi should find his level where he belongs". That he cited to them Articles 28(1) and 44(c) of the Constitution but the DCJ's answer was "Our court is not

going to be the first court to breach those rules of procedure." That he was evicted, first to back seats and later to the dock.

That it was regrettable that the Constitutional court could stand proud that it will not be the first court to breach those rules yet Kanyeihamba,JSC in Ssemwogerere V. Ag (supra), held that …the Constitutional Court…must remain constantly vigilant in upholding the provisions of the Constitution..."

He cited the Canadian Supreme court decision of **Andrews V. Law Society Of British Columbia [1989] 1SCR 143**, it was stated by MCINTYRE J, "…discrimination…It arises where. . . adopts a rule or standard…which has a discriminatory effect upon a prohibited ground…because of some special characteristic… …no intent was required as an element of discrimination,…"..

He also cited **Soon Yeon Kim & Anor V. Ag, Const. REF. No.6/07**, where it was held that "By use of the word 'shall' in sub Article (1) above makes it mandatory that in determination of one's civil rights or obligations…that person must be given a fair, speedy and public hearing before an independent and impartial court'

It approved the Kenya case of **Juma & Ors V. Ag [2003] 2 EA 461 (HCK)**, which inter alia stated that "[8.]….The adjective 'fair' describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure…[10]…He should not be denied something the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case.. [11.]…'facilities'…means the resources, conveniences, or means which make it easier to achieve a purpose…"

That the court turned into 'defence counsel through excessive interruptions hence derogating the right to fair hearing. Mr. Mabirizi noted that the DCJ opposed his submission as he stated that "No, it doesn't say like that… if it is a private members motion then it can only be gone into when there is a certificate if it has financial implication."

Mr. Mabirizi also referred to Justice Kakuru's question as to whether or not a motion, a bill and amended motion is in compliance with article 93 could require a certificate, saying there was no financial implication.

That Before hearing the defence case and rejoinder, the learned Justices made it clear on what their interpretation will be, which was picked by the respondent and the justices held exactly as they promised in the above passage. This was unfair.

He cited the case of **Peter Michel V.The Queen [2009]UKPC 41**- the Privy Council declared the proceedings and judgment a nullity due to increased interruptions by court. It was inter alia held that the core principle, that under the adversarial system the judge remains aloof from the fray and neutral.,applies no less to civil litigation than to criminal trial…He must not be sarcastic or snide…he must not make obvious to all his own profound disbelief in the defence being advanced.…this conviction cannot stand."

Mr. Mabirizi submitted that the conduct of the Constitutional Court was far from complying with any of the above principles and as the decision was nullified above, this should follow the same line.

That failure to grant him ample time to present his case was a failure of fair hearing since ample time is one of the facilities required in fair hearing, as already pointed out in the Kenyan Juma case.

That despite his warning as to the speed, the Justices were sarcastic in their reply and never bothered.

7 That the denial of the right to a rejoinder derogated the right to fair hearing & Court of Appeal rules nullifying the entire process.

Mr. Mabirizi contended that Rule 28(1) of Court of Appeal rules provides that "The court shall, at the hearing of an application or appeal, hear first the applicant or appellant, then the respondent and then the applicant or the appellant in reply." and (4) that "After hearing the opposing party, the court may allow but shall not dismiss
14 any preliminary objection, application, appeal or cross-appeal without giving the objector, applicant, appellant or cross-appellant an opportunity to reply."

That his right to reply after submissions by the respondent is outright and absolute and not put to the whims of court as the court made it to the extent that had to plead for it. That the DCJ introduced two terms; 'CLOSING REMARKS' and 'NEW MATTER'. Which are not known
21 under any law.

He cited the case of **Hamid V. Roko Construction Ltd,** SCCA No.1/13, in nullifying the judgment stated "The Court of Appeal is the second highest court of appeal in Uganda. As prescribed under Article 28(1) of the Constitution, litigants expect the Court of Appeal to handle litigation with fairness and openness which was not the case in this appeal"

28 Mr. Mabirizi submitted that court was bound to be patient to enable them to present their case as required by Principle 6.3 of the Judicial Code of Ethics which provides that "A Judicial Officer shall …be patient and dignified in all proceedings, and shall require similar conduct of advocates, witnesses, court staff and other persons in attendance."

That to the contrary, throughout the proceedings, the learned justices seemed to be so much in a hurry which indeed led to derogation of the right to fair hearing.

Mr. Mabirizi contended that the actions of derogation of the right to fair hearing, by the justices were contrary to international conventions as reflected below:

A. Article 2 (3)(c) of the International Covenant On Civil And Political rights provides that "Each State Party to the present Covenant undertakes…to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial,.. authorities.."

B. Article 27 of the Vienna Declaration & Programme of Action provides that an independent judiciary…are essential to the full and non-discriminatory realization of human rights…democracy ."

C. Article 26 of The African Charter on Human & Peoples' Rights provides that "States Parties…shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

D. Article 6(d) of The East African Community Treaty provides that "…good governance including adherence to the principles of democracy, the rule of law,..;"

He cited the case of **Congo & Anor V. Zimbabwe, Sadct:05/08**, where it was held that "…the concept of the rule of law embraces …the right to a fair hearing before an individual is deprived of a right,…The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested…" he submitted that Plainly, the procedures adopted by the lower court was below the standards above.

Mabirizi also submitted that the Justices of the Constitutional Court did not refer to appellant's pleadings, evidence, authorities & decided cases which was contrary to the rules relating to judgments. Mr. Mabirizi argued that Order 21 Rule 4 of The Civil Procedure Rules (CPR) provides "Judgments….shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision." that his case contained the petition with its main supporting affidavit, the 1st & 2nd supplementary affidavits in support, rejoinder to the answer, 4 affidavits in rejoinder and the discovered documents, which were all not mentioned. That he lined up a total of 66 authorities but no acknowledgment of them was made.

He cited the case of **Obbo & Anor V. Ag, (supra)** where Tsekooko JSC noted that "Courts should at least as a matter of courtesy acknowledge the effort of advocates who produce relevant and useful or binding decided cases…In the Court below the majority decision did not allude to any of those cases and no reasons were given why.

Order JSC held that "..the Constitutional court, …ought to have followed those authorities having a bearing on this case to which the appellants referred to"

That in the case of **Ssemwogerere V. Ag, (Supra),** Kanyeihamba, JSC"…the majority of the learned Justices of the Constitutional Court do not appear to have taken into account counsel's submissions and relevant authorities cited…" Mr. Mabirizi submitted that Court had a duty to confirm reading of the authorities and their conclusions on them.

That the constitutional court was bound to determine all matters in controversy between the parties before it as provided by S. 33 of the Judicature Act that"…so that as far as possible all matters in

controversy between the parties may be completely and finally determined…."

Mr. Mabirizi defined ' a judgment' as per S.1(i) of The Civil Procedure Act(CPA) to be "the statement given by the judge of the grounds of a decree or order;" He also referred to Order 21 Rule 5 Civil Procedure Rules(CPR) which requires a judgment to state its finding or decision, with the reasons…upon each separate issue..." it was his submission that The Constitutional Court flouted the above.

In his further submission he referred to the case of **Ebenezer & Ors V.Onuma & Anor, Nigeria Supreme Court Case No.213/88,** where ESO,JSC, held that It is the primary obligation of every court to hear and determine issues in controversy before it, and as presented to it by litigants. The Court cannot suo motu formulate a case for the parties…" and Belgore JSC held It is within the province of the parties to indicate the issue they wish the court to resolve and the court taking upon itself the formulation of issues for the parties may unwittingly be setting a destructive trap for itself to be accused not of jumping into the fray but forcing issues down the parties throats"

Mr. Mabirizi submitted that court was duty bound to determine issue 6(a) in relation to article 93 of the constitution which was pleaded & argued , Issue 6(a) read that "Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.",

That instead, the DCJ dealt with issue No. 6 but did not resolve issue 6(a). That all the other justices concentrated on the 29million shillings and the 2nd Certificate of Compliance introduced by Hon. Tusiime. That the constitutional court abdicated its duty to determine the case of constitutional replacement which was well pleaded & argued before them. He referred to the case of **Bakaluba V. Nambooze, Scepa No.4/09**, Katureebe, JSC as he was then, held

that"…since the matter had been raised as a ground of appeal and an issue had not only been framed on it but both parties had made submissions thereon, it was imperative on the court to deal with it and make specific findings on it. Simply to ignore it was a misdirection both in law and fact."

Mr. Mabirizi submitted that it was irregular for court to propose answers to witnesses & to prevent the appellant from cross examining witnesses. That the Evidence Act under S.137(2) provides that "…the cross-examination need not be confined to the facts to which the witness testified on his or her examination-in-chief.", S.144,A witness may be cross-examined as to previous statements made by him or her in writing…"

S.145 of the Evidence Act provides that when a witness is cross-examined, he or she may,…be asked any questions which tend— to test his or her veracity;.. or to shake his or her credit, by injuring his or her character,..." That the lower court over-protected Mr. Keith Muhakanizi and made it so impossible for him to give the answers which he wanted.

That the DCJ, with threats to evict him prevented Gen. Muhoozi from answering questions to point out that his affidavit was not commissioned. That the interference by the DCJ was well intended to cover-up the truth that Gen. Muhoozi's affidavit was never sworn.

He referred to the case of **Turinawe & Anor V. Kyalimpa & 4 Ors, SCC Ref.No.1/12**, where this court declined to strike out an affidavit simply because counsel had, after ascertaining that the deponent deposed the affidavit from her lawyer's office, did not ask who was around, to ascertain whether there was a Commissioner for Oaths. That the DCJ's interference defeated his intention to strike out the affidavit hence irregular as it derogated his right to cross-examine which is part of the right to fair hearing.

He also referred to the case of **Nguza Viking (Babu Seya) & Anor V. Tanzania, African Court on Human & People's Rights, Application No. 06/15,** where the court in nullifying the proceedings, ` held that "…denial of an opportunity for the Applicants to cross-examine persons who would have been material witnesses, was a violation (of) Article 7(1)(c) of the charter by the respondent state"

Uganda is a signatory. That the omission to rule on admissibility of substantial paragraphs could have been deliberate to leave hearsay evidence on record.

S.59 of The Evidence Act requires evidence to be direct but a look at the depositions of Mr.Keith Muhakanizi vis-avis, what he stated at cross examination and the depositions of Gen. David Muhoozi vis-avis what he stated at cross-examination, it is clear that neither Mr. Keith Muhakanizi nor Gen David Muhoozi's depositions in the impugned paragraphs of their respective affidavits could pass the test under S.59 of The evidence Act.

That this court in **Mbabazi V. Museveni & 2 Ors, Pep No.1/16,** prohibited affidavits of third parties but insisted that an affidavit must be by a person who perceived the actions. This what is at Similar hearsay affidavit evidence was rejected in **Banco Arabe Espanol V. Bank Of Uganda**.

It was his contention that the two affidavits are nothing but a pile of fabricated lies intended to mislead court which had to be thrown out as was done by Kato JSC, in **Tibebaga V. Begumisa & Ors, SCCAPI. No. 18/02, BERKO, JCC**, in **Ssemwogerere V. Ag**, **CCP No.3/**and in **Mubiru V. Ag, CCP No.1/01.**

Mr. Mabirizi contended that there is no reason why Patrick Ochialap who Mr. Keith Muhakanizi says is the one who processed the certificates of Financial implications or the commander who

commanded the UPDF military operation at parliament did not make their respective affidavits. That Justice Musoke's attempts to save the affidavits on ground that the deponents disclosed their sources of information, without reasons why the sources could not swear is below the statutory standard.

That court had to strike out section 1(b) of the act after nullifying all amendments introduced by Hon. Tusiime. That whether by inadvertence or otherwise, after the majority justices nullifying all the results of the provisions introduced by Hon. Tusiime in the night of 20th December 2018, in their respective judgments, the DCJ declared the entire section as having been passed in full compliance with the Constitution.

Mr. Mabirizi submitted that Issue No. 9 was couched in terms "…in absence of a valid certificate of compliance…"

That the Black's Law Dictionary, 8th Edition at page 675 defines Certificate' as "A document in which a fact is formally attested"

'Attest' meaning "...To affirm to be true or genuine." Certify meaning "To authenticate or verify in writing. To attest as being true or as meeting certain criteria..."

His submission is that after finding that the Certificate of Compliance was not genuine, authentic, true and that it did not meet the required criteria, court could not rely on it.

Mr. Mabirizi argued that court granted the remedy of severance, which was not pleaded. That no issue was framed on whether none compliance affected the act in a substantial manner, or even whether court should sever some parts of the act from others because both parties knew that failure to comply leads to nullification. The court originated the 'pleading' & 'prayer' of 'severance it is the court that originated the discussion of un-

pleaded material relating to severance and court indeed turned into the pleader for the respondent who never pleaded any alternative prayer that severance be adopted or even that the none-compliance did not affect the amendment in a substantial manner.

He contended that court had no power to frame sub-issues of 'whether severance can be applied & whether the none-compliance affected the act in a substantial manner' which did not arise out of the pleadings.

That the power of Court to frame issues is restricted by Order 15 Rule 3 CPR which restricts it to 'allegations made on oath by the parties. Allegations made in the pleadings…and the contents of documents produced by either party." Therefore, court could not originate issues of whether the amendment affected the Act in a substantial manner or whether there would be severance. That it was contrary to fair hearing for court to apply the principles & grant un-pleaded remedy of severance. Court's making of a decision on its own invented points is contrary to fair hearing principles, rules of procedure & decided cases. That order 21 rule 4 of the CPR requires judgments to be based on "…a concise statement of the case, the points for determination..."

Mr. Mabirizi submitted that this court has in several decisions nullified decisions based on matters which were not pleaded. An illustration of which was in **Besigye V. Museveni & Anor, SCPEP NO.1/06**, where Katureebe, JSC held that "…the petitioner could not expect this court to determine on facts or alleged facts that he had not pleaded.."

That in **Fangmin V. Belex Tours & Travel, SCCA No.6/13**, Odoki, Ag. JSC, court relied on the decision of Katureebe, JSC (as he then was) then in **Julius Rwabinumi V. Hope Bahimbisibwe, SCCA No.10/09**,

that "…a Court should not base its decisions on un pleaded matters", before stating that "…a party cannot be granted relief which it has not claimed in the plaint …"

Also in **Rwabinumi V. Bahimbisibwe**,(supra), Kisaakye,JSC held that "…the learned Justices of Appeal erred in law,…when they made pronouncements…which were neither founded in law nor on the pleadings of the parties." That in **Hamid V. Roko Construction Ltd** (supra), this court noted that"…None of those eight grounds of appeal in the memorandum complained about illegalities upon which the learned justices decided the appeal on.' That in **Bitarabeho V.Kakonge**, **SCCA No.4/2000,** it was held that "Had the matter been properly pleaded the possibility of the defendant being the administrator or not of her husband's estate would have been investigated…." He also relied on **Cairo International Bank V. Sadique, SCCA No.03/10**, where it was held that "However since in the plaint the respondent had claimed for interest from date of judgment I think that any interest to be awarded had to conform to the pleadings which had not been amended…" That there is need for this court to revitalize the above principles by nullifying the decision.

The DCJ erred in holding that the location of an entrenchment provision does not matter because it encourages to colourable legislation which this court prohibited in the Ssemwogerere decision,

The framers of the Constitution were sober by making a specific Chapter 18 dealing with all amendment matters and specifying Article 260 of The Constitution to deal with amendments requiring a referendum. Any attempt by parliament to create another Article elsewhere providing for a referendum before amendment of the constitution will be colourable legislation, contrary to the Constitution.

The DCJ's holding that members of parliament can wake up & vote was not pleaded and has no constitutional basis in Uganda & his source was unreliable and quoted out of context.

That the words attributed to Gerald Kaufman were neither spoken nor written by him but by a bystander. That such rumors cannot be of jurisprudential value. The proceedings under issue in the instant case were plenary proceedings and not committee proceedings yet the conversation was on how "the committee system" and passage begins that "once a member goes into the Committee room".

He contended that the passage cannot work in Uganda where people are supreme and members of parliament are accountable to them independent of the political parties, in line with Article 1(4) of The Constitution, Paragraph 3(d) of The Code of Conduct for Members of Parliament, Appendix F to Parliament Rules of Procedure.

That it contravenes the decision in **SSEKIKUBO & ORS V. AG & ORS(Supra)** and **SSEMWOGERERE V. AG,** where Karokora JSC stated that "…It is the people of Uganda who are sovereign and exercise their sovereignty through the Constitution…Each of these organs must be transparent and accountable in their operations…"

That it was erroneous for the DCJ to rely on article 2 of the constitution & the case of **Salvatori Abuki v AG; Constitutional case No. 2 of 1997** to support severance. That the DCJ's reliance on Article 2 to support severance is questionable because if a flouted procedure leads to a law, the constitution prevails rendering the law null and void. That he relied on **Salvatori Abuki v AG; (supra)**, which was not relevant to this case because as per the issues laid out in the lead judgment of Manyindo, there was no issue of the procedural validity and constitutionality of the Witchcraft Act 1957 which was passed by the colonial regime when there was no democracy to

talk about or even rule of law. The petitioner's complaint was on the exclusion order under Section 7 of The Act and not other provisions or the enactment process.

That the decision in **Ag For Alberta V. Ag For Canada(1947)AC503 AT518** relied upon by Justice Kasule to support severance was quoted out of context because from the facts as summarized by Viscount Simond at it is clear that the only point in contest was whether the legislature could legislate on 'Banking' and not whether the procedure adopted in the legislation was contrary to that laid down by the law granting powers to the legislature. This decision would have instead helped him to find for him on Article 93.

That the decision of **Matiso V Commanding Officer, Port Elizabeth Prison** was not relevant to the facts before court. Justice Kasule relied on it but the facts as summarized by KRIEGLER J, reveal that the petitioners therein were not challenging the process of enacting legislation. They were challenging some parts of the Magistrates Courts Act, enacted prior.

That the decision of , MR, **In Kingsway Investment (Kent) Ltd V. Kent County Council (1969) 1 ALLER 601 AT 611** was misapplied by Justice Barishaki, because in the circumstances of this case, no severance could be done because the law depended on the process. Looking at the facts as stated at, the issue before court was whether the provisions of the urban authority outline planning permissions were in line with the law at the time and the effect of invalidity of a clause of a permission or license. It is also clear that severance was only used in reference to a building permission and not to a statute making process.

That at hearing, the effects of not summoning the speaker caught up with the Justices and AG since the Speaker would be the only person to answer questions relating to the invalid certificate of compliance. That without summoning the speaker, court erred in commenting and deciding in favour of and against her without testing the basis and credence of these actions.

Mr. Mabirizi submitted that denying him professional compensation contravenes Articles 21, 28(1),44(c),126(1),126(2)(c) of The Constitution at ,Rule 23(1) Court Of Appeal Rules and Or 3 r1 CPR. That Common law jurisprudence is against denying self-represented litigants costs and compensation for time and resources spent in litigation as decided in **Cabana V. Newfoundland And Labrador et al., 2016 NLCA 75 (CanLII), Mr Scott Halborg V. Emw Law Llp England & Wales Court of Appeal (Civil Division) Neutral Citation Number: [2017] EWCA Civil 793 Case No: A2/2015/, 2014 ONSC 5768 (CanLII),** which are highly persuasive in this case where there is no doubt that he did professional work in preparation and exhibited much zeal and diligence at presentation in a highly contentious matter.

The UGX 20million awarded as professional fees for each petition was without basis, inadequate and below the standard set by this court. Article 126(2)(c) commands courts to award 'adequate compensation'. That in **Ag V. Sekikubo & 4 Ors SCC Ref. No.13/16,** with the reasoning Opio-Aweri JSC, awarded instruction/professional fees of shs. 80,000,000/= for Senior Counsel and shs. 50,000,000/= for the second counsel, in **Muwanga Kivumbi V. Ag, SCC Ref. No.35/18**, he awarded Ugx. 80,000,000 in the place of 6 million. Although it is true that the above decisions dealt with scenarios at Supreme Court, it is also true that the instant case is of a greater magnitude and indeed required and we did great research. In appreciation of the great research, he proposes that each petition should be awarded

Ugx.300,000,000 to meet the considerations stated by Opio Aweri JSC, above.

Mr. Mabirizi submitted that there was no need to prove general damages because they are assessed depending on the general circumstances of the case and not evidence as it has been done in **Omunyokol V.Ags, CCA No.2/12,Stanbic Bank Ltd V. Kiyemba Mutale, SCCA No.2/10, A.K.P.M. Lutaya V.Ag, SCCA No.10/02,A.K.P.M. Lutaya V. Ag, CACA No.2/05.** That Courts have awarded general damages even where a party has not proved some pertinent aspects of the case as it was done in **Opus V. Harvest Farm Seeds Ltd SCCA No.2/12, Ushabe & Anor V M/S Anglo African Ltd & Anor SCCA No.7/99,Kakembo V. Roko Construction Ltd,CACA No.5/05 & Mk Financiers Ltd & Male H. Mabirizi K.K V. Owere Franco & Ors, High Court Execution & Bailiffs Division Misc. Application No. 2763 of 2014.**

ISSUE 7(b): If so, what is the effect on the decision of the Court?

Mr. Mabirizi submitted that the failure of fair hearing & procedural irregularities rendered all the proceedings and judgment null & void. He cited the case of **Bakaluba V. Nambooze, (Supra),** Katureebe, JSC held that "…allegations of denial of the right of fair hearing or trial are very serious indeed and should not be made lightly or merely in passing. They impact on the very core of our trial system." He also relied on **Ebenezer Nwokoro & Ors V. Titus Onuma & Anor-Nigeria** (supra) Nnamani JSC held that "…I am, however, not able to say in this case that there has been no miscarriage of justice. The right to be heard is so fundamental a principle of our adjudicatory process that it cannot be compromised on any ground"

That as to the inconveniences which may arise from nullification of the proceedings and Judgment, he relied on **Chief Ifezue V. Mbadugha, Nigeria (supra)**, where UWAIS, JSC, while nullifying the

judgment held that"…The fault which leads to the infringement of the Constitution…may entirely be the fault of the court, for example…where it fails to give judgment within the period prescribed as in the present case…any hardship arising therefrom should be regarded as one of the hazards of litigation which parties have to endure."

In the alternative, Mr. Mabirizi submitted that since this court is empowered by S. 7 of The Judicature Act, it can make directions that can remedy the irregularities and grant appropriate remedies.

Respondent's case;

The Respondent submitted that the respective Appellants do not satisfy or otherwise meet the threshold required for an Appellate Court, herein the Supreme Court hearing the instant Constitutional Appeal, to interfere with the discretion or otherwise overturn the decision of a Court of Original Jurisdiction and prayed court to find no merit in the appeal.

He submitted that in the case of **American Express International Banking Ltd Vs. Atul [1990-1994] EA 10 (SCU)**; the Supreme Court of Uganda elaborated the circumstances/tests for interference with discretion and they include;

i. Where the Judge misdirects himself with regard to the principles governing the exercise of his discretion;

ii. Where the Judge takes into account matters which he ought not to consider; or fails to take into account matters which he ought to consider;

iii. Where the exercise of his discretion is plainly wrong.

Counsel submitted that the procedure to be followed by the Constitutional Court in hearing and determining Constitutional Petitions is provided for in the Judicature Act, Cap. 13, Judicature (Constitutional Court) (Petitions and Reference) Rules SI 91/2005. The Judicature (Court of Appeal Rules) Directions SI 13-10,The Civil Procedure Act Cap. 71, Civil Procedure Rules SI 71-1 and decided cases and Authorities.

He submitted that the Constitutional Court herd and determined the Constitutional Petition expeditiously and that because court delivered past the 60 days does not render the judgment a nullity. Counsel relied on Article 137(7) of the Constitution which requires that upon presentation of a Petition, the Constitutional Court shall proceed to hear and determine the Petition as soon as possible. That Rule 10(1) of the Constitution Court (Petition and References) Rules SI No. 91/2005 similarly provides that the Court shall, in accordance with Article 137(7) of the Constitution, hear and determine the Petition as soon as possible. He submitted that the standard established by the Constitution for the Constitutional Court to hear and determine Constitutional Petitions is "as soon as possible".

The five (5) Petitions were lodged respectively in December, 2017 and January 2018.The 1st Appellant specifically lodged his petition in December 2017.On 9th April 2018 several petitions were called for hearing in Mbale and thereafter consolidated for purposes of being heard together with others due to the similarity of the issues raised by the different petitioners in the lower court. The timetable adopted by the Court was implemented as follows:-First hearing, preliminaries

and Consolidation - 9th April 2018; Commencement of hearing - 10th April 2018; Conclusion of hearing - 19th April, 2018 and Judgment was delivered on 26th day of July 2018.

The Respondent submits that the record of proceedings demonstrates that the Constitutional Court considered and determined the Five (5) Consolidated Petitions with due diligence and expedience in the circumstances considering the multiple claims and multiple litigants and Counsel participating in the Court proceedings.

The Respondent invites this Honorable Court to find that the Constitutional Court duly expeditiously heard and determined the Consolidated Petitions as required by the standard established by Article 137(7) of the Constitution and that the Appellants suffered no prejudice whatsoever or derogation of the right to a fair hearing on account of the manner in which the hearing and determination was conducted.

In Ground 2 , the 1st Appellant complains that he was evicted from Court seats occupied by representatives of other Petitioners and put in the dock throughout the hearing and decision of the Petition and in (Para 9) submits that the alleged eviction was a derogation of his right to a fair hearing and the rules of natural justice. The Respondent notes that the 1st Appellant purports to selectively quote Hon. Justice Kakuru, the Hon. Deputy Attorney General and the Hon. Deputy Chief Justice respectively while ignoring or attempting to obfuscate the entire context of the discourse.

The Respondent submits that the authoritative and conclusive determination is contained in the guidance of the Hon. Deputy Chief Justice where he states: -

"… the position is this, Mr. Mabirizi is a Petitioner and he has every right to be heard like other Petitioners, the other Petitioners chose to be heard through learned Counsel, they brokered professional services of learned Counsel and they are called members of the bar with the right to appear here in a particular way. The right to be heard does not mean you choose where to sit. The right to be heard is to be able to present your case, every institution, every profession has got its rules of conduct and rules of procedure. Our Court is not going to be the first to breach those rules of procedure. Accordingly, Mr. Mabirizi will sit with the other litigants and when the time comes for him to present his case we will bring him to sit in an appropriate place where he can present his case."

The Respondent prays that the Honorable Court finds that the 1st Appellant was courteously treated like other litigants and that the record of appeal clearly demonstrates that the 1st Appellant enjoyed and was accorded every opportunity to present his case including; - conferencing, making applications, cross-examination of witnesses, submissions and receiving Judgment and suffered no prejudice whatsoever or derogation of his right to a fair hearing by way of his accommodation in Court during the hearing and determination of the Petitions. No eviction occurred.

In Ground 3 and Ground 4 the 1st Appellant complains respectively that a miscarriage of Justice was allegedly caused by the Court not

giving him ample time to present his case and alleged extreme and unnecessary interference with his submissions and that the Court allegedly derogated his right to a fair hearing by allegedly preventing him from substantially responding to the Respondent's submissions by way of rejoinder.

In (Para 10) the 1st Appellant generally accuses Court of allegedly turning into defense Counsel through excessive interruption allegedly derogating the 1st Appellants right to a fair hearing citing remarks made by the Hon. Deputy Chief Justice and Hon. Justice Kakuru, JSC.

A proper understanding of the context and the language used therein is instructive and demonstrates that the Court was seeking clarification on the proper construction of the contents of documents and enquiring into the legality of the passage of the Constitutional Amendment Bill, No. 1/2018 as part of its duty under Article 137(1) of the Constitution. The Respondent submits that the 1st Appellant's submissions are presumptuous and without any basis whatsoever.

In (Para 11), (Para 12), (Para 13) and (Para 14) respectively; the 1st Appellant complains that he did not have ample time to present his case though he does not substantiate, alleges that he was denied the right to make submissions in rejoinder, further complains that throughout the proceedings the Hon. Justices of the Constitutional Court were in a hurry derogating his Constitutional right to a fair hearing and International Conventions.

At the outset, the Respondent points out that these grounds are in stark contradiction and undermines the 1st Appellant's Ground 1 (Para 7 and Para 8) where the 1st Appellant purports to complain that the Court did not hear and determine the Consolidated Petitions expeditiously.

Notwithstanding, the Respondent re-iterates its earlier submissions that the Hon. Justices of the Constitutional Court duly heard and determined the Consolidated Petition according all parties an equal chance to present their respective cases and the record of appeal demonstrates that all the parties in the Consolidated Petitions - fully participated in the proceedings and had ample time to present their cases.

Additionally, the record of appeal demonstrates that the Hon. Justices of the Constitutional Court were deliberate and methodical as required by and in accordance with the Rules cited above.
With regard to the right to make a rejoinder, the Respondent submits that the Appellants could only submit in rejoinder in regard to new matters raised during the course of the Respondent's submissions. Contrary to the 1st Appellant's submissions in Para 12B, his right to reply is not "outright and absolute".

That the record of proceedings is instructive specifically at page 2226 Learned Counsel Mr. Wandera Ogalo stated that;

"My Lords, we request your indulgence that you allow a rejoinder … My Lords in the course of submissions by the learned Attorney

General we are of the view this side that in those arguments new matters were raised …"

7 That accordingly, Learned Counsel Byamukama rejoined at page 2226-2227 of the record of appeal, Mr. Lukwago rejoined at pages 2229 and Mr. Mabirizi was accorded an opportunity to rejoin at pages 2230-2231. At pages 2230 Mr. Mabirizi commences his rejoinder and the record demonstrates as follows: -

14 "My Lords I have a few, first of all I want this Court to note that in the pleadings and submissions the Respondent has not refuted the fact that there was colorable legislation …"
Whereupon the Hon. Deputy Chief Justice observed stating that: -
"No that is not new."

The 1st Appellant then continued stated that: -
21 "My Lords I am moving to issue 6A and B …" and at page 2231 concludes by stating that: - "… in conclusion My Lords I reiterate my earlier prayers maybe since Counsel Ogalo is closing I need to thank you for your indulgence here, for the patience and for everything except this which I challenged but it's okay I have made my case and I am grateful my Lords for you."

28 The Respondent submits that there was no derogation of the 1st Appellants right to a fair hearing arising from the procedure adopted by the Hon. Justice of the Constitutional Court and the allegations that the Court acted contrary to International Conventions do not arise whatsoever.

In **Constitutional Appeal No. 1/2015: Hon. Theodore Ssekikubo & 4 Others Vs. The Attorney General & 4 Others**, while considering the power (discretion) of the Constitutional Court to grant leave to allow cross examination of deponents of affidavits under Rule 12 of the Constitutional Court (Petitions and Reference) Rules SI No. 91/2005 at pages 18 – 19 of the decision, the Supreme Court made reference to **Mbogo & Others Vs. Shah [1968] E.A. pages 93** and stated that: -

"From the wording of Rules 12(2) above, the Court's power is purely a discretionary one. That being the case, it is well settled that this Court will not, as an Appellate Court, interfere with the exercise of discretion by a lower Court including the Constitutional Court, unless it is shown that the Court took into account an irrelevant matter which it ought not to have taken into account or failed to take into account a relevant matter which it ought to have taken into account or that the Court has plainly gone wrong in its consideration of the issues raised before it."

That while in the instant Appeal the 1st Appellant complains about the Hon. Justices making enquiry into the submissions of the respective parties, which the Respondent submits the Court is entitled and duty bound to do by seeking clarification where necessary and requiring the 1st Appellant to point out the areas for submissions in rejoinder, the Supreme Court in somewhat similar circumstances held at page 19 that: -

" …, the complaint in ground 3 of Appeal is that the learned Justices of the Constitutional Court not only refused to allow cross examination of the President, but they first directed Counsel for the

Appellants to point out the questions and areas they intended to cross-examine the President on. To us, the learned Justices were only executing their duty of first establishing the material upon which to base their decision to allow or disallow the request by the Appellant's Counsel. This is in line with the well settled principle of law that the Court must exercise discretion judicially on the basis of material placed before it by the parties, not whimsically or capriciously."

That concerning fair hearing the Court proceeded to find that: -
"It is further our finding that the procedure adopted by the learned Justices of the Constitutional Court did not in any way, defeat the right to fair hearing as alleged by the appellant's Counsel since the record clearly shows that both sides were afforded an opportunity to address Court on the issues before the Court arrived at its decision. In the premises, this Court declines the invitation to interfere with the decision of the learned Justices of the Constitutional Court"

That in Ground 17, 18, 19 and 20 respectively the 1st Appellant complains that the Hon. Justices of the Constitutional Court did not refer to his evidence and submissions ,did not consider his authorities presented in submissions; that the majority Hon. Justices failed to properly evaluate the pleadings, evidence and submissions hence reaching wrong conclusions. In (Para 15) the 1st Appellant submitted that the Hon. Justices of the Constitutional Court omitted to refer to his pleadings, evidence, authorities and decided cases contrary to Order 21 Rules 4 of the Civil Procedure Rules SI 71-1. The 1st Appellant generalizes and does not elaborate on any specific

omissions. The Respondent submits that each and every Hon. Justice of the Constitutional Court acknowledged the pleadings, submissions and authorities in their respective Judgments.

Reference is made to the respective Judgments of the Hon. Justices of the Constitutional Court. Hon. Deputy Chief Justice at pages 2338-2345 of the record of appeal; Hon. Justice Kasule at page 2456 , 2501 & 2590 of the record ; Hon. Justice Kakuru at pages 2960-2966 of the record ; Hon. Justice Elizabeth Musoke at pages 2451, 2452-2454 , page 2608, pa /e 2625, 2639; and, Hon. Justice Cheborion at pages 2738-2739;

In (Para 16) the 1st Appellant submitted that the Constitutional Court was bound to determine all matters in controversy between the parties as required by Section 33 of the Judicature Act, Cap. 13. The Respondent submits that the Hon. Justices of the Constitutional Court duly determined and resolved all the issues in controversy as presented in the pleadings, framed in the issues and submitted by the respective litigants. The Respondent further submits that the core subject matter referred to the Constitutional Court were the issues for Constitutional Interpretation regarding the Constitutional Amendment Act, No. 1/2018 under Article 137(1) of the Constitution and the respective Hon. Justices of the Constitutional Court duly and faithfully interpreted the provisions Constitutional Amendment Act, No. 1/2018 vis-à-vis the Constitution and granted redress.

That in **Supreme Court Civil Appeal No. 1/2012: British American Tobacco (U) Ltd Vs. Shadrach Mwijikubi & 4 Others** it was held that "While it is prudent for Judges to provide explanations for how and

why they reached a certain decision, I am of the opinion that this is not an indication that the evidence was not properly evaluated, and is simply, as Counsel for the Respondent asserted, 'a matter of style'. However, I have carefully perused the leading Judgment and found that he actually re-evaluated the evidence of the two principal witnesses in detail and came to his own conclusion before he agreed with the findings of the trial Judge. The learned Justice ensured that he recounted the various points in contention and had them in mind while writing the Judgment."

The Respondent re-iterates that the Hon. Justices of the Constitutional Court duly considered the matters and issues complained of by the 1st Appellant and the complaints of the 1st Appellant are in respect of style and not substance.

In Ground 6, Ground 7 and Ground 8 the 1st Appellant complains respectively that; - the Hon. Justices of the Constitutional Court did not mention or even rely on the Petitioner's two (2) supplementary affidavits, rejoinder to the Answer to the Petition and supporting affidavits as well as affidavits in rejoinder to affidavits of Mrs. Jane Kibirige, Mr. Keith Muhakanizi and General David Muhoozi; the majority Hon. Justices did not determine the legality of the substantial contents of the affidavits of General David Muhoozi, Chief of Defense Forces which were allegedly put in issue as hearsay and the majority Justices did not determine the legality of the substantial contents of the affidavit of Mr. Keith Muhakanizi, Secretary to the Treasury which were allegedly put in issues as hearsay. In (Para 23) the 1st Appellant submitted that Court was

bound to make a decision on his Application to strike out the affidavits of Mr. Keith Muhakanizi and General David Muhoozi. The record of appeal shows at pages 809-814 that the Appellants applied to cross examine witnesses.

Cross examination of General David Muhoozi was at pages 1525-1561 of the record of appeal and specifically at page 1554 he testified that as the Chief of Defense Forces he was the best person to swear the affidavit since the operation was under his command and at page 1532 he testified that he passed instructions down the chain of command. Cross examination of Mr. Keith Muhakanizi was at pages 1414-1498 with the 1st Appellant specifically cross examining him at pages 1463-1480. Re-examination was at pages 1491-1498 . Mr. Muhakanizi testified that the Certificate of Financial Implications was prepared under his authority as the Permanent Secretary/Secretary to the Treasury and duly explained the circumstances under which the certificate was prepared. Sources of information were duly disclosed. No hearsay therefore arose in either circumstance.

In Ground 25 & Ground 26 (Para 24& 25) the 1st Appellant submitted and accused the Honorable Court of proposing answers to witnesses and preventing him from cross examining witnesses ;that the court over protected Mr. Keith Muhakanizi and prevented him from answering questions put to him.

The Respondent submits that the Court has discretion to regulate cross examination and guide litigants to cross examine witnesses on pertinent matter related to the litigation and surrounding

circumstances. The Court has the authority to limit cross examination including on matter that are speculative, irrelevant and otherwise inconsistent with the Evidence Act, Cap. 6. The Court may further make enquiry of the witnesses even beyond the enquiry made by the lawyer cross examining the witnesses for the purpose of clarification and obtaining wholesome testimony depending on the circumstances of the case.

The Respondent submits and prays that this Honorable Court finds that the Hon. Justices of the Constitutional Court were fully justified in making their enquiry. Moreover, the record of appeal at pages 1384-1385 demonstrate that the Hon. Justices of the Constitutional Court set ground rules for cross-examination to guide all the parties and Counsel cautioning them to either keep within the rules or lose the opportunity to cross examine. At pages 1556-1557 the Hon. Deputy Chief Justice guided the 1st Appellant on his cross examination since he was deviating from the ground rules established and required the 1st Appellant to abide by the ground rules set for the cross examination.

In (Para 25) the 1st Appellant submitted that the Hon. Deputy Chief Justice's alleged interference was intended to cover up the truth that General Muhoozi's affidavit was never sworn. The Respondent objects to this ground on the basis that it is speculative and offends Rule 82 of the Judicature (Supreme Court Rules) Directions SI 13-11 and prays that the ground is struck out and the submission is similarly treated. Notwithstanding, the testimony of General Muhoozi has already been referred to under (Para 24) and in the record of

proceedings at page 1525-1561. Suffice it to say that the allegation is without merit.

In (Para. 26) the 1st Appellant submitted that the alleged omission to rule on admissibility of substantial paragraphs could have been deliberate to leave hearsay evidence on record. The Respondent objects to this submission on the basis that it is speculative and offends Rules 82 of the Judicature (Supreme Court Rules) Directions SI 13-11 and prays that the ground is struck out and the submission is similarly treated. Notwithstanding, the testimony of both General David Muhoozi and Mr. Keith Muhakanizi have already been submitted on herein-above. Suffice it to say that the allegation is without merit.

In Ground 79 and Ground 80 the 1st Appellant complains respectively that the majority Hon. Justices erred when they allegedly proposed and granted a remedy of severance which was not pleaded by the Respondent; the majority Hon. Justices erred in applying the principle of severance of some sections in a single Act allegedly in a situation where the Constitutional Amendment procedure was fatally, unconstitutionally defective. In (Para 29), (Para 30), (Para 31) and (Para 32) the 1st Appellant submitted respectively that the Court granted the remedy of severance which was not pleaded, the Court originated the pleading and prayer of severance, the Court had no power to frame sub-issues of whether severance can be applied and whether non-compliance affected the Act is a substantial manner which did not arise from the

pleadings and that the foregoing were contrary to his right to a fair hearing.

7 The Respondent submits that the core role of the Constitutional Court under Article 137(1) of the Constitution is to interpret its provisions while Article 137(3) (b) and 137(4) provide for the grant redress within the discretion of the Court based on the circumstances pertaining. Accordingly, while declarations are the primary duty the Court may grant redress including the remedy of severance either at the
14 pleading or prayer of Counsel or a Litigant or exercising its own discretion.

The Court has the discretion to require Counsel or litigants to address it even on under pleaded issues and remedies and even to accordingly frame issues for Counsel and litigants to address. Severance is a well-established legal remedy and there is no bar to
21 the Hon. Justices of the Constitutional Court exercising their discretion to grant the remedy of severance. The Respondent addressed Court on the remedy of severance at page 2206 of the record. The 1st Appellant had every opportunity to address the Hon. Justices of the Constitutional Court on the issue of severance, did not suffer any prejudice and was duly accorded a fair hearing.

28 In (Para 33) the 1st Appellant submitted that the Courts making of a decision on its own allegedly invented points is contrary to fair hearing principles, rules of procedure and decided case. The Respondent submits that in the course of a Court conducting its enquiry the Court has wide discretion to draw on existing Constitutional and legal principles and both pleaded and not

pleaded depending on the circumstances of the case and it is the duty of the Court to apply the relevant principles for the ends of justice. The Hon. Justices of the Constitutional Court in applying the remedy of severance relied on Article 2(2) of the Constitution as well established authorities. The principles considered and applied by the Court are well established Constitutional and legal principles which the 1st Appellant had opportunity to address Court on. No prejudice was occasioned and the 1st Appellant was accorded a fair hearing.

Additionally, the 1st Appellants arguments are misconceived because authorities cited related to litigants being bound by facts and matters pleaded. They do not preclude a litigant from relying on the abundance of legal principles to advance their cases. Hon. Deputy Chief Justice's decision is at pages 2437-2440, Hon. Justice Kasule's decision is at pages 2523-2528, Hon. Justice Kakuru's decision is at page 2970, Hon. Justice Elizabeth Musoke's decision is at pages 2668-2676 and Hon. Justice Cheborion's decision is at pages 2788-2789.

In (Para 34) and (Para 35) the 1st Appellant further submitted respectively that the Court initiated and granted the un pleaded defense that once there is a quorum, absence of opposition is immaterial and that it was erroneous for the Court to raise the point of quorum which was not in issue. The Respondent re-iterates that in any adjudication, specifically Constitutional Interpretation, the Court is at liberty and has a duty to enquire into the entire factual and evidential circumstances of the case and review the entire breadth and depth of Statutes, Authorities and Literature in coming to its

determination. That specifically in the Constitutional Court, the Court is not fettered in its consideration of the case by the limitations of litigants. Notwithstanding, the respective parties had every opportunity to address Court on the issue. That the parties had equal opportunity and no prejudice was suffered and thus all parties were duly and fairly heard.

In Ground 5 and Ground 82 of his Memorandum of Appeal the 1st Appellant complains respectively that the Hon. Justices of the Constitutional Court erred when they did not give reasons for the decision not to summon the Rt. Hon. Speaker of Parliament and that the Hon. Justices erred when they allegedly "un-judiciously" exercised their discretion allegedly in contravention of basic legal principles by not summoning the Rt. Hon. Speaker of Parliament for questioning on her role in the process leading to the impugned Act.

In (Para 43), (Para 44), (Para 45) and (Para 46) the 1st Appellant respectively submitted that his desire to have the Rt. Hon. Speaker summoned was well pleaded and the Application was so contentious that its decision could not go without reasons; failure by Court to give reasons for dismissing his Application for summoning the Rt. Hon. Speaker was an abuse of discretion; at hearing the effects of not summoning the Rt. Hon. Speaker caught up with the Hon. Justices and the Attorney General and without summoning the Rt. Hon. Speaker the Court erred in commenting and deciding in favor of and against her.

The Respondent refers to pages 809-850 of the record of appeal for the submissions and prayers of Counsel in respect of summoning the

Rt. Hon. Speaker. The Respondent submits that a review of the record demonstrates that the 1st Appellant was the only one that sought cross examination of the Rt. Hon. Speaker. The decision of the Court is at page 850 and 851 (print pages 85 and 86) wherein the Court states: -

"We have taken into account the fact that this is not an ordinary Petition. We have five consolidated Petitions seeking answers to a number of issues that are of great public importance. The peculiar circumstances of these Petitions require that we stretch our discretion and grant the Application to call for cross examination of the witnesses whose names have been set out and whose affidavits are on record. We decline to grant an order calling the Speaker of Parliament for examination as we have found no reason to do so. The detailed reasons for our decision shall be set out in the final Judgment or Judgments".

The Respondent submits that the decision of the Court cited above is a ruling on an Interlocutory matter and the Court duly considered the arguments of the respective Counsel and litigants and pronounced itself on the matter of examination of the Rt. Hon. Speaker, declining to grant the order sought. The Respondent submits that the ruling of the Court already contained the abridged reasons for declining to grant the Application and as such the Appellant had due notice of the reasons for refusal.

That notwithstanding, the 1st Appellant filed in the Supreme Court Misc. Application No. 7/2018 similarly seeking to cross examine the Rt. Hon. Speaker which was heard on the 12th December, 2018 and

dismissed on the 14th December, 2018. The Respondent submits that Issues 5 and 82 were duly rendered moot by the Applicant filing Misc. Application No. 7/2018 and as a consequence of its subsequent dismissal.

The Respondent submits that Grounds 5 and Ground 82 of the 1st Appellants Memorandum of Appeal regarding the decision not to call the Rt. Hon. Speaker for examination are overtaken by events and any decision of the Court in that regard would therefore be moot. Notwithstanding, the Respondent prays that the Hon. Justices of the Supreme Court uphold the decision of the Hon. Justices of the constitutional Court not to call the Rt. Hon. Speaker who had not sworn any affidavit for examination. The Respondent submits that the verbatim record of Parliamentary proceedings produced in the Hansard is already on Court record together with the Certificate of Compliance.

Rule 223 of the Rules of Procedure of Parliament, 2017 provides: -
"The Clerk shall keep minutes of the proceedings of the house, which shall record the attendance of Members at each sitting and all decisions taken by the House."

Rule 224 of the Rules of Procedure of Parliament, 2017 provides: -
"(1) The Clerk shall –

(a) Be responsible for making entries and records of things done and approved or passed in the House;

(b) Have custody of all records and other documents belonging or presented to the House; and

Rule 225 of the Rules of Procedure of Parliament, 2017 provides: -

"(1) The Clerk shall be responsible for ensuring that all Parliamentary proceedings are reported word for word and that an official report of the proceedings is published as soon as possible after each sitting."

Rules 229 of the Rules of Procedure of Parliament, 2017 provides: -

"All papers laid before the House shall upon production be deposited with the Clerk who shall be responsible for their safe custody."

The Respondent accordingly submits that the designated custodian of the records of Parliament is the Clerk to Parliament who fulfilled her duty by making the Hansard and Certificate of Compliance available to Court and the Litigants in the consolidated Petition who had the opportunity to cross examine her at length.

That the Hansard and Certificate of Compliance are recognized as public documents under Section 73 and Section 75 of the Evidence Act, Cap. 8. Section 76 of the Evidence Act, Cap. 8 provides that certified copies may be produced in proof of the contents of public documents. Therefore, the admittance in evidence of the Hansard and Certificate in evidence by the Court was sufficient to enable the parties litigate the Petitions and the Hon. Court determine the matters in issue. The notion that the 1st Appellant intended to cross examine the Rt. Hon. Speaker on the contents of the Hansard is misconceived, since the Rt. Hon. Speaker cannot add, reduce or otherwise very the contents of the Hansard and the documents

speaks for itself as a true, faithful, accurate, complete and impartial account of the deliberations and decisions of Parliament.

7

In Ground 21 and Ground 22 the 1st Appellant complained respectively that the Hon. Justices of the Constitutional Court erred in allegedly failing to exercise their discretion to call for the evidence of the Rt. Hon. Speaker of Parliament, the Rt. Hon. Deputy Speaker of Parliament, the Hon. Minister of Justice and Constitutional Affairs, the Chairperson and Deputy Chairperson of the Parliamentary
14 Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi and that the majority Hon. Justices misdirected themselves by allegedly failing to take into consideration the Respondent's failure to adduce their evidence.

The Respondent re-iterates its submissions herein-above that the Clerk to Parliament, as the custodian of Parliamentary records and
21 documents, duly submitted the requisite record and documents evidencing the entire series of events and circumstances involved in presenting and considering the Constitutional Amendment Bill, 2017 and its evolution into the Constitutional Amendment Act, No. 1/2018.

The Respondent further submits that neither the 1st Appellant, nor the 2nd Appellant, sought to examine the Rt. Hon. Deputy Speaker
28 of Parliament, the Hon. Minister of Justice and Constitutional Affairs, the Chairperson and Deputy Chairperson of the Parliamentary Committee of Legal and Parliamentary Affairs and Hon. Raphael Magyezi. Their Grounds of Appeal and submissions are an afterthought.

In Ground 81, Ground 83 and Ground 84 the 1st Appellant respectively complained that the Hon. Justices of the Constitutional Court erred when they denied the Petitioner General Damages on ground that he did not prove them; that the Hon. Justices allegedly exercised their discretion "un-judiciously" and without any sound reason held that the Petitioner is not entitled to professional indemnification and that they erred when they allegedly "un-judiciously" and without any reason held that each Petition should receive professional fees of Ushs. 20,000,000/= (Twenty Million Uganda Shillings).

In (Para 47), (Para 48), (Para 49), (Para 50) and (Para 51) the 1st Appellant respectively submits that he was allegedly denied professional compensation on account of appearing in person whereas he is allegedly a professional; alleged denial of professional compensation contravenes Articles 21, 28(1),44(c),126(1) and 126(2)(c) of the Constitution; common law Jurisprudence is against denying self-represented litigants costs and compensation for time and resources spent in litigation; the Ushs. 20,000,000/= awarded as professional fees for each Petition was without basis, inadequate and below the standard set by Court and that there was no need to prove general damages. The Respondent submits that the awards by the Hon. Court were purely discretionary under Article 137(3) and Article 137(4) of the Constitution. The Respondent submits and prays that the Court finds that in the circumstances the redress ordered was appropriate.

(b) If so, what is the effect on the decision of the Court?

In (Para 52) the 1st Appellant submits that the alleged failure of the hearing and procedural irregularities rendered all the proceedings and Judgment null and void. The Respondent re-iterates that as shown and submitted above the Appellants participated at each and every stage of the proceedings in the Constitutional Court and duly received a fair hearing in accordance with Article 28 of the Constitution. The Respondent further submits that the procedures adopted by the Constitutional Court were entirely within their discretion and did not in any way prejudice the Appellant or occasion derogation of such right. The Respondent, in conclusion, submits that the Appellants have not proved any of their respective Grounds of the Appeal pray that the Consolidated Appeals are dismissed with costs.

Court's consideration;

Fair trial means a fair and public hearing, within a reasonable time, by an impartial court. The right to fair hearing in civil matters is enshrined in the Constitution of Uganda under **Article 28 (1).** It provides as follows;

"In the determination of civil rights and obligations…….. a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."

The importance of this right was emphasized in **Article 44(c)** of the Constitution which is to the effect that;

"Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the right to a fair hearing."

This right is internationally recognized in several international treaties and covenants which Uganda ratified. **Article 2 (3) (c)** of the

International Covenant on Civil and Political rights (ICCPR) provides that;

"Each State Party to the present Covenant undertakes…to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial authorities.."

Article 27 of the **Vienna Declaration & Program of Action** provides that an independent judiciary…are essential to the full and non-discriminatory realization of human rights…democracy. . . ."

Article 26 of **The African Charter on Human & Peoples' Rights** provides that

"States Parties to the present charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

The appellants submitted that they underwent an unfair hearing in the constitutional court in various ways which I will resolve hereunder;

Expeditious hearing.

It was the appellant's contention that they did not receive a speedy trial. Further, that the judgment was delivered after 60 days and therefore is null and void.

Article 137 (7) provides that ;

Upon a petition being made or a question being referred under this Article, the court of Appeal shall proceed to hear and determine the petition **as soon as possible** and may for the purpose, suspend any other matter pending before it.

Rule 10 of the **Constitutional (petitions and Reference) Rule , 2005** provides that;

1. **The Court shall, in accordance with article 137 (7) of the Constitution, hear and determine the petition as soon as possible and may for that purpose, suspend any other matter pending before it.**

2. **The Court shall sit from day to day and may, for the purposes of hearing and determining the petition, sit during Saturdays, Sundays and on public holidays where the Court considers it necessary for ensuring compliance with article 137 (7) of the Constitution.**

3. **In any case, the Court or the Deputy Chief Justice may order that the Registry of the Court shall stay open on Sundays and public holidays to facilitate the filing and service of documents connected with the proceedings of the petition.**

In the instant case, five (5) Petitions were lodged singly in December, 2017 and January 2018. Hearing of the petitions was held on the 9th April 2018 where it handled the preliminaries and consolidation of the appeals due to the similarities in the issues contained therein. This therefore follows that the actual hearing commenced on the 10th April 2018 and concluded on the 19th April, 2018. The hearing therefore lasted 10 days. It should be noted that the case in question is a peculiar one since it was a five in one case and therefore could not be heard in just a day or two. Further, all the petitioners presented their cases in totality without regard that some issues are repetitive. In the case of **Isadru v Aroma & Ors (CIVIL APPEAL No. 0033 OF 2014) [2018], court observed that;**

"The right to a fair trial in civil matters is guaranteed by article 28 (1) of *The Constitution of the Republic of Uganda, 1995*. In the determination of civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Entailed in that right to a "speedy hearing" is the right to a trial within a reasonable time, often termed the right to be tried without undue delay or the right

to a speedy trial. For the realization of this right, all parties, including the courts, have a responsibility to ensure that proceedings are carried out expeditiously, in a manner consistent with this article. The overriding objective under article 28 (1) of *The Constitution of the Republic of Uganda, 1995* and *The Civil Procedure rules* in general is that courts should deal with cases justly, in a way which is proportionate to the amount of money involved, the interests and rights involved, the importance of the case, the complexity of the issues and the financial position of each party.

The case before court was not an ordinary case that requires ordinary treatment as the appellant seem to suggest. It had complex issues and matters of national importance. I am persuaded by the above authority and therefore hold that 9 days is a reasonable time for court to hear five petitions merged in one.

The appellant contended that the judgment in the constitutional court was delivered past the 60 days as prescribed any law and should therefore be nullified. In the same spirit, the complexity of the petition could not be overemphasized by this court. The hearing ended on the 19th of April 2018 and judgment was delivered on the 26th of July 2018. The court thus took around 97 days to deliver its judgment. Firstly judicial code of conduct are only guidelines for judicial officers to follow while dispensing their duties therefore cannot be interpreted in strict terms. Further the code stipulates that judgment should be in 60ndyas where possible. I reiterate that this case was a five case petition and the constitutional court had to evaluate all the evidence forwarded by all parties involved. I humbly find that 97 days was expeditious time for delivery of a judgment in a consolidated case.

Calling of witnesses;

Appellants contended that court erred when they failed to call key witnesses. These included the Speaker of parliament, the deputy speaker of parliament, the minister of Finance, Hon. Magyezi Raphael, the president and the Chairperson of the Committee of Legal and Parliamentary Affairs.

Rule 12 (3) of the **Constitutional Court (Petitions and References) Rules, SI. 91 of 2005** is to the effect that **Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the <u>evidence of the witness is likely to assist the Court to arrive at a just decision.</u>**

The provision is to the effect that court may call an examine witnesses only if it is of the opinion that their testimony will assist court arrive at a just decision. First of all, the president enjoys immunity from being part of any court proceedings as provided for by Article 98(4) of the Constitution.

The speaker, deputy speaker, Magyezi and chairperson of the committee of legal and parliamentary affairs in my opinion could not assist court more than the Hansards that were filed on court record. The Hansards reflect all the event s that took place in parliament and therefore court could ably decide on all those issues without the need of those witnesses.

Sitting Arrangement

The 1st Appellant argued that his right to fair hearing was derogated when court ordered him to vacate from sitting at the Bar. I agree with the constitutional court that the bar is meant for barristers. Fair hearing is all about a party given a chance to present their case and not really about where to sit in a court room.

Professional fees

The 1st appellant claimed that he was not awarded professional fees yet he represented himself in the case.

In the case of **Kasaija vs Iga & Anor (HCT-04-CV-MC-004-2014)[2015],** court observed that;

"The Advocates (Remuneration and Taxation of costs) Regulations are made under the Advocates Act, which specifically refers to enrolled advocates." I agree with the court in above and I humbly

opine that Mr. Mabirizi is not an advocate and therefore could not claim remuneration provided for under the Advocates (Remuneration and taxation of costs).

Interruptions, cross examination and right to rejoinder.

The appellants claimed that the court over interrupted them while making their case. Further, that they were restricted to cross examination of only facts deboned upon. Appellants also claim that they were denied their right to rejoinder.

Court is enjoined with discretionary powers to interrupt a witness, or any other person presenting before it for purposes of clarity and better understanding of the case. These powers are provided for under **Section 164 of the Evidence Act.** It reads that;

" a judicial officer may in order to discover or to obtain proper proof of relevant facts , ask any question he or she pleases , in any form , at anytime , of any witness, or of the parties about any fact relevant or irrelevant. It is my humble view that court did interrupt where necessary and indeed it had powers to do so.

The appellants received a fair hearing and this ground is answered in the negative.

Issue Eight.

What remedies are available to the parties?

<u>Appellants' Submissions</u>

Counsel started by laying down the authority of **Tinyefuza vs Attorney General Appeal 1 of 1997 Oder JSC at page 37** which cited with approval the case of **Troop vs. Dulles** where the Supreme Court of the US stated that:

"The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital. Living principles that authorize and

limit government power in our nation. They are rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not the words of the Constitution become little more than good advise"

Counsel submitted that *Article 20(2)* requires all organs and agencies of government to uphold and promote rights and freedoms enshrined in the Constitution.

He further relied on *Article 137(4)(a)* of the Constitution which provides that Court may grant an order of redress in addition to the declarations sought.

Counsel submitted that the Constitutional Court unanimously appeared to appreciate that the security forces crossed the red line however no declarations were made by court.

Counsel submitted that this violation was a well thought out strategy to facilitate the enactment of the Act by sending a message to the Members of Parliament and their constituents that opposition to the Bill was a red line for government. Counsel submitted that it was intended to instil terror and fear.

He explained that the emboldened of the army grievously beating up Members of Parliament to an extent of long hospitalization is not acceptable and the only remedy is nullifying the Act. That this would send a message to all the people of Uganda that there is a price to pay for contravention of the Constitution.

Counsel submitted that this court is under duty to prevent future individuals in government from looking at violence as a means of

achieving their objectives because at the end of the day, such objective shall not be achieved.

He submitted that since it is clear that the entire process of introducing, processing and enactment of The Constitution (Amendment) Act 2018 was flawed, in addition to other factors discussed above, the entire process was vitiated rendering the Act unconstitutional, null and void.

The appellants unanimously prayed court for the following remedies;

- That court allows the appeal.
- That the Constitutional Amendment Act be annulled and the costs be paid to the appellants.
- Mr. Mabirizi prayed for general damages and full costs of the case in this court and the court below with an interest of 25% per annum from the date of judgment till payment in full.
- That in the alternative, If issue 7 is answered in the affirmative, then the court should order for a retrial.
- That just as in the lower Court the Appellant in Appeal Number 4 of 2018 does not seek costs of the Appeal but prayed for disbursements only.

Respondent's Submissions

Counsel submitted that the Constitutional Court was right in applying the principle of severance. He stated that severance is provided for in Article 2(2) of the Constitution

He relied on courts' observations in the cases of **Salvatori Abuki V Attorney General; Constitutional Case No. 2 of 1997**, **South African**

National Defence Union vs Minister of Defence& Another Constitutional Court case No. 27 of 1998.

Counsel further submitted that in order to maintain the purpose of the Act, the Court came to the right conclusion by severing sections of the Constitution (Amendment) Act, No. 1 of 2018 that had been validly passed from those sections of the Act that had not met the criteria set out in the Constitution and the Rules of Procedure of Parliament.

Pursuant to the above, counsel prayed court to find that the appeal lacks merit and thereby be dismissed with costs to the Respondent.

The respondent further prayed court to affirm and uphold the findings of the majority Justices of the Constitutional Court of Uganda that sections 1, 3, 4 and 7 of the Constitution (Amendment) Act No. 1 of 2018 which remove age limits for the President and Chairperson of Local council V to contest for election to the respective offices and for implementation of the recommendations of the Supreme court in **Presidential Election Petition No. 1; Amama Mbabazi vs. Yoweri Museveni** were lawfully enacted in full compliance with the Constitution and valid provisions of the Constitution (Amendment) Act, No. 1 of 2018.

In regard to the alternative prayer by the appellants, the respondent prayed court to dismiss it because it was misconceived and the appellants have not adduced evidence before this Honourable Court to warrant issuance of an order for a retrial.

Regarding the prayer for general damages with interest at 25% per annum from the date of judgment, the respondent submitted that

general damages are awarded to restore a party to a position he or she was in before he suffered injury, loss or inconvenience arising from a breach of duty or obligation. He explained that appellant has not proved or adduced evidence to show that he suffered any material inconvenience or at all a loss by the passing of the Constitution (Amendment) Act No. 1 of 2018 and therefore ought to be denied.

Rejoinder

It was counsel's submission that the authorities that the Respondent cited and relied on to support the application of the principle of severance to justify the refusal to nullify the whole Act by the lower Court are non-binding authorities for the following reasons;

- None of those laws is an Act amending the Constitution. Different standards and procedures apply in enacting an ordinary law as opposed to the Constitution.

That in Uganda the procedure of enacting legislation is to be found in rules 112 to 136 of the rules of procedure of the House. That all bills have to comply with those rules. However in respect of constitutional amending legislation, Articles 259 to 263 are applicable in addition to rules 112 to 136. An ordinary legislation does not go through the process laid down in Articles 259 to 263.

- That all the challenged legislations cited in the cases above were enacted by respective Parliaments using the rules of procedure of the House and not their National Constitutions. He further argued that authorities applying the principle of severance to legislation enacted under the ordinary rules of

procedure of Parliament are not applicable to legislation enacted under a procedure prescribed by the Constitution. Those authorities apply parliamentary regulations fundamentally different from the one in the instant case.

- That in all the cases cited above, the process followed by Parliament was never in issue. What was in issue was simply the final product as it appeared on the law books viz-a viz the Constitutions.
- That in all the cases cited, Parliament was not warned that it was about to enact unconstitutional law but nevertheless went ahead to enact the law as is in the case now before the court.
- That in the cases relied upon the challenged and severed sections were not arrived at as a result of constitutional breaches.

Counsel further re-joined that it was not true that severance maintained the purpose of the Bill because purpose of a Bill can change after it is introduced in Parliament. Rule 133(20) allows Parliament to amend the long title to reflect amendments made to the Bill. It is therefore not a sound reason to justify severance on maintaining the original purpose of a Bill.

Counsel invited court to hold that the principle of severance is not applicable in the present case.

That in the alternative, exceptions to the rule in respect of constitutional amendments ought to be made. Such exceptions are that where Parliament amends a constitution well aware that any of

the provisions is unconstitutional then the rule does not apply. That others are in bad faith and deliberate contravention of the Constitution so as to achieve the challenged law. That in such case as is in the present case the principle of severance should not apply. That if the Court is inclined to uphold the principle counsel prays that exceptions are made and the Court holds that the principle is not applicable in the present case.

Counsel re-iterated his earlier prayers and those reflected in the Memorandum of Appeal.

Court's Considerations

This issue seeks to answer the question whether the majority justices of the Constitutional Court correctly severed some sections of the impugned Act and whether the appellants are entitled to any remedy. It is therefore pertinent that in resolving these issues, I am simply going to answer the following question;

Did the Constitutional Court rightly apply the doctrine of severance?

Severance is the process by which courts strike unconstitutional portions of a given law and let the remainder stand as a valid law.

According to **Johnathan Whitefield in his works, Two Tests of severance: Procedural and Substantive Constitutional violations and the legislative process in Missouri, 79 MO.L.REV (2014),** Severance may take two forms which are statutory severance and doctrinal severance. Statutory severance is provided for by the law and doctrinal severance is judicially created. In Uganda, severance is provided for under the provisions of Article 2(2) of the Constitution. It provides as follows;

"if any other law or any custom is inconsistent with any of the provisions of this Constitution , the Constitution shall prevail and that other law or custom <u>shall to the extent of its inconsistency be void.</u>

Severance is used by courts to cure legislations that violate the constitution. It is important to note that there are two types of unconstitutional legislations. There are legislations that violate procedural constitutional requirements and legislations that violate substantive requirements.

Controls on the procedure of the legislation process are the restrictions that regulate only the process by which a legislation is enacted. Now these are referred to as *procedural constitutional violations*. Substantive procedural violations on the other hand occur when the bill contains provisions that are found to be substantively invalid based on the constitution. The appellants in their submissions impeached the impugned Act on procedure and content.

Procedure

John Godfrey Saxe, a great poet in his works, **An impeachment Trial (MICH. U. CHIRON** said that **"….. Laws …like sausages, cease to inspire respect in proportion as we know how they are made…"**

The process through which a legislation is made is very important and it squarely affects its validity. This position was echoed in the case of **Oloka Onyango& 9 Ors vs the Attorney general (Supra)**, where court observed that;

"Parliament as a law making body should set standards for compliance with constitutional provisions and with its own Rules. The speaker ignored the law and proceeded with passing the Act. We

agree with counsel Opiyo that the enactment of the law is a process and the law that is enacted is as a result of it……failure to obey the Law (Rules) rendered the whole process a nullity. It is an illegality which this court cannot sanction.."

As already set out in my discussion on issue 2, I highlighted the procedural violations that were committed by parliament. Both parties agree that it is trite that procedural violations in enactment of a law render the result of such a process a nullity. The constitutional court unanimously agreed to certain procedural irregularities however the majority of the Justices observed that those irregularities affected just some of the provisions of the impugned Act and accordingly, they were severed from the rest. The question now is did the procedural irregularities affect the severed parts of the Act or did they affect the Act as a whole?

In the instant case, the said Bill was brought by hon. Raphael Magyezi, a private member of parliament. It sought to amend Articles 102(b), 183(b) and amendments pertaining to the recommendations by this court in the case of Amama Mbabazi vs Y.K Museveni and Ors (supra) touching the conduct of presidential election petitions. It was tabled for the first reading, and the bill was taken to the Committee of Legal and Parliamentary Affairs for deliberations. The committee did its job and produced its report before parliament. In the report were recommendations that term limits for presidency be reinstated in the constitution and the tenure of presidency, parliamentarians and other political leaders be increased from a five year term to a seven year term. Some

members of parliament at that point opposed the recommendations as they would impose a charge on the consolidated fund and would only be introduced by or on behalf of Government.

The speaker dismissed the points stating that there was no bill but rather just a report of the committee. The Bill was read a second time and was sent to the Committee of the whole House for further deliberations as required under Rules 130-134 of the Rules of Procedure of Parliament. During those deliberations as a committee of the House, amendments that effected the recommendations of the committee of Legal and Parliamentary Affairs were forwarded by two private members of Parliament. They were to the effect that the term limits for presidency be brought back since they had been ousted from the constitution by a previous Parliament. The other amendment was increasing the terms of parliamentarians and local government leaders from five years to seven years. The amendments were discussed by the Committee of the House under the guidance of the speaker as the chairperson and they agreed that the Bill by Magyezi be amended to encompass the amendments.

The committee at the third reading reported to the House that the Bill had amendments. The honourable Magyezi moved the House that the Bill be read the third time and informed the House that he had **adopted** the Bill with all the amendments (*See Hansards dated 20th December 2017*). The Bill was read the third time, debated upon and the final vote was done hence passing of the Bill. The clerk then prepared assent copies to be sent to the president which copies

were accompanied by the speaker's certificate of compliance. The president assented and it became an Act of parliament.

7 It is not in contention that amendments that were adopted by the Bill at the third reading offended Article 93 of the Constitution. The speaker when notified by a member that the amendments violated Article 93 responded that the Bill was still at committee level and therefore there was no Bill really. What is not comprehensible is that when they resurfaced again as amendments still before her as
14 chairperson of the committee, she still rejected the arguments of the persons that raised points of procedure against them. The amendments were adopted, read to the whole House and members voted.

The Article 93 is couched in mandatory terms. It forbids Parliament to proceed on a motion or amendment to a motion which creates a
21 charge on the consolidated funds.

It is my humble view that Parliament unconstitutionally proceeded on a Bill which violated the constitution and therefore the Constitutional Court was right to sever that part which offended the Constitution.

28 The doctrine of severance was discussed in the 2013 case of **Round Table for Life, Inc vs State of Missouri, 396 S.W.3d.348 (Mo.2013,** the General Assembly enacted a law which touched various subjects. The petitioners challenged the legislation based on the fact that it violated the Constitutional 'single subject rule" which was to the effect that a bill shall not embrace more than one subject and that

shall be expressed in the long title. (Section 23 Article III of the Missouri constitution.

Court declared the legislation null and void in its entirety and held that Section B could not be severed from S.B7. The Attorney General appealed to the Supreme Court and his case was that court should severe the unconstitutional part of the legislation. Court held that the sections could not be severed form the initial bill due to its inclusion in the title of the bill contrary to the Constitutional requirement. **Justice Zel Fischer (CJ)** despite his concurrence with the court wrote separately in order to express his views on procedural constitutional violations and severance. He observed as follows;

"…. <u>Judicial severance encourages the Missouri General Assembly to disregard its oath to protect the Missouri constitution and the procedural mandates expressed within it</u> and that it violates the principle of separation of powers." Emphasis mine. He further observed that **"procedural constitutional mandates exist to promote necessary and valuable legislative accountability and transparency"**

In the case of **Semogerere & Anor vs AG(supra)** court observed as follows;

"an amendment need to be passed by two thirds majority on each of the second and third readings of the bill. Thereafter, a bill must be accompanied by the certificate of the speaker to the effect that it has been passed in accordance with the provisions of chapter eighteen,…"

Martha J. Dragich, a Legal Author and Law Professor in her works, **State Constitutional Restrictions on Legislative Procedure** observed as follows;

"……the applicability of S. 1.140 (equivalent to Article 2(2)) is nonsensical when applied to procedural constitutional violations since procedural violations taint the entire affected Act, it makes more sense to restrict it (severance) to substantive constitutional violations."

In the case of **Hammer Shimidt vs Boone county, 877 S.W.2dat 102,** court observed that severance is a potential remedy for constitutional infirmities of House Bills however it is a more difficult issue when procedural mandates of the constitution are violated.

Further in the case of **Legends Bank Vs State.36, S.W.3d 383,391(M.2012)** Justice Fischer (CJ) observed that **the judicially created doctrine of severance should be abolished. That doctrinal severance provides no incentives for the legislators to follow and that it violates the state separation of powers.** He further observed that;

"…. It may subvert the legislative process by allowing legislation that might not have received enough votes to become law to survive.

I have pursued the submissions of both parties together with their authorities. With greatest respect it is trite that the courts while applying authorities should bear in mind the relevance of the same to the circumstances at hand.

In the instant case, Hon. Magyezi rightly presented his bill and it went through stages upto the committee of the whole House where debates were made clause by clause. At that stage two amendments were purportedly made which created a change on consolidated funds contrary to Article 93 of the Constitution.

Although those amendments were purportedly passed, they violated the Constitution and could not be construed as amendments in law. Therefore, the Constitutional Court was right to apply the doctrine of severance on those amendments which the law could not consider as passed.

In my view, it would be very costly and a great abuse to separation of powers to strike the whole Act because of the ill intention of introducing illegal amendments to the original Bill introduced by Hon. Magyezi. This Court as a Court of last resort is not only a Court of justice but also acts as a problem solver under Article 2 (2) and 126 of the Constitution and Rule 2(2) of its Rule of Procedure.

Having found all the issues in the negative, I find that the appeal has no merit. It is accordingly dismissed. The judgment of the Constitutional Court is upheld. Parties to bear their own costs.

Dated this …… ……. day of …… ……2019

……

OPIO-AWERI
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; ARACH-AMOKO, MWANGUSYA, OPIO-AWERI, TIBATEMWA-EKIRIKUBINZA, MUGAMBA, TUMWESIGYE; JJSC]

CONSTITUTIONAL APPEAL NO. 01 OF 2018

BETWEEN

1. MALE MABIRIZI
2. HON. KARUHANGA & 5ORS **:::::::::::::::: APPELLANTS**
3. UGANDA LAW SOCIETY

AND

ATTORNEY GENERAL :::::::::::::::::::::::::::::::: RESPONDENT

[An appeal from the majority judgment of the Constitutional Court before (Owiny-Dollo, DCJ, Kasule, Musoke, Brishaki, Kakuru (dissenting), JJCC] in consolidated Constitutional Petitions Nos.49 of 2017, 3 of 2018, 5 of 2018, 10 of 2018 and 13 of 2018 dated 26th July, 2018].

Representation

The 1st appellant-Mr. Male Mabirizi represented himself.

The 2nd appellants (Honourable Members of Parliament: Gerald Karuhanga, Jonathan Odur, Mubarak Munygwa, Allan Ssewanyana, Ibrahim Ssemujju Nganda and Winnie Kiiza) were represented by Mr. Lukwago Elias and Mr. Rwakafuzi and assisted by Mr. Mpenge Nathan as well as Mr. Nalukora Elias.

The 3rd appellant - the Uganda Law society was represented by Mr. Wandela Ogalo and assisted by Mr. Moses Kiyemba.

The respondent was represented by Mr. William Byaruhanga, the Attorney General of Uganda, Hon. Mwesigwa Rukutana, the Deputy Attorney General and other Counsel from the Attorney General's Department.

JUDGMENT OF PROF.TIBATEMWA-EKIRIKUBINZA, JSC.

Background:

The brief background to this appeal is that in 2017, Hon. Raphael Magyezi, a Member of the 10th Parliament of the Republic of Uganda, brought a Private Member's Bill (Constitutional Amendment Bill No. 2 of 2017).

The Bill was brought in accordance with Articles 259 and 262 of the Constitution intending to amend Articles 61, 102 (b), 183 (2) (b) and 104 (2) and (3) of the Constitution as well as to implement some of the recommendations made by this Court in Presidential Election Petition No.1 of 2016, Amama Mbabazi vs. Yoweri Museveni. The objectives of the said Bill were:

(i) To provide for the time within which to hold Presidential, Parliamentary and Local Government Council elections under Article 61;

(ii) To provide for eligibility requirements for a person to be elected as President or District Chairperson under Articles 102 (b) and 183 (2) (b);

(iii) To increase the number of days within which to file and determine a presidential election petition under Article 104 (2) and (3);

(iv) To increase the number of days within which the Electoral Commission is required to hold a fresh election where a Presidential election is annulled under Article 104 (6); and,

(v) For related matters.

At the second reading of the Bill, two separate motions were moved to amend the Bill. The first motion was to extend the tenure of Parliament and Local Government Councils from five to seven years introduced by Mbarara Municipality MP Michael Tumusiime. The second motion introduced by Hon. Nandala Mafaabi sought to reinstate the Presidential term limits.

On 27th December 2017, the Bill was promulgated into law as Constitution (Amendment) Act (No.1) of 2018.

Pursuant to Articles 137 (1), (3) of the Constitution as well as Rules 3, 4, 5 and 12 of the Constitution Court (Petitions and References) Rules, five Constitutional Petitions challenging the validity of specific provisions of the Constitution (Amendment) Act (No. 1) of 2018 were filed in the Constitutional Court. All the said petitions were consolidated.

The issues for determination before the Constitutional Court were as follows:

1. *Whether sections 2 and 8 of the Act extending or enlarging of the term or life of Parliament from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77 (3), 77 (4), 79 (1), 96, 233 (2) (b), 260 (1) and 289 of the Constitution.*

2. *And if so, whether applying it retrospectively is inconsistent with and/ or in contravention of Articles 1, 8A, 7, 77(3), 77(4), 79(1), 96 and 233 (2)(b) of the Constitution.*

3. *Whether sections 6 and 10 of the Act extending the current life of Local Government Councils from 5 to 7 years is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.*

4. *If so, whether applying it retroactively is inconsistent with and/ or in contravention of Articles 1, 2, 8A, 176 (3), 181 (4) and 259 (2) (a) of the Constitution.*

5. *Whether the alleged violence/scuffle inside and outside Parliament during the enactment of the Act was inconsistent and in contravention of Articles 1, 2, 3 (2) and 8A of the Constitution.*

6. *Whether the entire process of conceptualizing, consulting, debating and enacting the Act was inconsistent with and/ or in contravention of Articles of the Constitution as here-under:-*

   (a) *Whether the introduction of the Private Member's Bill that led to the Act was inconsistent with and/ or in contravention of Article 93 of the Constitution.*

   (b) *Whether the passing of sections 2, 5, 6, 8 and 10 of the Act are inconsistent with and/ or in contravention of Article 93 of the Constitution.*

(c) Whether the actions of Uganda Peoples Defence Forces and Uganda Police in entering Parliament, allegedly assaulting Members in the chamber, arresting and allegedly detaining the said Members, is inconsistent with and/or in contravention of Articles 24, 97, 208 (2) and 211 (3) of the Constitution.

(d) Whether the consultations carried out were marred with restrictions and violence which were inconsistent with and/or in contravention of Articles 29 (1) (a), (d),(e) and 29(2) (a) of the Constitution.

(e) Whether the alleged failure to consult on sections 2, 5, 6, 8 and 10 is inconsistent with and/ or in contravention of Articles 1 and 8A of the Constitution.

(f) Whether the alleged failure to conduct a referendum before assenting to the Bill containing sections 2, 5, 6, 8 and 10 of the Act was inconsistent with, and in contravention of Articles 1, 91 (1) and 259 (2), 260 and 263 (2)(b) of the Constitution.

(g) Whether the Amendment 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.

(a) Whether the actions of Parliament preventing some members of the public from accessing Parliamentary chambers during the presentation of the Constitutional Amendment Bill No. 2 of

2017 was inconsistent with and in contravention of the provisions of Articles 1, 8A, 79, 208 (2), 209, 211 (3), 212 of the Constitution.

(b) Whether the act of tabling Constitutional Bill No. 2 of 2017, in the absence of the Leader of Opposition, Chief whip and other opposition members of Parliament was in contravention of and/ or inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, and 108A of the Constitution.

(c) Whether the alleged actions of the Speaker in permitting Ruling Party Members of Parliament to sit on the opposition side of Parliament was inconsistent with Articles 1, 8A, 69 (1), 69 (2)(b), 71, 74, 75, 79, 82A, 83 (1)(g), 83 (3) and 108A of the Constitution.

(d) Whether the alleged act of the Legal and Parliamentary Affairs Committee of Parliament in allowing some Committee members to sign the Report after the public hearings on Constitutional Amendment Bill No. 2 of 2017, was in contravention of Articles 44 (c), 90 (1) and 90 (2) of the Constitution.

(e) Whether the alleged act of the Speaker of Parliament in allowing the Chairperson of the Legal Affairs Committee, on 18th December 2017, in the absence of the Leader of Opposition, Opposition Chief Whip, and other Opposition members of Parliament, was in contravention of and inconsistent with Articles 1, 8A, 69 (1), 69 (2) (b), 71, 74, 75, 79, 82A and 108A of the Constitution.

(f) Whether the actions of the Speaker in suspending the 6 (six) Members of Parliament was in contravention of Articles 28, 42, 44, 79, 91, 94 and 259 of the Constitution.

(g) Whether the action of Parliament in:-

(i) *waiving the requirement of a minimum of three sittings from the tabling of the Report yet it was not seconded;*

(ii) *closing the debate on Constitutional Amendment Bill No. 2 of 2017 before every Member of Parliament could debate on the said Bill;*

(iii) *failing to close all doors during voting;*

(iv) *failing to separate the second and third reading by at least fourteen sitting days;*

are inconsistent with and/ or in contravention of Articles 1, 8A, 44 (c), 79, 94 and 263 of the Constitution.

8. *Whether the passage of the Act without observing the 14 sitting days of Parliament between the 2nd and 3rd reading was inconsistent with and/ or in contravention of Articles 262 and 263 (1) of the Constitution.*

9. *Whether the Presidential Assent to the Bill allegedly in the absence of a valid Certificate of Compliance from the Speaker and Certificate of the Electoral Commission that the amendment was approved at a referendum was inconsistent with and in contravention of Article 263 (2) (a) and (b) of the Constitution.*

10. *Whether section 5 of the Act which reintroduces term limits and entrenches them as subject to referendum is inconsistent with and/ or in contravention of Article 260 (2)(a) of the Constitution.*

11. *Whether section 9 of the Act, which seeks to harmonise the seven year term of Parliament with Presidential term is inconsistent with and/ or in contravention of Articles 105 (1) and 260 (2) of the Constitution.*

12. Whether sections 3 and 7 of the Act, lifting the age limit without consulting the population are inconsistent with and/ or in contravention of Articles 21 (3) and 21 (5) of the Constitution.

13. Whether the continuance in Office by the President elected in 2016 and remains in office upon attaining the age of 75 years contravenes Articles 83 (1) (b) and 102 (c) of the Constitution of the Republic of Uganda.

14. Remedies available to the parties

In resolving the above issues, the Constitutional Court made the following declarations and orders:

1. By unanimous decision, the Court declared Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act No.1 of 2018, which provide for the extension of the tenure of Parliament and Local Government Councils by two years and the introduction of Presidential term–limits unconstitutional.

2. By majority decision of (Owiny–Dollo, DCJ; Kasule, Musoke, Cheborion, JJCC), the Court upheld Sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018, on the removal of the age limit for the President and Chairperson Local Council V offices.

As regards costs, the Court awarded professional fees in the sum of Ushs. 20,000,000/= (Twenty million shillings) for three petitions. This was because in Petition No. 3 of 2018, the Petitioner prayed for disbursements only and in Petition No. 49 of 2017, the Petitioner represented himself .He was therefore not entitled to professional fees.

In addition, the Court awarded two–thirds disbursements to all the Petitioners subject to tax.

Being dissatisfied with the decision and orders of the Constitutional Court, three (3) appeals vide Male Mabirizi vs. AG (**Constitutional Appeal No.2 of 2018**), Hon. Karuhanga Gerald and 5 others vs. AG (**Constitutional Appeal No.3 of 2018**) and Uganda Law Society vs. AG (**Constitutional Appeal No.4 of 2018**) were filed in this Court.

Issues for determination

At the pre-hearing conference, the parties with the guidance of Court agreed to the following eight issues:

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?

Before I resolve the issues raised in the appeal, I must state my position on the Preliminary objections brought by the respondent Attorney General.

I have read in draft the decision of my Learned Brother Hon. Justice Paul Mugamba, JSC regarding the said preliminary objections. And for the reasons he has given, I agree that the objections must fail.

ISSUE 1:

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the Basic Structure Doctrine.

This issue was canvassed only by the second appellant. Counsel based his submissions on two points:

1. That the Constitutional Court restricted the application of the Basic Structure Doctrine to amendments which require a referendum
2. That in applying the basic structure doctrine the majority Justices of the Court ignored the significance of the Preamble.

Counsel 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 doctrine has been instrumental in shaping the Constitutional jurisprudence of different countries across the world. To augment his case, Counsel relied on authorities from across the globe.

From India, counsel cited **Kesavananda Bharati vs. State of Kerala,**[1] in which the Supreme Court of India held that: **"According to the doctrine, the amendment power of Parliament is not unlimited; rather it does not include the power to abrogate or change the identity of the Constitution or its basic features."** He also relied on the case of **Minerva Mills v. Union of India, AIR 1980 SC 1789,** where court unanimously held that Parliament has no power to repeal, abrogate or destroy basic or essential features of a Constitution.

The appellant also cited the Council of Grand Justices of Taiwan who stated that**: "Although the amendment of the Constitution has equal status with the Constitutional provisions, any amendment that alters the existing Constitution concerning governing norms and order, and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result such amendment shall be deemed improper."**

Counsel also relied on the Bangladesh authority of **Anwar Hossain Chowdhury vs Bangladesh**[2] in which the Supreme Court of Bangladesh held that: **"Call it by any name, basic structure or whatever, but that is the fabric of the Constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament... Because the amending power is power given by the Constitution to**

[1] AIR (1973) 4 SCC 225.
[2] 10 41 DLR 1989 App Div. 169.

Parliament and nevertheless it is a power within and not outside the Constitution".

And in South Africa, while discussing the applicability of the basic structure doctrine in **Executive Council of Western Cape Legislature vs. The President of the Republic of South Africa and Others**[3] the South African Constitutional Court noted as follows: **"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the Constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them ..."**

In Kenya, the court of Appeal in the case of **Njoya vs. Attorney General and Others**[4] held that: "Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing Constitution and that alternation of the Constitution does not involve the substitution thereof a new one or the destruction of the identity [of the existing one"

A reading of the various persuasive authorities cited by Counsel leads to the conclusion that although Parliament may be (is) empowered to amend a Nation's Constitution that power does not extend to authority to produce an output which alters the

[3] CCT27/95) [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877 (22 September 1995).

[4] (2004) AHRLR 157.

country's Constitutional order. The Legislature should not engage in amendments which can be described as a Constitutional replacement. This is because the power to replace a Constitution - with a radically different one - belongs to the people.

Counsel argued that the Constitutional Court erred when they limited the application of the basic structure doctrine to amendments which require a referendum and consequently arriving at the decision that S. 3, 4 and 7 of the Constitution (Amendment) Act 2018 were not in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution. In his view, such a construction of the doctrine was unduly restrictive. In support of his contention, counsel relied on the case of **Kesavananda (supra)** where court held that:

> **"To say that there are only two categories of Constitutions, rigid or controlled and flexible or uncontrolled and that the difference between them lies only in the procedure provided for amendment is an over-simplification. In certain Constitutions there can be procedural and or substantive limitations on the amending power. The procedural limitations could be by way of a prescribed form and manner without the satisfaction of which no amendment can validly result. The form and manner may take different forms such as a higher majority either in the houses of the concerned legislature sitting jointly or separately or by way of a convention, referendum etc. Besides these limitations, there can be limitations in the content and scope of the**

power. The true distinction between a controlled and an uncontrolled Constitution lies not merely in the difference in the procedure of amendment, but in the fact that in controlled Constitutions the Constitution has a higher status by whose touch-stone the validity of a law made by the legislature and the organ set up by it is subjected to the process of judicial review. Where there is a written Constitution which adopts the preamble of sovereignty in the people there is firstly no question of the law-making body being a sovereign body for that body possesses only those powers which are conferred on it. Secondly, however representative it may be, it cannot be equated with the people."

Counsel for appellant also pointed to the history of a country as a guide to Constitutional interpretation. In this, he associated himself with the finding of **Kakuru JCC** that every Constitution is a product of historical events that brought about its existence and the question whether the doctrine applies depends on the Constitutional history and the Constitutional structure of each country. The learned Justice also stated, not only that the doctrine applies to Uganda's Constitutional order, but also that articles such as 1, 2 cannot be amended even through a referendum and that doing so would be tantamount to abrogating the Constitution and therefore a violation of Article 3 (4) which obliges all citizens to defend the Constitution. Kakuru continued to state that:

"Under Article 3(4) an amendment by Parliament may have the effect of abrogating the Constitution even if such an amendment has been

enacted through a flawless procedure. I say so, because an Act of Parliament amending the Constitution is still subject to Article 2 thereof. It must pass the Constitutionality test."

In his postulation that a country's history is a guide to Constitutional interpretation, counsel also relied on the dissent judgment of **Kasule, JA in Saleh Kamba & others Vs. Attorney General & others; Constitutional Petition No. 16 of 2013** where the learned Justice held that in interpreting a Constitution, court ought to take into account the history of a given country. In that case, learned Justice Kasule considered the issue of the basic structure of the Constitution and stated as follows:

> **Therefore from the historical perspective, the Constitution is to be interpreted in a way that promotes the growth of democratic values and practices, while at the same time doing away or restricting those aspects of governance that are likely to return Uganda to a one party state and/ or make in-roads in the enjoyment of the basic human rights and freedoms of conscience, expression, assembly and association...**

Counsel also relied on **Yaakov vs Chairman of the Central Elections Committee for the sixth Knesset EA 1/65** where the Supreme Court of Israel held that:

> **... There are fundamental Constitutional principles that are of so elementary a nature, and so much the expression of law that precedes the Constitution, that the maker of the Constitution himself is bound**

by them. Other Constitutional norms, which do not occupy this rank and contradict these Rules can be void because they conflict with them.

In addition to a Nation's history, counsel also pointed to the Preamble of a Constitution as a guide to Constitutional interpretation. He argued that although the key pillars of the 1995 Constitution are reflected and embodied in the preamble to the Constitution the majority Justices of the Constitutional Court overlooked the significance of the preamble. Counsel cited several authorities from other jurisdictions in which courts considered the preamble as part of the basic structure of a Constitution.

In **British Caribbean Bank v The Attorney of Belize Claim No. 597/2011, the Supreme Court of Belize** invoked the basic structure doctrine to strike down a particular Constitutional amendment which was at variance with the preamble to the Constitution of Belize. The court emphasized that:

The basic structure doctrine holds that the fundamental principles of the preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of the existence.

.....

There is though a limitation on the power of amendment by implication by the words of the preamble and therefore every provision of the Constitution is open to amendment, provided the

foundation or basic structure of the Constitution is not removed, damaged or destroyed. .....

The preamble is the root of the tree from which the provisions of the Constitution spring, and which forms the basis of the intent and meaning of the provisions....

In the case of **Minerva case (supra**) while emphasizing the essence of the preamble, the Supreme Court of India explained that;

The preamble assures to the people of India a polity whose basic structure is described therein as a sovereign democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is ... a meaningful concept whose essential attributes are recited in the preamble itself.

In the case of **Anwar case (supra),** the Supreme Court of Bangladesh cited with approval the Indian case of **Minerva case (supra)** and held that:

... this preamble is not only part of the Constitution but stands as an entrenched provision that cannot be amended by Parliament alone. ... If any provision can be called the pole star of the Constitution then it is the preamble.

Finally, in the **Kesavananda case (supra)** court observed that the preamble constitutes a landmark in a country and sets out as a matter of historical fact what the people resolved to do for moulding their future destiny.

Counsel invited this Court to take cognizance of the fact that the framers of the 1995 Constitution deemed it necessary to enshrine within the text of the Constitution such provisions as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy. He argued that these provisions included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. He contended that these "lofty" provisions were designed and intended to guarantee orderly succession to power and political stability which to date remain a mirage for our motherland.

He argued that by amending Article 102 (b) to remove the presidential age limit, after scrapping term limits, Parliament not only emasculated the preamble to the Constitution but also destroyed the basic features of the 1995 Constitution thereby rendering it hollow and a mere paper tiger.

It was the appellants' contention that the basic features of the Constitution herein mentioned to wit; supremacy of the Constitution as an embodiment of the sovereign will of the people; political order through adherence to a popular and durable Constitution; political and Constitutional stability as well as Constitutionalism and Rule of law in general were fundamentally eroded by the impugned Act thereby destroying the original

identity and character of the 1995 Constitution. On that account alone the Constitutional Court ought to have invoked the basic structure doctrine to strike down the entire Constitution (Amendment) Act, No.1 of 2018.

Counsel submitted that Article 102 (b) was also intended to place the destiny of this country in the hands of a mature but not very old president; one who falls within the bracket of 35 to 75 years. That the framers of the Constitution recognized the dangers of entrusting the state structure in the hands of a young person or a frail elder however popular they may be. Uganda having adopted a Presidential system as opposed to a Parliamentary system; and given its checkered history characterized by political upheavals, *coup d'etat* as well as counter *coup d'etat* and rigged or sham elections opted to provide a mechanism of age limit as a basic feature of its 1995 Constitution.

Counsel prayed that Issue 1 be answered in the affirmative.

Respondent's reply

The Attorney General (AG) submitted that the Constitutional Court correctly applied the basic structure doctrine when they found that sections 3 and 7 of the impugned Act do not derogate from the Basic Structure of the 1995 Constitution.

Just as had been argued by the appellant, the AG submitted that the doctrine which was defined in the case of **Kesavananda Bharati (supra)** is to the effect that any amendment has to be done

without destroying the spirit and the basic structure and the foundation upon which Uganda was built as a nation.

AG contended that the Constitutional Court clearly and correctly identified provisions of the Constitution which are fundamental and form part of the Basic Structure of the 1995 Constitution. He was in agreement with the court in arriving at the conclusion that what the framers considered as the foundation of the Constitution were safeguarded against the risk of abuse of the Constitution by irresponsible amendment of those provisions. According to the AG, the safeguards are the requirement of at least a two–thirds majority of the entire membership of Parliament, and a referendum, in fulfillment of the provisions of Articles 260 and 261 of the Constitution.

That it follows therefore that Articles 69, 74(1), 75,260 and 261 of the 1995 Constitution cannot be amended by Parliament under the general powers conferred on it to make law as envisaged under the provisions of Articles 79 and 259 of the Constitution. Only the people can amend these Articles pursuant to the provision of Article 1(4) of the Constitution.

The AG argued that the Constituent Assembly that took a considerable amount of time to debate and eventually include the peoples' views in what eventually became the 1995 Constitution, was alive to the fact that our society is not static but dynamic and over the years, there would arise a need to amend the Constitution to reflect the changing times.

He further contended that Article 79 of the 1995 Constitution primarily gives Parliament the power to make laws that promote

peace, order, development and good governance in Uganda. That Article 259 of the Constitution offers the procedure to the amendment of the Constitution by giving Parliament powers to enact an Act of Parliament, the sole purpose of which is to amend the Constitution by way of addition, variation, or repeal of any provision in accordance with the procedure laid down in Chapter Eighteen.

That therefore, it was within the powers of Parliament to enact sections 3 and 7 of the Constitutional Amendment Act 1/2018 into law and this did not in any way contravene the basic structure of the Constitution neither was it inconsistent with or in contravention of Articles 1, 3, 8A, 79, 90 and 94 of the Constitution.

The AG supported his arguments with the unanimous decision of the learned Justices of the Constitutional Court's in answer to whether sections 3 and 7 of the impugned Act derogated from the Basic structure of the 1995 Constitution.

Owiny-Dollo DCJ held thus:

"...Since Parliament exercised power, which the people have conferred onto them under the provision of Article 2 of the Constitution, I am unable to fault it for the process it took to effect these amendments"

Justice Remmy Kasule noted that:

"...The framers of the 1995 Constitution ... in their wisdom ... did not put Article 102 amongst those Articles that have to be

amended after first getting the approval of Ugandans through a referendum.''

The AG submitted that the people's power to elect the President or District Chairperson of their choice is not taken away by lifting their respective age limits. If anything, citizens would be encouraged to aspire to elect leaders of their choice and to actively participate in politics and elections as they will now be presented with a wider choice of people to choose from.

In support of this submission, the AG referred to the judgment of **Justice Elizabeth Musoke** where she held as follows:

"....I have not found Sections 3 and 7 among the ones that have offended or contravened the Constitution. Articles 102 and 183 are not among the entrenched Articles and their amendment did not infect any other provisions of the Constitution.

He also referred to the landmark decision in **Kesavananda Bharati vs State of Kerala** (supra) wherein it was held that principles of democracy and democratic government are part of the basic structure of the Indian Constitution and incapable of amendment.

The AG agreed with the finding of **Cheborion JCC** to the effect that that 1, 3 and 7 of the impugned Act were enacted within the reach of the amending power of Parliament and do not derogate from the Basic structure of the 1995 Constitution.

The respondent's Counsel also pointed out that the Odoki Constitutional Commission Report did not propose that the age limits of the President or other local government leaders should be

entrenched provisions of the Constitution. The commission had in fact saw it fit that that it would be the electorate to decide on the appropriate candidate.

The respondent in essence agreed with the lower court's elucidation of the doctrine as a principle which does not require amendment procedures beyond what is specified through more stringent prerequisites such as referenda. Whatever is not "*entrenched"* can be amended under Article 259 of the Constitution.

Consideration by Court

Before I proceed to resolve the issue, I need to get over what I consider a preliminary point. The appellants invited this Court to adopt what the **Kakuru JCC** outlined as the basic features of the 1995 Constitution. These include: sovereignty of the people and their inalienable right to determine the form of governance for the country; the supremacy of the Constitution; adherence to a popular and durable Constitution; Political and Constitutional stability based on principles of unity, peace, equality, democracy, freedom, social justice and public participation in decision making at all levels; Rule of Law, observance of the Bill of Rights; land belongs to the people and not the state; Natural Resources are held by government in trust for the people; the eminent domain concept, the duty of every citizen to defend the Constitution and Parliament not to make laws legalizing a one party state; separation of powers and accountability of the government to the people.

However, I am unable to oblige the appellants' prayer. As was in the Kesavananda case, each of the Justices of Uganda's Constitutional Court pointed out different features as constituting the basic structure of Uganda's Constitution. In **Justice Owiny-Dollo's** view, the basic features of the 1995 Constitution are: the sovereignty of the people, the supremacy of the Constitution, political and Constitutional stability, Rule of law, non-derogable rights, eminent domain, non-establishment of a one party state, duty of every citizen to defend the Constitution and separation of powers. According to Justice Musoke JCC, the basic features of the Constitution are: the preamble, sovereignty of the people, the Bill of Rights found in Chapter Four of the Constitution and the non-derogable rights in Article 44 of the Constitution.

I now move on to the central issue – Did the Constitutional Court misconstrue the essence of the Basic Structure Doctrine?

I posit that from a reading of the various persuasive authorities cited by both counsel, it can be concluded that BSD is to the effect that although Parliament may be (is) empowered to amend a Nation's Constitution that power does not extend to authority to produce an output which alters the country's Constitutional order. The Legislature should not engage in amendments which can be described as a Constitutional replacement. This is because the power to replace a Constitution with a different one belongs to the people. The respondents too agreed with this principle.

What therefore was in contention is not whether the Basic Structure Doctrine is applicable in Uganda but rather whether removing the age cap at which an individual can offer themselves

for either the Presidency or District Chairperson would violate the basis structure of Uganda's Constitution.

However, in addition to the principle that the power to amend does not extend to authority to produce an output which alters the character or spirit of the Constitution, some of the authorities also posit that in amending provisions of the Constitution, the Legislature must be guided, not only by the procedure specifically laid down in the Constitution but must in addition identify and be guided by the implicit values and principles which form the bedrock of the Constitution.

It is to be noted that Uganda's Constitution provides for the amendment of various provisions by Parliament. These provisions are categorised into three; the first category is amendments requiring a referendum and the support of two-thirds majority votes of members of Parliament. Under this category are Articles: **259** (on the requirement for a referendum), **1 and 2** (Sovereignty of the people and Supremacy of the Constitution); **44**(Prohibition of derogation from particular human rights and freedoms); **69, 74 and 75** (prohibition of a one party state and the right to choose a political system), **79 (2)** (power of Parliament to make laws); **105 (1)** (tenure of the Office of the President being five years); **128 (1)** (independence of the Judiciary); and Chapter Sixteen(providing for the institution of traditional or cultural leaders).

The second category contains provisions whose amendment requires approval by District Councils and the support of two-thirds of all members of Parliament at the second and third readings. The said Articles are: **5 (2)** (providing for the districts of

Uganda); **152** (on tax laws); **176 (1), 178, 189** and **197** (providing for local government system and their functions).

The third category contains provisions whose amendment requires the support of two-thirds of all members of Parliament at the second and third readings. The Articles under this category are those which are not included in the above mentioned category. This means that Article 102 (b) of the Constitution falls under this category.

I note that the amendment of provisions in the first and second category require not only the support of two-thirds majority but also the support of the public through a referendum or the District local Councils. The provisions in these categories have been said to constitute the Constitution's basic structure and cannot be amended by normal Constitutional processes.[5]

The provisions under the third category where Article 102 (b) falls only requires the support of two-thirds majority. No further **stringent** requirement for amending such provisions is (explicitly) imposed by the Constitution.

On the basis of the fact that Article 102 (b) of the Constitution fell under the third category, the category whose provisions could be amended by the support of two-thirds of all members of Parliament at the second and third readings, the majority Learned Justices of the Constitutional Court held that it therefore follows that it was not the intention of the framers of the Constitution to include the age qualifications of a President as part of the basic features of the

[5] Kesavananda vs. State of Kerala (1973) 4 S.C.C. at 313-329.

Constitution. That had it been the intention of the framers that Article 102 (b) could only be amended by the people as opposed to being amended by the people's representatives, the Article would have been "entrenched" just like the provisions in the first and second categories.

Was the Constitutional Court correct in its interpretation of the Basic Structure Doctrine?

The Basic Structure Doctrine is Judge Made Law. My understanding of the doctrine is that it communicates an **implied** limitation on the power of Parliament to amend the Constitution. The claim that a particular provision is a basic feature of the Constitution is determined by the court in each case that comes before it. I therefore do not find it necessary to set down an exhaustive list of what constitutes the basic structure of Uganda's Constitution.

I must emphasize however that I subscribe to the view that the Basic Structure Doctrine is a fundamental factor of Constitutionalism which holds together the substratum of the Rule of law. The doctrine requires that the spirit of the Constitution as distinct from the text be invoked in interpretation of the Constitution.

What constitutes the Basic Structure of a Constitution is not exclusively explicit, it is also implicit. The Basic Structure Doctrine deals with principles and values inherent in a Constitution. It transcends procedural imperatives and its essence cannot be reduced to procedural imperatives which must be followed in amending a particular provision.

The import of the doctrine is that it communicates an implied limitation on the power of Parliament to amend the Constitution – the power to amend is not the same as the power to re-write or replace a Constitution. There is therefore a direct link between the Basic Structure Doctrine and the philosophy of Constitutional replacement. The latter power is with the people and not with the people's representatives.

I posit that the Basic Structure Doctrine is concerned with the substance of a particular provision and its linkages to the spirit or character of the Constitution and with universally accepted principles such as democracy, human dignity, and peoples' sovereignty. I posit that any article dealing with universally accepted human is part of the Constitution's fabric. I also posit that provisions of the Constitution which inherently rest on the universally acceptable principle of separation of powers between the Judiciary, Parliament and the Executive - such as the independence of the Judiciary - are part of the Constitution's basic structure. The list is long.

And the question which should be asked is: what is the bed rock, the purpose, the value inherent in a particular provision? Would the amendment of this particular provision contravene the spirit of the Constitution, would it alter the character of the Constitution? In which ways would the amendment of a particular provision for example go against the aspirations of the people as espoused in the preamble and in the National Objectives and Directive Principles – both of which were necessitated by our sad history?

I therefore agree with the appellant that to equate the doctrine to the need for referenda is a narrow interpretation of the doctrine.

In the matter before us, the specific question to be answered is: would the removal of the age restriction regarding eligibility to stand for presidency and for the office of District Chairperson change the character of the Constitution? I must answer the question: can one say that alteration of Article 102 (b) which set a minimum and maximum age for presidency and Article 183 (2) (b) which set age limits to who can stand for the office of District Chairperson restricted run counter to the character of the Constitution?

But before I answer that question, I must also answer another question: what is the role of the Preamble in Constitutional Adjudication?

The preamble to a Constitution has grown from serving as a mere introduction or preface to the substantive part of the Constitution to emerging as the document that lays down the basic structure of the Constitution.[6] The preamble contains the fundamental values and guiding principles on which the Constitution is based.[7] It serves as a guiding light for Constitutional Judges to interpret the Constitution in its light.[8]

According to Liav Orgad (2010),[9] a preamble is the part of the Constitution that best reflects the Constitutional understandings

[6] The Basic Structure Doctrine of the Indian Constitution: A comparative study of the preambles of the UDHR, ICCPR and ICESCR with the preamble to the Constitution of India, page 30.
[7] Ibid, page 42
[8] Ibid , page 42.
[9] International Journal of Constitutional Law, Vol 8, Issue 4, 714-738.

of the framers, what Carl Schmitt[10] calls the "fundamental political decisions." A preamble presents the history behind the Constitution's enactment, as well as the nation's core principles and values. The preamble "is a key to open[ing] the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished.[11]

A look at the contents of the Preamble to Uganda's Constitution indeed reflects the country's history. One can confidently say that the preamble to Uganda's Constitution has an explanatory purpose: it serves to specify the reasons for the Constitution's enactment, its raison d'être and eternal ideals. Consequently the preamble to our Constitution is a guiding framework for Constitutional interpretation and a guide in understanding the spirit of the Constitution. It is what Liav Orgad (supra) refers to as an interpretive preamble.

The importance of an interpretive preamble is that it is part of a Constitution's Basic Structure. In **Kesavananda Bharati vs. State of Kerala (supra),** the Indian Supreme Court Ruled that the preamble is the key to understanding the Constitution and interpreting its clauses. It was further held that the preamble, together with the Fundamental Rights and the Directive Principles of State Policy – the most important parts of the Indian Constitution – constitute the core of the Constitution. Jaganmohan Reddy J stated that elements of the basic features of

[10] Carl Schmitt, Constitutional Theory 77–79 (Jeffrey Seitzer trans. and ed., 2008).
[11] Joseph Story, Commentaries on the Constitution of the United States 218-219 (1883).

the Indian Constitution were to be found in the preamble of the Constitution.

I am persuaded that the above is as true of Uganda's Constitution as it is for the Indian Constitution.

Liav (ibid) posits that Preambles are not only a source of rights and powers but also of entrenchment. (My emphasis).

It must therefore be concluded that the Preamble is part of the Basic Structure of our Constitution and the authority of Parliament to amend a specific provision in the Constitution must be tested against the principles in the preamble. Consequently, I must answer the question: can one say that alteration of Articles 102 (b) … which set a minimum and maximum age for presidency and LCV … run counter to the character of the Constitution as represented in the preamble?

I must also posit that in addition to the Preamble, the power to amend a specific provision in the Constitution must be tested against the National Objectives and Directive Principles of State Policy. The central position of the National Objectives and Principles of State Policy in the country's governance was made clear by an amendment to the Constitution which introduced Article 8A which states that Uganda shall be governed based on principles of national interest and common good enshrined in the national Objectives and Directive Principles of State Policy. Does an amendment of an article restricting the age at which an individual can stand for Presidency go against any of the National Objectives and Principles of State Policy?

I have carefully studied the Constitutional Court judgments and find that the learned Justices did not ignore the preamble in considering the basic structure doctrine. In fact, **Justice Musoke JCC** did mention the preamble as well as the National Objectives and Directive Principles as basic features of Uganda's Constitution. She further held that the preamble to the Constitution captures the spirit behind the Constitution. That the preamble is meant to emphasize the popularity and durability of the Constitution. **Cheborion JCC** also held that the Preamble and National Objectives and Directive Principles of State are part of the Basic Structure of the Constitution. **Justice Kakuru JCC** (dissenting) also referred to the preamble in applying the basic structure doctrine.

I therefore hold that on the face of it, the 2nd appellants' submission that the court ignored the preamble being untenable.

Nevertheless, it is possible that after referring to the Preamble, the Learned Justices did not go further to clearly identify the principles and values therein and then come to the conclusion that amending Article 102 (b) and Article 183 (2) (b) would in no way violate the identified principles.

I posit that the import of the Preamble is that it places the Constitution in a historical context. The Constitution was enacted as a tool to protect the people of Uganda from the ills of our sad history, a history characterised by tyranny, oppression and exploitation. It is a history of political and Constitutional instability. What is contained in the National Objectives and Directive Principles of State are linked to the said history. In the

appeal before us, Democratic Principle (i) and (ii) are relevant. Principle (i) provides that: The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance. Democratic Principle (ii) provides that: All the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution.

Counsel invited this 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 provisions as would be necessary to give effect and operationalize the ideals encapsulated in the preamble as well the National Objectives and Directive Principles of State Policy. He argued that these provisions included the two term presidential cap, presidential age limit and abolition of the Kelsenian theory under Article 3 of the Constitution. All these lofty provisions were designed and intended to guarantee orderly succession to power and political stability which to date remains a mirage for our motherland.

As already stated, it was the appellants' contention that the basic features of the Constitution are supremacy of the Constitution as an embodiment of the sovereign will of the people; political order through adherence to a popular and durable Constitution; political and Constitutional stability as well as Constitutionalism and Rule of law. Counsel for the appellant argued that these were fundamentally eroded by the impugned Act thereby destroying the original identity and character of the 1995 Constitution.

Even if I were to agree with what the appellant considers to be the Basic Structure of Uganda's Constitution, there is no evidence to the effect that the tyranny, oppression and exploitation suffered by Ugandans in the past was a result of the leadership being in the hands of particular age groups. I am unable to come to the conclusion that the impugned amendment had the effect of re-introducing the Kelsenian theory into our law or that the amendment violated the sovereignty of the People. It cannot be said that the impugned Section ignored the supremacy of the Constitution. There is no evidence that removing age restrictions in leadership positions would violate the aspirations of Ugandans to build a society based on democracy, a politically and constitutionally stable society.

I therefore hold that amending Article 102 (b) and 183 (2) (b) did not violate the basic structure of Uganda's Constitution.

ISSUE 2

Whether the learned majority Justices of the Constitutional Court erred in law and in fact in holding that the entire process of conceptualizing, consulting, debating and enactment of the Constitution (Amendment) Act, 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament.

The appellants contend that there were fatal irregularities committed from the time the motion was presented in Parliament until it was enacted into law.

In resolving the appellants' complaints under this issue, I will in tandem discuss the chronological legislative path that a Private Member's Bill takes.

Article 94 (4) of the **Constitution** and **Rule 120(1)** of the **Rules of Procedure of Parliament** (hereinafter abbreviated as Rules) provide for the right of a Member of Parliament to move a Private Member's Bill.

It is pertinent from the outset to note that in October 2017, the 2012 Rules of Procedure of Parliament were amended and the 2017 Rules came into force.

Since the amendment occurred during the time when Parliament was already in the process of enacting the impugned Act, the Rules applicable to the proceedings in Parliament at each stage depended on whether the sitting was before or after the amendment.

Stage 1-Leave to bring a motion

According to **Rule 121 (1)** a Private Member's Bill is first introduced by way of Motion. **Rule 55** provides that the motion shall only be moved after the Member responsible for its introduction has given the Speaker 3 days' written notice. After expiry of the 3 days' written notice, the motion shall then be placed on the Order Paper.

In the instant appeal, Hon. Raphael Magyezi introduced a Private Member's Bill seeking to amend various Constitutional provisions. On 21st September 2017, the office of the Deputy Speaker as well as the Clerk received the written notice of the said motion. On 26th Tuesday September 2017, the Speaker informed the House that Magyezi's motion to bring a Private Members' Bill had passed the test of 3 days written notice required by Rule 47 of the old 2012 Rules and was allowed to seek leave to introduce the Bill.

The Hansard of 26th September 2017 at the second session of the 7th sitting reports the Speaker addressing the House as follows:

"Honourable members, I have spent a bit of time trying to rationalize a number of requests for motions for the amendment of the Constitution. Therefore, I will be amending the Order Paper to permit those which are eligible to be presented. For a long time, we have been demanding that the Government presents in this House Constitutional amendments. The last time we discussed this was a year ago when we asked them to bring a comprehensive amendment, but they have not done so. I am now constrained; I do not know how long I can continue stopping Members from bringing motions. Now that the Government has failed, Members should proceed and bring the motions so that we do our part."

The Speaker then went ahead and cited Rule 47 (supra) which allows a Private Members to bring a Bill after 3 days' notice. She then continued her address to the House:

"if we are to include any of the motions on today's Order Paper, the office of the Speaker should have received that notice by 21st September 2017. The following notices for motions for leave to

introduce Private Member's Bill have met the test under Rule 47 for inclusion in today's Order Paper: the Magyezi motion whose notice was received by the office of the Deputy Speaker on 21st September 2017; Lyomoki motion providing for the transitional term for the first President under the 1995 Constitution whose notice was received by the Office of the Speaker on 21st September 2017; and the Nsamba motion providing for set up of a Constitutional review Commission to comprehensively review the Constitution. The notice for this motion was received by the Office of the Speaker on 18th September 2017. It had a draft motion attached to it. This motion therefore also meets the test under Rule 47 of our Rules of Procedure for inclusion on today's Order Paper."

However, before Hon. Magyezi sought the leave to introduce Constitutional (Amendment) Bill No.1 of 2018, Hon. Ssegona raised a procedural issue arising out of Rule 26 (1) which states that, "*the Clerk shall send to each Member a copy of the Order Paper for each sitting- in the case of the first sitting of a meeting, at least two days before that sitting and in case of any other sitting, at least three hours before the sitting without fail.*"

Hon. Ssegona raised issue that the Order Paper received by all Members did not include the Magyezi motion. That the Speaker had amended the Order Paper to include the said motion. The Hansard also shows that Hon. Winifred Kiiza also raised the same issue and noted that on the 19th and 20th September the Deputy Speaker had assured Parliament that the matter would not be brought on the floor by "surprise (without first going to the Business Committee). Hon Kiiza stated that since a ruling to that

effect had been made by the Chair (Deputy Speaker), such a ruling had to be taken seriously. That whereas the Order Paper was brought out early, the Magyezi proposal had not been included therein The Speaker answered: "Honourable Leader of the Opposition, are you questioning the powers of the Speaker?"

The Constitutional Court held that the Rules do not require the Speaker to seek permission from the Members of Parliament or any other person to determine what should be included on the Order Paper. Therefore, the Speaker could not be accused of having smuggled the Magyezi motion onto the Order Paper.

Appellants' submissions

The appellants fault the Constitutional Court for the above finding and submitted that Rule 174 vests the Business Committee with the power to determine the contents of the Order Paper. That the Speaker's powers are limited to determining the order of Business in Parliament and not the Order Paper.

In support of this alleged contravention, the appellants relied on the affidavit evidence of Hon. Semujju Nganda which supported the petition in the Constitutional Court wherein he deponed that:

On 19th and 20th September 2017, the Deputy Speaker of Parliament assured the House that there was not going to be any ambush of the Members of Parliament concerning the Bill introduced by Magyezi since all business was to go through the Business Committee of the House for appropriate action and consideration. That however, on 26th September 2017, the Members of Parliament were taken by surprise when the Speaker amended the Order Paper which was already on the floor of

Parliament to include the leave sought by Hon. Magyezi to bring a Private Member's Bill.

The appellants contended that according to Rules 27 and 29 (1), the Speaker had the duty to direct the Clerk to distribute in advance to all Members the Order Paper. This had been done without the Magyezi motion.

AG's Reply

The AG submitted that the Speaker's action of amending the Order Paper was authorized by **Article 94 (4).** The AG also relied on **Rule 25** which provides that the Speaker shall determine the order of business of the House and shall give priority to government business. The AG further contended that the Speaker had been given written notice of the Magyezi motion 3 days in advance before it was placed on the Order Paper on 26th September 2017. Therefore, the appellants' contention that the Magyezi Bill was smuggled onto the Order Paper was unfounded.

Consideration by Court

Article 94 (1) provides that:

"Subject to the provisions of this Constitution, Parliament may make Rules to regulate its own procedure, including the procedure of its Committees.

(4) The Rules of Procedure of Parliament shall include the following provisions –

(a) The Speaker shall determine the order of business in Parliament and shall give priority to Government Business."

In line with **Article 94 (4)**, Parliament made **Rule 25**. **Rule 25** provides as follows:

"(1) The Speaker shall determine the order of business of the House and shall give priority to Government business.

(2) Subject to sub Rule (1), the business for each sitting as arranged by the Business Committee in consultation with the Speaker shall be set out in the Order Paper for each sitting and shall wherever possible be in the following order –

(a) – (y)."

The Rules made by Parliament complied with Article **94 (4) (a)** and in fact **Rule 25 (1)** is in *pari materia* with the Constitutional imperative that the authority to determine the order of business is with the Speaker.

I however note that the Constitution is silent as to who has the authority to determine what gets to the Order Paper. On the other hand, the Rule 25(2) gives the said role to the Business Committee. The power of the Business Committee is however subject to the Speaker's authority – the authority set out by Article 94 (4) (a) and Rule 25 (1) – authority to determine the Order of Business.

In resolving this issue, it is important to understand the two different phrases used in the provisions under discussion – Order Paper and Order of Business. In Parliamentary language, an Order Paper would mean the agenda of Parliament at a particular sitting.

On the other hand, Order of Business would be the arrangement of business, the sequence/order in which items will be discussed during a sitting, the time allocated for each item on the agenda and so on. This sequence may be a standard order of business or a sequence listed on an agenda or Order Paper that the Parliament has agreed to follow. This is drawn from Rule 25 (5) which provides that: "The Clerk shall, on instructions of the Speaker, draw up the order of business for each sitting." (My emphasis)

Rule 174 relied on by the appellants to argue that the power to determine the contents of the Order Paper lies in the Business Committee provides as follows:

"It shall be the function of the Business Committee subject to Rule 25, to arrange the business of each meeting and the order in which it shall be taken; except that the powers of the Committee shall be without prejudice to the powers of the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business as required by clause (4) (a) of Article 94 of the Constitution."

Although **Rule 174 (supra)** gives power to the Business Committee to arrange the business of each meeting, the Rule does not circumvent the powers of the Speaker given in Rule 25. In fact, Rule 174 and 25 (2) contain the proviso "subject to" which means that the power of the Business Committee to determine the order of business does not override that of the Speaker. The Speaker remains with the final word as to what order the business of Parliament will take. And under Rule 25 (5) the Clerk draws up the

order of business for each sitting on instruction by the Speaker. One notes that the provisions are consistent in linking the powers of the Speaker to determining the order of business but not anywhere does the law link her powers to determining the content of the Order Paper. The provisions limit the Speaker's powers to determining the order of Business in Parliament, the powers do not extend to determining what is to be on the Order Paper. It must have been for this reason that on both the 19th and 20th September 2017, the Deputy Speaker of Parliament assured the House that there was not going to be any ambush of the Members of Parliament concerning the Bill introduced by Magyezi, since all business was to go through the Business Committee of the House for appropriate action and consideration.

It must also be noted that the power to determine the items to be discussed is vested in the Business Committee in consultation with the Speaker. The Speaker is the chair of the said Committee. This means that the power in question is bestowed on a Committee which the Speaker is chair of. The power bestowed upon the Committee cannot be unilaterally exercised by the Speaker, consultation is expected. However, because the Speaker is the Chair of the Business Committee and furthermore the Committee cannot act in isolation but rather in consultation with the Speaker, the role of the Speaker is not whittled down.

I must therefore find that the Speaker had no power to unilaterally determine the contents of the Order Paper/the agenda of the sitting.

I must also emphasize that a reading of all the provisions giving power to the Speaker – Article 94; Rule 25, Rule 174 oblige the Speaker to give priority to Government Business.

"The Speaker shall determine the order of business of the House and shall give priority to Government business. (Article 94 and Rule 25)."

"... the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business. (Rule 174)"

It must therefore be concluded that the major reason for empowering the Speaker was to ensure that Government business would be given precedence over other matters. It is this that the power of the Business Committee is subject to. The power was not for purposes of enabling the Speaker to take unilateral decisions without engaging the Business Committee and thus rendering the Committee redundant.

From the above, I come to the conclusion that whereas the Speaker had the authority to determine the order of business, the amendment to the Order Paper which was done on the floor did not comply with the Rules.

Stage 2-Secondement

According to Rule 59 (1) after a Private Member is granted permission to introduce a Bill amending the Constitution, the Private Member's motion has to be seconded. It is on record that the Magyezi Motion was seconded.

At this point, the Speaker also ensures that the Private Member's Bill is accompanied with a Certificate of financial implication.

Under this stage, I will deal with the legal requirement of a Certificate of Financial Implications as well as the import of **Article 93** of the **Constitution.**

Certificate of Financial Implications

Section 76 (1) of the **Public Finance Management Act** as well as **Rule 117** require every Bill introduced in Parliament to be accompanied by a Certificate of Financial Implications issued by the Minister of Finance. The Certificate indicates the estimates of revenue and expenditure over the period of not less than two years after the Bill is passed. It also indicates the impact of the Bill on the economy.

The Attorney General submitted that the evidence on record shows that on 3rd October 2017, when Hon. Raphael Magyezi moved the House to have the Bill read for the first time, it was accompanied by a Certificate of Financial Implications as required by Section 76 of the Public Finance Management Act and the Rules of Procedure of Parliament. In the Attorney General's view, this Certificate also served as a guarantee that the Bill did not have financial implications prohibited by **Article 93** of the **Constitution**.

The Attorney General emphatically submitted that Parliament only proceeded with the original Bill presented by the Hon. Raphael Magyezi after the Speaker and the House were satisfied that the Bill was accompanied by a Certificate of Financial Implications.

That this position was confirmed by the Constitutional Court in the judgments of Kasule, Kakuru and Cheborion, JJCC.

Consideration by Court

I note that the Certificate of Financial Implications from the Minister of Finance dated 28th September, 2017 was issued in respect to the original Magyezi Bill which dealt with the amendment of Article 102 (b). This Certificate was received by Parliament on 29th September, 2017 and presented before the House on 3rd October, 2017.

I also note that the original Magyezi Bill did not contain provisions on term limits or the extension of tenure of Parliament which required to be voted on through a referendum.

However, the Hansard of Wednesday, 20th December 2017 indicates that while at the Committee stage, Hon. Tusiime proposed amendments to the effect that the tenure of Parliament be extended from five to seven years. These amendments were adopted into the Bill. In support of the said amendments, Hon. Rukutana (the Deputy Attorney General) stood in Parliament and stated that the Minister of Finance had provided a Certificate of Financial Implications in regard to the amendments and the Certificate indicated that if the expected amendments pass, the country will register a saving in revenues."

At the hearing of this matter in the lower court, the Clerk to Parliament tendered in evidence the second Certificate of Financial Implications accompanying the amendments introduced by Hon. Tusiime. Upon interrogation, the Court came to the conclusion that it was not a valid certificate for the following reasons:

(i) Hon. Mugoya Kyawa Gaster, Member of Parliament, Bukoli County North, Bugiri who had requisitioned for the second Certificate of Financial Implications from the Minister of Finance on 18th December, 2017 did not have the legal capacity to do so because it was Hon. Tusiime and not Mugoya who moved the amendments in Parliament.

(ii) Although Hon. Mugoya's letter of requisition was dated 18th December 2017, the endorsements and receipt stamps on the letter showed that it was received by the Deputy Secretary to Treasury on 17th December 2017. The Minister of Finance gave instructions to process the certificate on 16th December 2017. It was unexplainable how the certificate could be processed days earlier before the letter requisitioning for it was actually written.

(iii) Furthermore, no dates and particulars were given to Court as to who received the certificate for and on behalf of Parliament. The Clerk to Parliament only informed Court that, as the accounting officer of Parliament, it was her responsibility to originate a letter to the Minister of Finance requesting for a Certificate of Financial Implications as regards any Bill or amendment to be tabled before Parliament.

Arising from the above reasons, the Constitutional Court came to the conclusion that the second Certificate of Financial Implications was wrongly applied for, issued and was not genuine. Accordingly, it served no legal purpose.

The question which then follows is: *whether a Certificate which spoke to only a part of the Bill fulfilled the requirements of the law?*

The facts on record reveal that the Certificate of Financial Implications issued on 28th September, 2017 was only in respect to the original Magyezi Bill. Accordingly, the amendments introduced by Hon. Tusiime on 20th December 2017 were not covered at all by that certificate. The Certificate which would have covered the amendments was requisitioned from the Minister of Finance but was rejected by the Constitutional Court as invalid.

I therefore come to the conclusion that by the time the Bill was passed, it was not accompanied by a Certificate speaking to the whole document in its entirety.

As a result, I answer this sub-issue in the affirmative.

I now move onto **Article 93** of the Constitution which prohibits Parliament from proceeding on a Private Member's Bill that creates a charge on the Consolidated Fund.

Bill violated Article 93

Article 93 of the Constitution provides that:

"Parliament shall not, unless the Bill or the motion is introduced on behalf of the Government—

(a) proceed upon a Bill, including an amendment Bill, that makes provision for any of the following—

(ii) the imposition of a charge on the Consolidated Fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction;

(iii) .....

(iv) .....

(b) <u>proceed upon a motion, including an amendment</u> to a motion, the effect of which would be to make provision for any of the purposes specified in paragraph (a) of this article." (My emphasis)

The provision bars Parliament from proceeding upon a private Member's Bill which imposes a charge by way of increment on the Consolidated Fund or Public Fund of Uganda.

The Constitutional Court held that, the introduction of the Private Member's Bill that led to the enactment of the Constitution (Amendment) Act, 2018 was not inconsistent with Article 93 of the Constitution, except for the introduction of Sections 2,5,6,8 and 10 because they required a referendum which has a charge on the Consolidated Fund. **Musoke, JCC** specifically held that the proposed Private Member's Bill in its original form together with its proposed four amendments was not likely to impose a charge on the Consolidated Fund and was budget neutral. However, the amendments which re-introduced term limits and increased the tenure of Parliament and Local Government Councils had the effect of imposing a charge on the Consolidated Fund.

Appellants' submissions

The gist of both the 2nd and 3rd appellants' argument is that the court having found that some of the provisions in the Bill contravened Article 93 should have come to no other conclusion than to nullify the whole Act.

Counsel for the 3rd appellant specifically argued that the words "Parliament shall not proceed" in Article 93 should be given their ordinary meaning. He supported his argument with the authority of **Theodore Sekikubo and ors vs. Attorney General**[12] where this Court applied the cardinal rule of statutory interpretation that where words are clear and unambiguous, they should be given their primary, plain, ordinary and natural meaning.

In counsel's view, the words "Parliament shall not proceed" in their ordinary interpretation mean "to stop, not to go forward". He argued that Parliament proceeded with the Bill contrary to Article 93 and subsequently enacted the Act. The fact that the offending provisions were later found to be unconstitutional does not change the fact that Parliament proceeded with the Bill in contravention of the Constitution.

Counsel further contended that according to **Rule 113** of the **2012 Rules**, the Speaker was required to inform the House that the Bill contravened Article 93. However, the Speaker Ruled that Article 93 was not applicable because the House was dealing with a Committee report and not a Bill. Counsel contended that the Speaker's Ruling was wrong because she had earlier put the

[12] Supreme Court Constitutional Appeal No. 01 of 2015.

question that the Bill be read for the second and called for a vote on the same. Therefore, **Article 93 (b) (supra)** was applicable.

Counsel contended further that even if the Speaker's Ruling (that the House was dealing with a Committee report and not a Bill) was to be true, the report of the Committee of the Whole House contained provisions which created a charge on the Consolidated Fund.

That in the above circumstances, the Constitutional Court could not validate the unconstitutional acts by severing the offending parts of the Bill.

Counsel also faulted the Constitutional Court for using the Certificate of Financial Implications as the test for determining whether the Bill created a charge on the Consolidated Fund.

In counsel's view, by the Minister stating in paragraph 'e' of the Certificate that there were no additional financial obligations beyond what was provided in the medium term expenditure framework meant that the Bill had financial implications. That "medium term" is defined in the Public Finance Management Act as a period of three to five years. A medium term expenditure framework is a primary document which contains the consensus on policies, reform measures, projects and programmes that a Government is committed to implement during a specific period of between three and five years. It draws on a larger objective such as vision 2025. It may identify priority areas scheduled for implementation during the period, specify economic growth percentage expected policy goals, project sources of financing etc. According to counsel, it is just a plan which is

incapable of being used as a yardstick to determine whether a Bill creates a charge on the Consolidated Fund under Article 93 of the Constitution. Thus, the Minister's assertion that the Bill will not have additional financial obligations beyond what is provided in the Medium Term Plan has no relevance to determine whether or not the Bill will create a charge on the Consolidated Fund. Counsel argued that when the law requires a determination of whether a Bill places a charge on the Consolidated Fund, it is erroneous to use a forecast/plan as the yardstick.

That the determination of whether a Bill creates a charge on the Consolidated Fund is the Speaker's role and not the Minister of Finance since Article 93 (supra) opens with the phrase: "Parliament shall not proceed …"

In respect to the 29 million facilitation, counsel argued that **Article 156** of the **Constitution** requires Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill "which shall be introduced into Parliament to provide for issue from the Consolidated Fund of the sums necessary to meet that expenditure."

Article 154 of the **Constitution** also provides that no monies shall be withdrawn from the Consolidated Fund except….where the issue of those monies has been authorized by an Appropriation Act." The Appropriation Act is in this respect a conduit from the Consolidated Fund. Counsel submitted that it was erroneous for the Constitutional Court to hold that the 29 million did not come from the Consolidated Fund but the account of Parliament. The decision to pay that money was a result of the Motions for the 1st

and 2nd second reading of the Bill. Those Motions therefore had the effect of removing 29 million shillings from the Consolidated Fund albeit unconstitutionally.

To hold otherwise would mean that expenditure on Magyezi Bill was provided for in the 2016/17 Budget since it was introduced in September 2017. It would mean that at the time of preparing budget estimates in 2016, Parliament was aware of this Bill and made provision for it. That does not seem logical. The logical conclusion is that the Ministry of Finance provided the money. If it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act. The burden to do so laid with the Respondent but it failed to do so.

On the other hand, the 1st appellant (Mr. Mabirizi) submitted that since the impugned Act affected expenses of various offices like the Electoral Commission, payments and emoluments to the President and Local Government leaders which are charged on the Consolidated Fund, the Bill could not be introduced by a Private Member. To support this argument, Mabirizi cited **Article 66(3)** of the **Constitution** and **Section 9(2)** of the **Electoral Commission Act**, which are to the effect that the Commission's expenses are charged on the Consolidated Fund.

Mabirizi further contended that the impugned Act added more 15 days for the Supreme Court to determine a Presidential Election petition lodged before it which translated into more allowances. That **Article 128(5)** of the **Constitution** provides that, "the

administrative expenses of the judiciary, including all salaries, allowances … shall be charged on the Consolidated Fund."

In his view Mabirizi argued that **Article 93** (supra) prohibits 'proceeding' against a Bill or motion as opposed to Article 92 which prohibits the 'passing' of a Bill. Mabirizi relied on the **Black's Law Dictionary**[13], to define the words 'proceeding' and 'passing'. Proceeding is defined as an act or step that is part of a larger action." This means that any step, be it notification of the Speaker of an impending motion or the seeking of leave is prohibited under Article 93. Passing on the other hand is defined as enact (a legislative Bill or resolution); or to adopt.[14]

Mabirizi prayed that the impugned Act be considered illegal and struck out since its enactment was prohibited by Article 93.

AG's reply

The Attorney General submitted that the Justices of the Constitutional Court were right to apply the principle of severance by striking out the provisions of the impugned Act that did not comply with Article 93 and maintained those that complied with the Constitutional provision.

The Attorney General invited this Court to uphold the decision of the Constitutional Court that the original Bill presented by Hon. Magyezi did not contravene Article 93 of the Constitution.

[13] 8th Edition at Pages 3807-3808
[14] Ibid pages 3550-3551

In regard to the twenty nine million given to the Members of Parliament, the Attorney General relying on the affidavit evidence of the Clerk to Parliament submitted that the said sum of money was appropriated for use by the Parliamentary Commission. It was not drawn from the Consolidated Fund.

Consideration by Court

The purpose of Article 93 is that, a Bill introduced by a Private Member should not contain any provision which causes the withdraw of funds from the Consolidated Fund.

The amendments introduced by Hon. Tusiime had the effect of placing a charge on the Consolidated Fund contrary to Article 93.

Once it is noted on the floor of the House that a Bill or an amendment to a Bill which is being introduced by a motion brought by a Private Member would have the effect of imposing a charge on the Consolidated Fund, the motion should for that reason fail. In the matter before Court therefore, Parliament should not have adopted the amendment to the Bill.

Nevertheless, the Constitutional Court severed those provisions which had the effect of creating a charge on the Consolidated Fund and upheld the provisions contained in the original Magyezi Bill. I will later in this judgment discuss whether severance was applicable in such circumstances.

Be that as it may, I do not agree with the appellants' arguments that paragraph (e) of the Certificate of Financial Implications accompanying the original Magyezi Bill can be interpreted to mean that the Bill had the effect of causing financial implications

contrary to **Article 93**. Every Bill whether introduced by Government or a Private Member at a certain point has financial implications in terms of administrative and operation costs. It can never be said that any Bill should have a 'zero' financial cost. In fact, **Section 76 (2)** of the **Public Finance Act** provides that the certificate shall indicate the estimates of revenue and expenditure over the period of not less than two years after the Bill is enacted into law. Therefore, the appellants' argument that paragraph (e) meant that there was financial implication cannot be sustained.

Arising from my analysis above, I also do not find that the UGX 29,000,000/= facilitation amounted to the impugned law placing a charge on the Consolidated Fund contrary to Article 93. If the money used had already been appropriated for use by Parliament, the funds cannot be said to have been directly withdrawn from the Consolidated Fund for purposes of implementing an amendment to the Constitution brought by a Private Member. Similarly, I also do not find Mabirizi's argument that the allowances to be paid to the Judges due to the extended time of hearing a Presidential petition or expenses incurred by the Electoral Commission in carrying out its mandate amounted to placing a charge on the Consolidated Fund.

Stage 3- First reading

Rule 124 provides that every Bill shall be read three times prior to its being passed. At the stage of the first reading, the clerk to Parliament shall cause the Bill to be printed and published in the gazette. The Clerk shall then read aloud the Short Title of the Bill and it shall be taken to have been read for the first time. In the

instant appeal, the Bill that led to the impugned Act was read for the first time on 3rd October 2017.

Stage 4- Committee stage

In regard to this Stage, two complaints were raised by the appellants. One that the Committee report was signed by non-members and the other that the Committee did not comply with the 45 days Rule.

After the first reading is done, the Bill is referred to the appropriate Committee for consideration. (See: **Rule 128**) .In the instant case the appropriate Committee to which the Bill was referred was the Legal and Parliamentary Affairs Committee.

The Committee examines the Bill in detail and makes all such necessary Public inquiries in relation to it and shall report back to the House within 45 days from the date the Bill is referred to the Committee as required by **Rule 128 (2)**.

The Bill that led to the impugned Act was referred to the Legal and Parliamentary Affairs Committee on Tuesday 3rd October 2017. On Monday 18th December 2017, the Speaker informed the House that the majority and minority reports from the Committee on Legal and Parliamentary Affairs were ready to be presented to the House. This was way beyond the 45 days threshold required by the Rule.

The Committee report according to **Rule 201 (1)**, must be signed and initialed by at least one third of all the Members of the said Committee. The majority Committee Report on record was signed by 29 members. During the presentation of the Report, Hon. Ssekikubo raised issue with 8 signatories who were not part of the

appointed Legal and Parliamentary Affairs Committee and the fact that they appended their signatures on to the Report yet they had not attended the Committee sessions.

The Constitutional Court held that although the fact that people who were not members of the Legal and Parliamentary Affairs Committee signed the report was irregular, it was not fatal to the enactment process and cannot invalidate the Committee report. The court reasoned that according to **Article 94 (3)** of the Constitution, *the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself invalidate those proceedings.* Furthermore, the court stated that even if the eight (8) non-members who signed the report after the deliberations were removed, there would still be sufficient quorum of Members who signed the report for it to pass.

Appellants' submissions

The appellants alleged that **Rule 201 (1)** was flouted when 8 non-members of the Legal and Parliamentary Affairs Committee signed the report. **Rule 201 (1)** provides that: **"A report of a Committee shall be signed and initialed by at least one third of all the Members of the Committee, and shall be laid on the Table."**

Furthermore, the appellants argued that the Committee did not report back to the House within 45 days from the time the Bill was referred to them as required by Rules 128 (2) and 140 (1). The said Rules provide as follows:

"128 (2). The Committee shall examine the Bill in detail and make all such inquiries in relation to it as the Committee considers expedient or necessary and report back to the House within forty five (45) days from the date the Bill is referred to the Committee.

140 (1). Subject to the Constitution, no Bill introduced in the House shall be with the Committee for consideration for more than forty-five days."

AG's reply

In response to the appellants' allegation, the AG submitted that the Committee had the requisite quorum to sign the report with or without the non-members. The AG supported the findings of the Constitutional Court and prayed that this Court upholds them.

In regard to the 45 day Rule, the AG submitted 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. During recess, there was no transaction of parliamentary business without leave of the Speaker. That therefore, the 45 days could not start running until the leave was obtained.

It was the AG's submission that by a letter dated 29th October 2017, the Committee Chairperson duly applied for leave to the Speaker, which was granted on the 3rd November 2017. Therefore, the 45 days started to run from 3rd November 2017 and would

expire on 16th December 2017. The Committee reported back on 14th December 2017, two days before the expiry of the 45 days period. Thus, the Committee report was duly presented to the whole House within the period stipulated under Rule 128.

The AG further argued that the above notwithstanding, non-compliance with the 45 days Rule did not vitiate subsequent proceedings on the Bill since Rule 140 provides that where extra time is granted and it expires, the House shall proceed with the Bill without any further delay.

Consideration by Court

Signing of the Committee report by non-members

It is on record and undisputed that the report of the Parliamentary and Legal Affairs Committee was signed by non-members to the Committee. The Hansard indicates that Hon. Ssekikubo raised a procedural issue on the floor of Parliament concerning the matter.

The discourse on record clearly shows that the two Honorable members were part of two Committees at the same time contrary to **Rules 154 (1)** and **155 (2)** which prohibit Members from being part of more than one Committee at the same time.

Be that as it may, **Rule 203** allows non-members of a Committee to participate in any of the public proceedings of a particular Committee. Furthermore, **Rule 206 (1) and (2)** also allows for co-opting of Members to participate in the proceedings of a Committee. This Rule provides that:

"(1) A Committee may, with the approval of its Members co-opt any other Member who is not a Member of the Committee but shall have no vote on any matter to be decided by the Committee."

From the above cited Rules it can safely be concluded that non-members of a Committee can participate in proceedings of any Committee but not cast a vote so as to make a binding decision.

The question which follows is: *whether the signatures of the eight non-members invalidated the Committee report?*

The voting on the resolutions and subsequent signing of the Committee report by members are binding. The votes determine what forms the majority view and the minority view. The binding effect of the signatures flows from people who have the authority to sign the report. The validity or invalidity of the report resulting from non-members' signatures depends on whether the provisions of law makes it material or not. **Rules 203** and **206** (supra) emphasize the prohibition that non-members of a designated Committee are not allowed to cast a vote or form part of the quorum. Therefore, a non-member's signature on the report is invalid and has no authority to form binding decisions by their signatures.

A properly constituted Committee Member is one who is entitled to not only participate in Committee proceedings but also cast a vote.

I therefore hold that the signing of the Committee report by non-members was a material irregularity which rendered the report suspect. The Constitutional Court erred in holding that although

the signing of the report by non-members was fatal, it did not invalidate it. It follows that the AG's argument that the signatures of the 8 non-members when severed do not invalidate the report cannot be sustained.

Non-compliance of the Committee to the 45 days Rule

In light of the explanation given by the AG in regard to this matter, I find that **Rule 128 (2)** was not violated.

Stage 5- 2nd reading and Constituting of the Committee of the Whole House.

The next procedural step in the legislative path is for the Bill to be read the second time and the Committee report to be debated.

Rule 201 (2) provides that:

"Debate on a report of a Committee on a Bill, shall take place at least three days after it has been laid on the Table by the Chairperson or the Deputy Chairperson or a Member nominated by the Committee or the Speaker."

The appellants argued in the lower court that the rule requires physical laying of a document on the Table in Parliament. Furthermore Mr. Mabirizi argued that the Constitutional Court was dishonest in finding that the motion to suspend Rule 201 (2) was when the House constituted itself into the Committee of the Whole House whereas it was at plenary. That according to **Section**

8 (2) and (4) of the Electronic Transactions Act, there was no evidence to support the finding of the court that the report had been electronically delivered four days prior to the debate.

On the other hand, the Attorney General contended that since each Member of Parliament had been availed with an ipad, laying on table of the Committee report had been done electronically through the ipads. That it was on this basis that he moved a motion to have Rule 201(2) suspended.

The Respondent submitted that Members of Parliament received the report of the Committee three days before the debate and prayed that the finding of the Justices of the Constitutional Court is upheld.

Regarding the secondment of the motion moved by Hon. Rukutana, the AG submitted that the majority Justices of the Constitutional Court came to the right conclusion that the Rules were not flouted since no secondment was required.

Furthermore, the AG argued that it would be inconceivable for the Speaker to have allowed debate on the motion moved by Hon. Rukutana without it being seconded as required by **Rule 59**.

In conclusion, the AG invited this Court to uphold the findings of the majority Justices of the Constitutional Court as far as the secondment of the motion for suspension of **Rule 201** was concerned.

The Constitutional Court held that the motion by Hon. Rukutana to suspend the operation of Rule 201 (2) (supra) which required a lapse of 3 days before the report was debated was permitted by

Rule 16 of the Rules of Parliament. Court concluded that the suspension of Rule 201 (2) was not fatal to the subsequent legislation.

The court reasoned that the proceedings indicated in the Hansard show that the Speaker pointed out to the Members that they had received copies of the report on their ipads four days prior to its being laid on Table. That the purpose of the said Rule is to give adequate notice to Members of Parliament as to the contents of the report so that they are prepared to debate the same on the floor of Parliament.

Furthermore, the court found that the requirement for secondment of the motion to suspend Rule 201(2) was merely directory and not mandatory. This is because the motion to suspend the Rule was moved when Parliament was sitting as a Committee of the Whole House and Rule 59 (2) provides that, *"in a Committee of the Whole House or before a Committee, a seconder of a motion shall not be required."*

The AG invited this Court to consider the rationale for inclusion of **Rule 201** as stated by **Cheborion**, **JCC** that since the rationale for the inclusion of Rule 201was to give adequate notice of the Committee report, the purpose of the Rule was achieved and no breach was occasioned to the Rules.

I however note that on the other hand, **Kakuru, JCC** (dissenting) held that according to the Hansard, the debate went on without the motion having been seconded or voted upon. That from the record, by the time the motion to suspend *Rule 201(2)* was moved, Rt. Hon. Speaker of Parliament had ruled that she had already

given the notice required under *Rule 201(2)* to members electronically through their IPads.

That Rule 201(2) is couched in mandatory terms. It requires that Members of Parliament be given sufficient time to read and internalize a report of a Committee before debating on it. According to **Kakuru, JCC**, Rule 201 is not one of those that cannot be suspended. However, its suspension was not seconded by anyone as required by *Rule 59,* of the Rules of Procedure of Parliament which stipulates thus;-

"(1) In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded."

In conclusion on the issue, Kakuru JCC held that the Speaker of Parliament failed to apply Rule 201(2) which is mandatory. He accepted the submissions of the Petitioners' counsel that "laying on the table" means physically presenting the Bill on the table of Parliament and does not include sending an electronic copy to Members. The Judge noted that, Parliament amended and adopted the 2017 Rules in October 2017. That had Parliament intended to amend Rule 201 to take into account "electronic notice", or "electronic laying on the table" it would have done so, since according to the Hon. Speaker, the practice was already in place. The fact the Rule remained unchanged following the 2017 amendment means that, there was no intention to adopt a new procedure or turn the existing practice into law. Therefore, the submissions of the Hon. Deputy Attorney General that when the

Members of Parliament were availed with IPads, Rule 201 no longer serves any useful purpose has no legal basis .

Thus, Parliament while passing the impugned Act, failed to comply with *Rule 201(2)* of its Rules of Procedure, which is mandatory. That failure contravened **Article 94 (1)** of the **Constitution** and as such vitiated the whole process of enactment of Act 1 of 2018.

Consideration by Court

The first important question to be addressed under this sub-issue is: the proper meaning of the phrase "laying on the table/tabling."

The interpretation section of the Rules defines "table" and "tabling" as follows:

"Table" means the Clerk's Table;

"Tabling" means the laying of an official document on the Table and laying before Parliament shall be construed accordingly.

The Parliamentary Rules were amended in October 2017 but the definition of the above phrases were left intact. On the other hand, another rule (**Rule 29 (1)**) which I find pertinent in resolving the issue at hand was amended by integration of electronic interaction as a mode of communication to Members of Parliament.

Rule 29 (1) provides that: *"a weekly Order Paper including relevant documents, shall be made and distributed to every member through his or her pigeon hole and where possible, electronically."*

In my view, this is evidence that where Parliament intended to integrate electronic modes of communication into its rules and practice, the changes were specifically dealt with. Indeed I am in agreement with Justice Kakuru (dissenting) when he stated that since at the time of debating the impugned Act, Parliament had adopted the 2017 Rules, but did not change the Rules to take into account "electronic laying on the table", Rule 201(2) remains in force.

It therefore is clear to me that tabling and laying an official document before Parliament must be physically done and the document must be placed on the Clerk's table.

Furthermore, a look at the Hansard shows the phrase being equated to physical laying on the table by other Members of Parliament who in the same session presented reports from other committees. For example: in the Hansard of Tuesday 26th September 2017, Hon. Muwanga Kivumbi stated: "*Madam Speaker, I beg to lay on the Table a report entitled , Report of the Delegation of Parliament of Uganda …"* .Muwanga Kivumbi then proceeded to present the physical report to the House. And furthermore, the Hansard of 3rd October 2017 records Hon. Peter Ogwang stating that: "*Madam Speaker I beg to lay on the Table reports of the Auditor- General on the financial statements of the following entities…"* He then went ahead to physically present the said reports before the House and the Speaker directed that they be sent to the Committee on Public Accounts.

Would it be reasonable in a parliamentary session to attach different meanings to a rule, depending on which report was in issue? My answer is "No".

I therefore find that tabling and laying an official document before Parliament must be physically done and the document must be placed on the Clerk's table. As the Rules stand today, electronic distribution of the Committee Report on Members' ipads or pigeon hole does not amount to tabling.

Arising from the above analysis, it would follow that there was no lapse of three days after the laying on the table of the report. The report was laid on the table on 18th December 2017 and the debate ensued on the same day.

Without prejudice to the foregoing analysis, I must address the appellants' argument that the motion to suspend 201 (2) by Hon. Rukutana needed to be seconded.

The Hansard states that on Monday 18th December 2017, when the House reconvened to receive the Committee report, the Speaker stated as follows:

"... Today, we shall receive two reports; one on the Constitutional (Amendment) (No.2) Bill, 2017. It is anticipated that we shall receive the report; debate it today and tomorrow so that as many Members as possible, are given an opportunity to express their views ... Debate what will be presented to us."

Hon. Karuhanga raised a procedural issue that debating the report on the same day it was laid on the table would violate 201 (2) because the minimum period of 3 days between the tabling of the

report and the debate would not be respected. The Deputy Attorney General responded by moving a motion to have the rule suspended so that the debate could continue. A debate on the report indeed ensued.

Did the motion to suspend 201 (2) require secondment?

I note that when Hon. Rukutana moved the motion, the House was constituted as a Committee of the whole House. **Rule 59 (2)** provides that, "*in a Committee of the whole House or before a Committee, a seconder of a motion shall not be required." (My emphasis).*

When Hon. Rukutana moved the motion to suspend Rule 201(2), the motion for the second reading of the Bill by Hon. Magyezi had been moved. At this point, the Bill stood committed to the Committee of the whole House. This is according to **Rule 130 (1)** which is to the effect that if a motion for the Second Reading of a Bill is carried, the Bill shall stand committed, immediately, to the Committee of the Whole House.

Rule 2 defines a Committee of the Whole House as a Committee composed of the whole body of Members of Parliament. As shown above in **Rule 59(2)** (supra) the motion in issue did not require secondment since the House had been constituted as a Committee of the whole House.

Consequently, the debate which ensued would be regular.

I nevertheless still need to expound on the import of Rule 29 and draw a distinction between the purpose of this rule and Rule 201 (2)

It was argued by the AG that the purpose of Rule 201(2) is to adequately notify each Member of the content in a document such as the committee report in this matter. Based on this argument, it was submitted that there was no need to physically lay the Committee Report on table because it was sent to Members' iPads electronically which fulfilled.

Let me start with a discussion of Rule 29 and more specifically with how it is formulated. The rule uses the word "and". The use of the word "and" connotes togetherness. The use of "and" would mean that the documents must be availed both in the "pigeon hole" and "electronically." However, whereas availing a hard copy in the pigeon hole is mandatory, the distribution of the electronic copies has been subjected to its being possible.

Why then was it necessary for Parliament to craft Rule 201 (2) in addition to Rule 29? I posit that the purpose of Rule 29 is to notify members that a particular document is ready. On the other hand, Rule 201 (2) is aimed at ensuring that members start reading the document in preparation for meaningful debate. The tabling of a document under Rule 201 (2) is like a referee's whistle, blown so that those in the race commence the run. Without Rule 201, it is possible for members who have been availed with numerous documents under Rule 29 to each concentrate on documents of their choice and consequently members would attend sittings when not on the same page.

I now move on to Mabirizi's contention that the requirements of **Section 8(2) of the Electronic Transactions Act** were not complied with. It must be noted that the fact that the report was

electronically re-laid to all Members of Parliament was not in dispute. What was in issue was whether or not Parliament complied with Rule 201 (2)-an issue I have already discussed above.

Consequently, I do not find it relevant to discuss the Electronic Transactions Act.

Debating the Bill

The next step after the Committee report is tabled and 3 days have elapsed is for the House to constitute itself into a Committee of the Whole House. The Committee of the Whole House starts to debate the Bill clause by clause and any amendments proposed to the clauses or Bill are raised.

The appellants here allege that the Speaker denied the Members adequate time to debate the Bill, allowed the debate to proceed in absence of the Leader of Opposition and allowed Members of the Ruling party to cross the floor of Parliament to the Opposition side.

In respect to the above irregularities, the Constitutional Court held that as long as there was the requisite quorum of one-third of the Members in Parliament, the business of Parliament can go on in the absence of the Leader of Opposition, the Chief Whip and opposition Members of Parliament. That **Article 94** of the **Constitution** allows Parliament to act notwithstanding a vacancy in its membership.

Furthermore, Court held that there was no evidence presented as to why the Leader of the Opposition and opposition Members were not in Parliament when the Bill was tabled for debate.

In regard to crossing the floor of Parliament, Court held that the Speaker according to circumstances obtaining at a particular moment can exercise her powers and permit MPs to sit at particular places in the chamber of Parliament.

On the denial of adequate time to debate the Bill, the Court held that there is no provision making it a mandatory requirement for deliberations to be got from every Member of Parliament. The only condition precedent under **Article 262** is the requirement for the Bill to be supported by a two-thirds majority of all the Members of Parliament. That from the Hansard, 124 Members of Parliament had contributed before the Speaker closed the debate. The Leader of Opposition equally frustrated the Speaker's effort to have more Members contribute to the debate. This however did not adversely affect the passing of the Act.

Appellants' submissions

Denial of adequate time to debate the Bill

Regarding the denial of adequate time to debate the Bill and the debate ensuing in the absence of opposition Members, Mabirizi contended that it is not the quorum which makes Parliament properly constituted to transact business. That the quorum is only a requirement at the time of voting. Therefore, the absence of the Opposition Members at any stage renders the House improperly constituted.

Crossing the floor of Parliament

On crossing the floor of Parliament, Mabirizi submitted that the Court was wrong in finding that the Speaker exercised her general

powers under Rule 7 (2) yet Rule **82 (1) (b)** provides that, **during a sitting, a Member shall not cross the floor of the House or move around unnecessarily.** Mabirizi supported this argument with the principle of law that a general provision cannot apply where there is a specific provision. He relied on the authority of **Adonia vs. Mutekanga**[15] wherein it was held that the Courts will not normally exercise their inherent powers where a specific remedy is available.

For the 2nd appellant (MPs), it was submitted that there was evidence on record to show that Members of Parliament were denied adequate time to debate the Bill which violated the Rules.

AG's reply

The AG submitted that the Constitutional Court rightly found that the Members of Parliament were given adequate time to debate the Bill. Furthermore, that **Rule 9 (1) and (4)** obliges the Speaker to ensure that each Member has a comfortable sit in Parliament. The Speaker was therefore justified in the circumstances to permit Members to sit in the available seats on the Opposition side. Thus, there was no crossing of the floor of Parliament as alleged by the appellants.

Consideration by Court

Denial of adequate time to debate

[15] (1970) 1 E A 429.

In regard to denial of adequate time to debate the Bill, the appellants did not provide Court with any parameters to guide it in determining what constitutes adequacy of time for debate.

Crossing the floor

The circumstances surrounding the alleged crossing of the floor of the House are that, when the Leader of Opposition voluntarily withdrew from the House, the Speaker invited Members who had been standing on the Government wing of the House to take up seats vacated by the Leader of Opposition and her colleagues. The appellants allege that this was prohibited by **Rule 82 (supra)**. The appellants also fault the Court for interpreting the crossing of the floor of the House in a Political sense.

'Crossing the floor' is an expression used to describe a Member's decision to break all ties binding him or her to a particular party.[16]

I note that the Members from the Ruling party took up opposition seats at the Speaker's directive. The Members were not changing from their Political party to join the opposition. Consequently, I do not find the appellants argument that there was crossing of the floor sustainable.

Debating in absence of Opposition Members

The Hansard details the events that led to the absence of the Leader of Opposition-Hon. Winfred Kiiza. Prior to her exit of the chamber, she raised an issue to the Speaker alleging intolerance of Members on the government side. Hon. Winfred appealed to Members who felt that the House was not proceeding within the

[16] A Glossary of Parliamentary words, Parliament of Australia accessed on 4/2/2019 at www.aph.gov.au.

Rules to first move out and consult each other. Thereafter, she exited the House.

The function of the opposition side in Parliament is to criticize and or offer alternative views in debating national issues. [**See: Rule 14 (4)**]. It is this arrangement and functionality of Parliamentary opposition that reflects the fundamental Constitutional principle of democracy and Rule of law. The Speaker as Chairperson of the House had to bear this in mind. However, in the circumstances of the present appeal, the Leader of Opposition voluntarily exited the Chamber and never returned.

I therefore cannot fault the Constitutional Court for answering this sub-issue in the negative.

Suspension of Members

Rules 87(2) and 88 provide for the suspension of any Member of Parliament as follows:

"**87 (2)The Speaker or Chairperson, shall order any Member whose conduct is grossly disorderly to withdraw immediately from the House or Committee for the remainder of that day's sitting; and the Clerk or the Sergeant-at-Arms shall act on such orders as he or she may receive from the Speaker or Chairperson to ensure compliance with this Rule."**

"88 (1) If the Speaker or the Chairperson of any Committee considers that the conduct of a Member cannot be adequately dealt with under sub Rule (2) of Rule 87, he or she may name the Member.

(2) Where a Member has been named, then-

(a) In the case of the House, the Speaker shall suspend the Member named from the service of the House; or

(b) In the case of a Committee of the whole House, the Chairperson shall forthwith leave the Chair and report the circumstances to the House and the Speaker shall suspend the Member named from the service of the House."

In addressing the issue of suspension of some Members from the House, the Constitutional Court held as follows:

*"Under **Rule 87(2)**, the Speaker has powers to order a Member of Parliament whose conduct is grossly disorderly to withdraw immediately from the House for the remainder of that day's sitting and the member so suspended has to immediately withdraw from the precincts of the House until the end of the suspension period under Rule 89. Under Rule 86(2) the decision of the Speaker on any point shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice.*

It is asserted by the petitioners that the Speaker ought to have afforded a hearing and also have provided reasons for suspending the six Honourable Members of Parliament under Articles 28(1) and 44(c). It is however unexplained by the petitioners what fair hearing the Speaker should have given to the suspended members. Like in contempt of Court proceedings the members affected misconducted themselves in the very eyes and hearing of the Speaker, including disobeying her very orders to them to be orderly and the very members were exchanging defiant words and physical gestures to the chair.

This Court did not receive any evidence whether any of the suspended members moved a substantive motion to question the decision of the Speaker. At any rate, later on, the Members of Parliament with the necessary quorum freely participated in debating the Constitutional (Amendment) Bill, 2017 in the Second and Third Readings.

It cannot therefore be concluded that the suspension of the six Members of Parliament made the enactment of the Constitution (Amendment) Act No. 1 of 2018 to be unconstitutional. Issue 7(f) is answered in the negative."

Appellants' submissions

The appellants submitted that on the 18th December 2017 when Parliament convened to consider the report of the Legal and Parliamentary Affairs Committee, three honourable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling and instead arbitrarily suspended the 1st, 2nd, 3rd, 4th and 5th Appellants and other Members from Parliament in contravention of Articles **1, 28 (1), 42, 44 (c) and 94** of the **Constitution**.

That the Hansard clearly showed that Hon. Theodore Sekikuubo brought to the attention of the Speaker the fact that the report of the Committee on Legal and Parliamentary affairs was fatally defective since non-Members to wit; Hon. Akampurira Prossy Mbabazi and Hon. Lilly Akello, who both sat on the Committee of Defence and Internal Affairs had signed it.

Furthermore, Hon. Ssentamu Robert and Hon. Betty Amongi raised another point of procedure that the matter concerning the

impugned Bill was before the East African Court of Justice and that proceeding with the same would amount to breach of the subjudice Rule. However, the Speaker declined to pronounce herself on the matter and instead adjourned the proceedings. Before Members could leave the chambers, the Speaker made an arbitrary order suspending the 1st to 5th appellants together with another MP without assigning any reason whatsoever as required under the Rules nor did she state the offences committed.

Therefore, that the Speaker grossly violated the Rules of Procedure of Parliament by: not according the said MPs a fair hearing before suspending them, not giving any reason for their said suspension and acting ultra vires after being *functus officio* at the time of making the suspension decision.

Counsel submitted further that by virtue of the illegal suspension of the MPs, the speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

The appellants argued that these illegalities were elaborately presented before the Constitutional Court but the court held that the participation of the new members that were added to the Committee though irregular, did not invalidate the Committee report because even if the number of non-Members was deducted, the majority report still had enough signatures to pass it. Also, that the action taken by the Speaker to suspend certain Members of the House from participating in the proceedings of the House was due to the fact that the suspended members had defied the

Speaker and disrupted the proceedings in the House thereby provoking the wrath of the Speaker.

AG's reply

In reply to the appellants' contention above, the AG submitted that **Rule 88(2) (a)** of the **Rules** empowers the Speaker to name and suspend from the service of the House a Member who conducts him/herself in a disorderly manner in Parliament. A Member so suspended from the service of the House is commanded in **Rule 89** to immediately withdraw from the precincts of the House until the end of the suspension period.

Rule 88 (4) guides the period of suspension of a member and it requires that a Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. In accordance with **Rule 88(4),** the 3 sittings for which the member is suspended are computed from the next sitting of Parliament.

Arising from the above, the AG contends that the appellants misconstrued the import of **Rule 88 (4)** in as far as it applied to the circumstances in this case. That it would be absurd that a Member, who is found by the Speaker to have conducted himself in a disorderly manner in the House and is therefore suspended from the service of the House, is then allowed to remain in the House for the rest of the day's sitting.

In regard to the right of fair hearing, **Rule 86 (2)** provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice in the instant case none was made.

In respect to the contention that the Speaker while suspending the Members was out of her chair, the AG referred to the Hansard of 18th December 2017 where the Speaker stated: "*I suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended:*

1. *Hon. Ibrahim Ssemujju*
2. *Hon. Allan Ssewanyana*
3. *Hon. Gerald Karuhanga*
4. *Hon. Jonathan Odur*
5. *Hon. Mubaraka Munyangwa*
6. *Hon. Anthony Akol."*

Article 257 (aa) of the **Constitution** as well as **Rule 2(1)** of the **Rules** define *"sitting"* to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee.

Rule 20 of the **Rules** provide that the Speaker may at any time suspend a sitting or adjourn the House.

The AG therefore submitted that the Speaker only suspended the sitting to 2.00 O' clock and did not adjourn the house, hence She was not *functus officio* because there was a continuous sitting of the House when Members were suspended.

That the Speaker acted within her mandate to suspend Members of Parliament for their un-Parliamentary conduct, there is no evidence to show that the suspended Members of Parliament moved a substantive motion challenging their suspension. The AG therefore prayed that the findings of the Justices of the Constitutional Court be confirmed.

Consideration by Court

It is imperative to note from the outset of resolving this sub-issue that there were two instances of suspension. The instance of suspension contended under issue 2 is one where six MPs were expelled from the House. The Members' suspension occurred during the presentation of the Committee report. Different Members kept interjecting the presentation by raising various procedural issues. I note that from the Hansard none of the six suspended MPs raised any interjections. The Hansard does not show why they were suspended. However, **Rule 87 (2)** gives discretion to the Speaker to suspend any Member whose conduct is grossly disorderly to withdraw immediately from the precincts of the House. The Speaker did not exercise her powers ultravires the law.

As to when the suspension takes effect, **Rule 88 (4)** provides that:-

If a Member is suspended, his or her suspension on the first occasion in a Session shall be for the next three sittings, excluding the sitting in which he or she was suspended; on the second occasion in a session, for the next seven sittings excluding the sitting in which he or she was suspended, and on the third and any subsequent occasion during the same Session, for the next twenty eight sittings of the House, excluding the sitting in which the Member was suspended.

The correct interpretation of the above provision is that where a Member has been suspended in a Session, the suspension takes effect from the next three sittings. The words 'excluding the sitting in which he/she has been suspended' does not mean that the

suspended Member stays in the House until the next three sittings commence. The suspension takes immediate effect and the duration of the suspension lapses after three sittings have been held.

Failure to close doors to the chambers at the time of voting on the 2nd reading of the Bill.

Article 89 of the **Constitution** provides for the voting procedures in Parliament as follows:

"(1) Except as otherwise prescribed by this Constitution or any law consistent with this Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting in a manner prescribed by Rules of procedure made by Parliament under article 94 of this Constitution."

The above Constitutional provision is reiterated in **Rule 92 (1)**. More specifically, **Rule 98 (1) (a)** provides that, "*Roll call and tally voting shall be held at the second and third reading of the Bill for an Act of Parliament to amend a provision of the Constitution."*

The appellants alleged that the Speaker did not comply with **Rule 98 (4)** which required the Speaker to direct that the doors to the chamber to be locked and the bar drawn before the voting commenced.

The Constitutional Court held that since the House was full and there were no seats for all Members of Parliament, the Rules could not be adhered to the letter. That in the absence of any evidence

that strangers took advantage of the failure to close the doors and voted, the allegation of any breach of Rule 98 of the Rules of Procedure is legally and factually untenable and did not render the Amendment Act unconstitutional.

Appellants' submissions

Counsel submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament before voting on the 2nd reading of the Bill was inconsistent with and in contravention of **Articles 1, 2, 8A, 44 (c), 79, and 94** of the **Constitution** as well as **Rule 98(4)** of the **Rules of Parliament**. That this fact was admitted by the Clerk to Parliament in her affidavit. According to the 2nd and 3rd appellants' counsel the rationale of Rule 98 (4) is to bar Members who had not participated in the debate to enter Parliament vote. That the Speaker however not only left the doors wide open but called for members who were outside the chambers during the time of debate to enter and vote.

Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how the failure to close all the doors during voting made the enactment of the Act unconstitutional. That the Rules of procedure were not made in vain. Therefore they must at all material times be obeyed and respected save where they have been duly suspended. Thus, the non-compliance with Article 98 (4) rendered the entire enactment process and the outcome thereof illegal.

AG's reply

No reply was made by the AG on this sub-issue.

Consideration by Court

I have carefully studied the Hansard when the motion to have the Bill read for the second time was moved. Hon. Kantuntu raised the issue of the need to have the doors locked during voting. The voting continued. After voting, the Speaker gave her reasons for not following the procedure in **Rule 98**. She stated as follows:

"Honourable members, ideally I was supposed to have closed the doors under Rule 98(4). However, that exists in a situation where all the Members have got seats, but in this Parliament, 150 Members do not have seats. Therefore, it was not possible to lock them out and that is why I did not lock the doors … Is there anybody who has not voted? We now close the ballot."

I find the Speaker's reasoning plausible. Most important is that a roll call of the Members was taken to identify who was present or absent as well as those who were not eligible to cast a vote. The voting process with unclosed doors went on smoothly. Voting was by roll call and the majority votes recorded was 317. Therefore, the appellants' contention that the failure to close the doors of Parliament during voting made the impugned Act unconstitutional lacks merit.

Stage 6- 3rd reading of the Bill

Rule 136 provides that the third reading is upon a motion that *"the Bill be now read a third time and do pass."*

If any member desires to delete or amend any provision contained in a Bill as reported from a Committee of the whole House he or

she may, at any time before a member moves the third reading of the Bill, move that the Bill be recommitted either wholly or in respect only of some particular amendment or amendments. [**Rule 137 (1)**]

The appellants allege that the 2nd and 3rd reading of the Bill was done on the same day, 20th December, 2017. This violated the Constitution.

Non observance of the 14 days Rule between the 2nd and 3rd reading of the Bill.

Article 263 of the **Constitution** provides that, "the votes on the second and third readings referred to in Articles 260 and 261 of this Constitution shall be separated by at least fourteen sitting days of Parliament."

The Hansard on record shows that the 2nd and 3rd readings of the Bill that led to the enactment of the impugned Act was done on the same day that is 20th December 2017.

In resolving the issues surrounding the enactment of the impugned Act, the Constitutional Court held that it is only the amendment of provisions under Articles 260, 261 and 263 which required the separation of 14 days between the 2nd and 3rd readings. That since Sections 1,3,4,7 and 9 of the Constitution (Amendment) Act did not amend any of the provisions covered by Articles 260 (amendments requiring a referendum), 261 (amendments requiring the approval of district councils) and 263 there was no requirement that the second and 3rd readings of the Bill be separated by fourteen sitting days of Parliament.

The court held that it was only the amendments which were introduced after the original Bill that required the separation of the 14 days sitting between the 2nd and 3rd readings. Such amendments were unconstitutional and contravened Articles 262 and 263 of the Constitution.

Appellants' submissions

The 1st and 3rd appellants faulted the majority learned Justices for finding that the passing of the Act without observing the 14 days between the 2nd and 3rd readings did not contravene the Constitution.

The 1st appellant (Mabirizi) argued that it was mandatory for the speaker to separate the 2nd and 3rd readings with 14 sitting days of Parliament. That both the provisions which required the separation of 14 days and those that did not formed part of a single Act. According to Mabirizi, this meant that the Act as a whole had to comply with the 14 days Rule. In support of this argument, Mabirizi cited **Article 257 (1) (a)** of the Constitution which defines an "Act of Parliament" as a law made by Parliament. That the Article does not define an Act of Parliament as a section, subsection or part of the law made by Parliament. Following this argument, Mabirizi submitted that had the justices keenly looked at the language of the Constitution which uses the word 'Act' as opposed to 'Section', they would have not have made a distinction between those Sections which had to comply with the Rule and those that did not have to.

Similar to the 1st appellant's submission, the 3rd appellant (ULS) argued that when the clauses in the Bill requiring 14 days

separation were passed at the third reading, they became part of the Act. The court could not therefore make a distinction of the provisions which had to comply and those that did not.

That the proper approach Court had to take was to hold that since the Act contained provisions which had the effect of amending Article 1 by infection, there was need to separate the 2nd and 3rd readings by 14 days sitting. Article 260 (1) states that a Bill shall not be taken as passed unless the votes at the second and third reading is by fourteen days.

Counsel for the third appellant argued that it was mandatory for the legislature to comply with the Constitutional 14 days Rule and not relegate its duty to the Constitutional Court to strike out the provisions which contravened the Rule and maintain those which did not.

AG's Reply

The Attorney General submitted 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. It is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution which required the 14 days separation between the 2nd and 3rd readings. That the learned Justices were right to sever those Articles that offended the Rule from those whose enactment did not require the separation of the second and third reading by 14 days. The Attorney General invited this Court to reject the Appellants'

submissions and uphold the findings of the majority Justices of the Constitutional Court.

Consideration by Court

Article 260 provides for the criteria to be met by an Act of Parliament amending the Constitution through a referendum. The Article requires that apart from referring the intended amendment to the people through a referendum, it must also have the support of two-thirds majority of Parliament. The two-thirds majority is determined through a voting system and the votes at the 2nd and 3rd readings have to be separated by 14 days.

Similarly, Article 261 also requires that a Constitutional amendment requiring the approval of district councils be backed by the votes of two-thirds majority of Parliament. The votes are to be separated by 14 days between the 2nd and 3rd readings.

The Constitutional Court held that the impugned Amendment Act did not require compliance with the 14 days sitting Rule in Article 263 (supra) because the Act did not contain provisions that needed a referendum or the approval of district councils. I note that in making this finding, the Constitutional Court severed those provisions which required a referendum and hence the need to comply with the 14 days Rule. The severed provisions were Sections 2, 6, 8 and 10 because they had the effect of amending Article 1 on the sovereignty of the people by infection. The said provisions amended the Constitution by extending the tenure of Parliament from five to seven years which provisions had to be submitted to a referendum but were not.

It is evident from the Hansard of 20th December 2017 that the second and third readings of the impugned Act were on the same day. The focus of the 14 days Rule in Article 263 (supra) applies to Constitutional amendments of provisions which either require a referendum or the approval of district councils. These are Articles 1, 2, 5(2), 44, 69, 74, 75, 79(2), 105(1), 128(1), chapter 16, 152, 176(1), 178,189 and 197. Article 102 (b) which is in issue before this Court is not one of those provisions whose amendment requires that the 2nd and 3rd reading be separated by 14 days.

I however note that when the Bill was passed at the reading it contained provisions extending the tenure of Parliament from five to seven years which required a referendum. As such, the Bill would have then required to comply with the 14 days Rule. As earlier noted the Constitutional Court severed these provisions from the impugned Act and came to the conclusion that the remainder of the Act did not need to comply with the 14 days Rule. I will discuss later in this judgment whether the doctrine of severance applied.

Stage 7- Assent by the President

The final stage of the Legislative process is the President's Assent to the Bill.

Article 263 (2) of the Constitution provides that: **A Bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if—**

(a) it is accompanied by a certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it; ...

Section 16 of the **Acts of Parliament Act** provides for the form the certificate of compliance takes. In essence the certificate shows which Articles have been amended, the number of majority votes obtained to pass the amendment and a statement to the effect that Chapter Eighteen of the Constitution has been complied with.

Appellants' submissions

The appellants fault the learned Justices of the Constitutional court for 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 that was sent to the President for assent. The discrepancies are that the speaker's certificate of compliance clearly indicated that the impugned Bill only amended Articles 61, 102, 104 and 183 of the Constitution whereas the Bill itself indicated that Parliament had in addition amended Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel for the appellants averred that the discrepancies and which appeared between the certificate and the Bill were gross both in content as well as form and thus contravened **Article 263 (2)** of the **Constitution** and **Section 16** of the **Acts of Parliament Act**. That this had the effect of not only rendering the presidential assent to the Bill a nullity but even the resultant Act.

The Constitutional Court found that the omission of some clauses in the certificate of compliance per se invalidated Sections 2, 5, 6,

8, 9 and 10 of the Constitution (Amendment) Act 2018 on grounds that the Speaker of Parliament did not certify that Articles 77, 105, 181, 289 and 291 had been amended in strict compliance with the provisions of the Constitution. Thus, the purported amendments in respect of these Articles were fundamentally flawed and invalid. However, the Court held that the Certificate was not invalid. That the only logical result of the omission of certain clauses in the certificate is that the omitted Articles were not validly amended.

AG's reply

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 between the certificate and the Bill at the time of Presidential Assent. That upholding the validity of the certificate was acknowledgement by the court that the certificate complied with the form prescribed in Section 16 (2) and Part VI of the Second Schedule of the Acts of Parliament Act since the Articles that were being amended were enumerated in the certificate.

That the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution to reach its finding that the other Articles that had been amended but not included in the Speaker's Certificate were unconstitutional.

Consideration by Court

Article 263 (2) of the Constitution hinges the President's assent to a Bill on the availability of the Speaker's Certificate of Compliance.

In **Semwogerere vs AG 2002**[17] this Court held that the presidential assent is an integral part of the law making process and not a mere formality and that a bill does not become law until the President assents to it. It was further emphasized that the Constitution **commands** the President, to assent to a Bill **only if specified conditions are satisfied**. The command is mandatory and does not allow for discretion in the President to assent without the Speaker's certificate of compliance.

Where the President assents to a bill which is not accompanied by a Certificate, the resultant Act would be invalid for non-compliance with the requirement under Article 262(2) (a) [now 263 (2)]. The resulting Act would not become law and its proposed amendments to the Constitution would not become part of the Constitution.

What is the legal status of a Certificate which speaks to only some of the provisions in a Bill presented to the President for assent and is silent on some provisions? The answer lies in Section 16 of the Acts of Parliament Act. The Section refers to Part V of the 2nd schedule to the Act which provides for the contents of the Certificate of Compliance. Part V specifically obliges the Speaker to indicate *inter alia*

(i) the Articles sought to be amended;

(ii) the number of members in support at each reading; and

(iii) to mention specifically that Article 261 of the Constitution has been complied with.

[17]Constitutional Appeal No. 1 of 2002

In the matter before this Court, the Certificate presented by the Speaker did not mention some of the Sections in the Bill that and was therefore defective.

I also find it necessary to answer the question: what is the purpose of the Certificate of Compliance envisaged under Article 263 of the Constitution. The purpose of the certificate is to assure/guarantee the President that Parliament complied with the requirements of the constitution. A certificate which tells half the story does not fulfill the legal objective. Furthermore, it is not expected of the President to engage in an inquiry as to what happened in relation to the sections which the certificate does not speak to. After all, Section 16 (7) of the Acts of Parliament Act states that: "A certificate under Section 16 signed by the Speaker shall be *prima facie* evidence of the facts stated in the certificate." It cannot be expected that the President will inquire into what happened in Parliament. Under no circumstances should a Speaker forward a Bill to the President with full knowledge that it contains provisions passed in contravention of the Constitution.

To assent to a Bill presented for signature, the President handles the Bill and the Certificate together. The certificate is not read in isolation of the Bill and the Bill is not dealt with in isolation of the certificate. A Certificate which does not comprehensively speak to the Bill cannot be considered a valid certificate. It was not necessary in the **Semwogerere case (Supra)** for this Court to specifically state that **a valid** Certificate of Compliance is mandatory - for indeed a document will only qualify for recognition

by courts if it is valid. If assent to a Bill which is not accompanied by a certificate renders the assent null and void, assent to a Bill accompanied by a defective certificate leads to the same result – null and of no legal effect.

What the Speaker did at the stage of preparing the certificate should have been done in Parliament – stopping amendments which had not complied with constitutional imperatives from tainting the Bill which would be presented to the President for assent. Instead, with the full knowledge that the Bill contained provisions passed in contravention of constitutional imperatives, the Speaker sent the Bill to the President for assent.

What the President assented to was a Bill which had provisions passed in violation of mandatory constitutional imperatives as well as provisions which perhaps[18] had been passed in compliance with the Constitution. But the President assents to a Bill and not to sections of a Bill. The assent was therefore to a Bill which was null and void.

Applying the principle of severance to a document which fails to satisfy the objective of a supreme law clause would be reducing the Certificate of Compliance to a mere procedural requirement – the very thing which this Court said it was not, in Semwogerere vs AG (Supra).

[18] I say perhaps because I have already made a finding that the Speaker did not comply with Parliamentary Rules when she placed the Magyezi Bill on the Order Paper.

I therefore find that the discrepancies in the Speaker's Certificate of Compliance went to the root of the enactment process of the Act and contravened the Constitution.

No Consultation in the course of enacting the Bill.

The majority learned Justices of the Constitutional Court held that despite the interference by Asuman Mugyenyi's directive prohibiting MPs from consulting beyond their constituencies, there was proper consultation carried out.

Appellants' Submissions

The Appellants fault the learned majority Justices of the Constitutional Court for finding that there was proper consultation of the people of Uganda on the impugned Act. The appellants submitted that the requisite consultation and public participation of the people, which is mandatory, was not conducted yet it is one of the basic structures of our Constitution. In support of their arguments, the appellants relied on the Kenyan authorities of: **Law Society of Kenya vs. Attorney General**[19] and **Robert N. Gakuru & Others vs. Governor Kiambu County & Others**[20].

The appellants invited Court to uphold the findings of the learned dissenting Justice of the Constitutional Court that Parliament failed to encourage, empower and facilitate public participation of citizens in the process of enacting the impugned Act.

AG's Reply

[19] Constitutional Petition No. 3 of 2016.
[20] Petition No. 532 of 2013

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 the conceptualization and enactment of the impugned Act.

The Attorney General argued that whereas South Africa and Kenya provide for parameters and guidelines for Public Consultations, Uganda did not have such parameters. Therefore, there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the Constitution. It was further argued that the body to determine the requisite standard of public consultation was the Parliament.

The Attorney General also argued that the appellants' contention on the quality and quantity of the consultation was not factual. The AG submitted that there is evidence on record of media prints inviting the Public to submit their views on the Bill, the Parliamentary and Legal Affairs Committee conducted open hearings for individuals and groups that wanted to give their views on the Bill and the Hansard which indicates the views that various Members of Parliament had got from their constituencies.

The AG submitted in the court below that consultations were done through live debate on Television, Radios, social and print media calling for the Public' s views on the Bill. Furthermore, that the report of the Parliamentary and Legal Affairs Committee included a list of 53 stakeholders from Civil Society organizations, prominent Constitutional law scholars and other interest groups who submitted their views on the Bill to the Committee. In addition, the Clerk to Parliament, Jane Kibirige, averred that each

Member of Parliament was facilitated with UGX. 29,000,000/= to go and consult the masses.

Basing on the above evidence, the Attorney General invited this Court to uphold the majority Judgment of the court that proper consultation was carried out.

Consideration by Court

The essence of the arguments from both parties call for resolution of a fundamental question: *what parameters should be used to evaluate the adequacy of the public consultations in Uganda?*

In answering the above question, it is imperative to first understand what public consultation/participation is.

In a constitutional making process, public consultation involves direct engagement with the public or representative groups or other factions of society. Public participation in Constitution making is considered to be essential for the legitimacy and effectiveness of the process.[21] A representative, open process with direct public input is, on balance, good for setting the course for a democratic state.[22]

The reason for engaging the public is that people are the custodians of democracy and should be involved at all stages of Constitution making. The process must empower the people rather

[21] The Citizen as Founder: Public Participation in Constitutional Approval, Zachary Elkins, Tom Ginsburg and Justin Blount, Temple Law Review, Vol 81 No.2, 2008.

[22] Post-conflict Peace- Building and Constitution Making (noting benefits of more participatory and inclusive Constitution-building processes), Kirsti Samuels, 6 CHI.J.INTL ,663, 668 (2006).

than inhibit them by creating opportunities and avenues for individual effective participation.[23](My emphasis)

Under the International Human rights regime, Public Consultation is derived from the right to 'democratic participation' under **Article 21** of the **United Nations Declaration of Human Rights (UDHR)**. Similarly, **Article 25** of the **International Covenant on Civil and Political Rights (ICCPR)** provides for every citizen's rights to take part in the conduct of public affairs.

At the regional level, **Article 13 (1)** of the **African Charter on Human and People's Rights (Banjul Charter)** provides for public participation as follows:

"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

In Uganda's Constitution, public participation is provided for in **Objective II (i)** of the **National Objectives and Directive Principles of State Policy** as follows:

"The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance." (My emphasis)

The content of public participation has been expanded and developed to include other rights like political equality, freedom of speech and association.[24]

[23] S Mwale, Constitution review: The Zambian search for an ideal Constitution making, paper presented at the 10th African Forum for Catholic social teaching (AFCAST) working group meeting, 02 may 2006, Nairobi Kenya.
[24] G Hyden & D Ventor, Constitution Making and Democratization in Africa, (2001) .

Can one say that the public was **empowered** and **encouraged** to express their views in regard to the amendments which resulted into the impugned Act?

Mc Whinney states that in Constitution making, public participation can come in different forms namely a constituent assembly, public meetings and a referendum.[25] Public participation can also be conducted in various ways, such as using the media and organizing public meetings, depending on the available resources and the geographical area of coverage.[26]

As submitted by the Attorney General unlike Uganda does not have laws or guidelines on how the public is to be engaged during Constitutional amendment processes. Based on this legal fact and the evidence submitted by the AG and not disputed by the appelllants, one can come to the conclusion that this Court would not be in position to question the modes of consultation adopted by Parliament. Based on this, I would have accepted the proposition by the AG that the body to determine the requisite standard of public consultation should be Parliament. I would have answered this sub-issue in the negative.

However it is an undisputed fact that in some instances the consultations were interfered with and the process was marred with violence and resulting from the Mugyenyi Directive. This was contrary to **Objective II (i)** of the **National Objectives and Directive Principles of State Policy (supra).**

[25] E McWhinney, Constitution- making: principles, process and practice, (1981) 12.
[26] H Ebrahim The Soul of Nation: Constitution making in South Africa (1998) 242.

I will more elaborately discuss the effect of the Mugenyi directive under Issue 3.

Conclusion on Issue 2: *Severance and constitutional violations of procedure.*

It was the unanimous decision of the Constitutional Court that Sections 2, 5, 6, 8, 9 and 10 of the Constitution (Amendment) Act 2018, which provide for the extension of the tenure of Parliament as well as Local Government Councils by two years; and for the reinstatement of the Presidential term–limits, were unconstitutional for contravening various procedural imperatives of the Constitution.

However, the court went ahead and held that the above Sections of the impugned Act could be severed and struck out of the Act so that Sections 1, 3, 4, and 7, of the Constitution (Amendment) Act No. 1 of 2018 would remain part of the Act.

It was the contention of the appellants that since violations of Constitutional imperatives had been proved, the only legal remedy which should have been given by the Constitutional Court was nullification of the impugned Act.

Mabirizi specifically faulted the Court for raising and considering the issue of severance *suo moto* yet it was not pleaded by any of the appellants. That the Court had no power to frame the sub-issue of whether severance can be applied because Order 15 Rule 3 of the Civil Procedure Rules restricts the court to determine allegations made by the parties on oath, in their pleadings and accompanying documents.

The AG on the other hand submitted that the learned Justices of the Constitutional Court were right to apply the severance principle because through severance, the Court is able to control and limit the consequence of its order of invalidity.

What is Severance?

Severance refers to the ability of courts to strike out a portion of a statute if that portion is held to be unconstitutional.

There are two types of unconstitutional legislation:

1. Legislation that violates substantive constitutional requirements.
2. Legislation enacted in violation of procedural constitutional requirements

Substantive constitutional violations occur when a Statute contains provisions that are found constitutionally invalid based on content. A Statute will have been enacted following the procedural requirements of the constitution but later - based on the Constitution – the content of some of the provisions are found by court to be invalid. I opine that Article 2 (2) of the Constitution deals with such enactments. The article empowers courts to sever portions which are invalid in substance from those whose content does not violate the constitution. It provides that:

Supremacy of the Constitution

(1) This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

My view that the Article is only relevant to statutes enacted in a procedurally constitutional manner, but does not deal with statutes enacted through *procedurally* unconstitutional processes is emboldened by the simultaneous enactment of a related Article – 274. In light of the fact that the 1995 constitution came into existence when a legal regime was already in existence, the enactors of the new constitution provided as follows:

274. Existing law.

(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution. (My emphasis)

(2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date.

The effect of the two articles read together is that severance is one way in which a statute which contains unconstitutional content
can be modified so as to be bring it in conformity with the constitution.

It is in line with the above provisions of the constitution that one can understand the authority of **Attorney General vs. Salvatori Abuki**[27] cited by the respondents. In that case, a section which provided for the banishment of a convict of witchcraft from his home area for a period of 10 years after serving a custodial sentence was declared unconstitutional for contravening several fundamental rights of an individual. However the 1957 Witchcraft Act itself was not declared unconstitutional – the offence of practicing witchcraft, the sentence of imprisonment and other provisions of the Act were left to stand.

What can be deduced from a reading of the constitutional provisions and from a reading of **Abuki** case is that if any provision of a statute is found by the Court to be unconstitutional, the remaining provisions of the statute are valid unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with the void provision that none can be implemented without the other.

Uganda's Legal Framework controls the procedure of the legislative process – this is through provisions of the Constitution

[27] Constitutional Appeal No. 1 of 1998

and through the Rules of Procedure of the Parliament of Uganda. These types of restrictions "regulate only the process by which legislation is enacted." Such restrictions are "designed to eradicate perceived abuses in the legislative process, such as hasty, corrupt, or private interest legislation." Abuses of these restrictions are called procedural constitutional violations. So it is possible to challenge a Statute on the ground that it is unconstitutional, not because of its content but rather because the process of its being enacted was marred by violations of constitutional procedural rules.

In the appeal before us I must answer the question: faced with the proven fact that the impugned Act contains both provisions which were passed without adherence to constitutional imperatives as well as provisions which did not require adherence to the above mentioned procedural rules, does the Court have the option of severing the unconstitutionally passed portions of the Act and letting the constitutionally handled portions of the bill remain law? If as I have already pointed out, Article 2 and 274 deal only with *Substantive* constitutional violations what would be the basis of severance?

Writing about the law in the State of Missouri, USA Jonathon Whitfield[28] talks of "statutory severance" on the one hand and

[28] *Two Tests of Severance: Procedural and Substantive Constitutional Violations and the Legislative Process in Missouri*, 79 Mo. L. Rev. (2014) Available at: http://scholarship.law.missouri.edu/mlr/vol79/iss3/10

"severance by judicial doctrine" on the other. He points out that whereas statutory severance is codified (similar to the presence of Article 2 and 274 of Uganda's Constitution), courts have created a separate doctrine of severability. This doctrine applies to procedurally unconstitutional laws and supplements the statutory delegation of authority. The doctrine was made necessary because the ability to sever portions of laws based on the substance of its provisions does "not adequately address the problems inherent in *procedurally* unconstitutional statutes.

According to Whitfield for procedural constitutional violations, "the entire bill is unconstitutional unless [the court] is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not." To determine whether or not the provisions that are part of the added subject pass this test, the court considers "whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill."

The principle laid down by Whitfield above is based on several decisions of the Supreme Court of Missouri beginning with **Hammerschmidt vs. Boone County**[29]in which an Act of Parliament was challenged for violating procedural regulations to wit Article III, section 23 of the Missouri Constitution which *inter*

[29] 877 S.W.2d 98 (1994) (Supreme Court of Missouri, En Banc.)

alia provides that: "No bill shall contain more than one subject which shall be clearly expressed in its title." The Law restricted an Act to one subject and matters properly connected therewith. And the Supreme Court stated that:

> **When the procedure by which the legislature enacted a bill violates the constitution, severance is appropriate if this Court is convinced beyond a reasonable doubt that the specific provisions in question are not essential to the efficacy of the bill. Severance is inappropriate if the valid provisions of the statute are so essentially and inseparably connected with, and so dependent on, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one. Severance is also inappropriate if the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.**

In several cases since **Hammerschmidt**, the Supreme Court of Missouri has applied doctrinal severance in Section 23 cases and has severed the unconstitutional portions in every case.[30]

Should we adopt the “severance by judicial doctrine” or can we say that the Missouri cases are so distinguishable that they cannot serve as persuasive authorities?

[30]See for example: Legends Bank vs. State 361 S.W. 3d 383 (2012) and Missouri Roundtable for Life, Inc. vs State of Missouri, 396 S.W. 3d 348 (Mo. 2013) (en banc).

In the Missouri cases the procedural irregularity in each case was the legislature's introduction into the Bill which was already before it, a matter that was unrelated to its original subject. The result was that the Bill contained a multiplicity of subjects – subjects with no link to each other. The Bill either violated the single-subject requirement of constitutional amendments and/or the original purpose requirement of constitutional amendments. The original purpose requirement does not prohibit subsequent additions or changes to legislation but is against the introduction of a matter that is not germane to the object of the legislation or that is unrelated to its original subject.

What type of procedural irregularity is this Court dealing with?

In the matter before us, we are dealing with a Bill which contained various sections calling for different steps as prerequisites for the provision to be validly amended. What the Legislature however did was to subject the Bill to a uniform process. Sections which required stringent/rigorous processes were subjected to the less rigorous processes. On this point the anomalies in the Missouri cases are distinguishable from what we are dealing with in the matter before us. Secondly, whereas the Missouri cases dealt with severance of irregularities in the enactment of ordinary statutes, the instant appeal deals with irregularities in the amendment of the Constitution.

I must also point out the fact that although in both **Legends Bank vs. State (Supra) and Missouri Roundtable for Life, Inc. vs. State of Missouri (Supra)** Judge Fischer filed concurrence

opinions, in each case he stated that although he concurred in the result of the case, he was writing separately to express his view that the judicial doctrine of severance as applied to procedurally unconstitutional Bills should be abolished. The Learned Justice argued that judicial severance encourages the Legislature to disregard its oath to protect the Constitution of the State and procedural mandates expressed within it. That judicial severance provides no incentive for legislators to follow the clear and express mandates of the constitution.

I am persuaded by Fischer J's reasoning.

But even more important is that severance in the context of an Act of Parliament passed in violation of constitutional imperatives and parliamentary rules goes against several principles already well established in our jurisprudence. One such principle is **the principle of legal purity** which is to the effect that in enacting and/or amending a country's constitution the actors must ensure that resultant Act is delivered in a medium of legal purity - sound constitution-making should never be sacrificed at the altar of expediency. Another principle is that Parliament as a law making body should set standards for compliance with Constitutional provisions and with its own rules. The result of the said principles is that failure to obey procedural rules of parliament while enacting a law renders the whole enacting process a nullity. That an Act of Parliament so enacted is by such reason unconstitutional.

The said principles are well articulated in the cases of **Prof Oloka-Onyango and 9 Others vs. Attorney General,**[31] **Ssempebwa vs. AG**[32] and **Ssemwogerere vs. AG 2002**[33]**.**

In Prof Oloka-Onyango and 9 Others vs. Attorney General,[34] the 10 Petitioners alleged that the enactment of the Anti-Homosexuality Act 2014 by the 9th Parliament was without quorum in the house and that this was in contravention of Articles 2(1) & (2), 88 and 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure.

Article 94 (1) provides that Parliament may make rules to regulate its own procedure. Article 88 of the Constitution provides that the quorum of Parliament shall be prescribed by the rules of Procedure of Parliament made under Article 94 of the Constitution. Rule 23 states that at any time when a vote is to be taken the Speaker shall ascertain whether the Members present in the House form a quorum for the vote to be taken. If the Speaker finds that the number is less, the Speaker shall suspend the proceedings of the House.

On 20th December 2013 when the Anti Homosexuality Act was being put to vote before Parliament, a procedural question as to the quorum in the House was raised by the Prime Minister. The Prime Minister stated that if the law was to be passed it must be with quorum. However, the Speaker of Parliament did not respond

[31] CONSTITUTIONAL PETITION N0. 08 OF 2014

[32] **Constitutional Case No. 1 of 1987**

[33] Constitutional Appeal No. 1 of 2002

[34] CONSTITUTIONAL PETITION N0. 08 OF 2014

to the issue raised and instead called for a vote to be taken.

The case for the petitioners was that the Anti- Homosexuality Act was not passed in accordance with the Law because Rule 23(1), a rule made pursuant to Article 94 imposes on the Speaker a Constitutional Command to ascertain that there is Quorum. So when a procedural question is raised about quorum, the question has to be determined. That According to the evidence adduced, the Speaker disobeyed that command. Counsel for the petitioners argued that legislative sovereignty must be exercised in accordance with the provisions of the Constitution.

On the other hand, the respondent stated that there is no evidence to prove that there was no quorum and that the burden to prove that fact rested with the Petitioners. According to the AG the key aspect to the petition was an allegation that Parliament passed the Act without a quorum and thus violated the Constitution, and so the key issue arising from the pleadings is; "the absence of Coram". She argued further that the fact of absence of Coram is what is alleged to have made the Act inconsistent with the Constitution and therefore the petitioners had the duty to adduce evidence that the required number was not present at the time of the vote. That the evidence adduced to prove that the Speaker did not comply with Rule 23 by failing to ascertain Quorum is not itself evidence of the absence of quorum.

The court held that Rule 23 obliges the Speaker, even without prompting by any Member of Parliament to ensure that Coram exists before a law is passed. That the Speaker did not ensure compliance with Rule 23 and thus acted illegally in neglecting to

address the issue of lack of Coram.

That the speaker is duty bound to ensure compliance with the Rule 23. That Parliament as a law making body should set standards for compliance with the Constitutional provisions and with its own Rules. That the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and vitiates the law that is enacted as a result of it. Failure to obey the Law (Rules) rendered the whole enacting process a nullity.

Court declared that the act of the Rt. Hon. Speaker of not entertaining the objection that there was no Corm was an illegality under Rule 23 of the Rules of Procedure which tainted the enacting process and rendered it a nullity. The Act itself so enacted was by this reason unconstitutional.

I must emphasize that indeed it was never proved that the Act was passed in the absence of the required quorum. What was proved was that the Speaker did not comply with a procedural imperative. The critical principle therefore - the *Ratio Decidendi* – is that *An Act of Parliament passed without strict compliance with Parliamentary Rules of Procedure is a nullity.*

I also find it useful to draw lessons from the pronouncements by (court which court?) in **Ssempebwa vs AG[35].** The National Resistance Council purported to pass an Act of parliament but did not strictly comply with the 1967 Constitution. It was held

[35] **Constitutional Case No. 1 of 1987**

that since the Constitution sets out not only who exercises legislative power but also how such powers are to be exercised valid legislation can only be made in accordance with the established legislative framework. The court emphasized many points which I consider very pertinent in a country which values the Rule of Law to wit:

1. Human affairs, much more so affairs of state, should always be conducted on the basis of certainty. That is why there are written laws and constitution according to which individuals and governments are expected to behave.
2. The National Resistance Council (read Parliament) … cannot be an exception. The people of Uganda are entitle to expect it as the legislature to follow the constitution. So it cannot choose to legislate inside or outside that constitution according to its own wish … (even more so for purposes of amending the Constitution).
3. … for reason of sanctity of the Constitution as the supreme law of Uganda … and certainty which is necessary in conducting affairs of the state it would be a dangerous precedent for this court to say that laws invalidly made should be left to stand because errors regarding them can be easily corrected. (My emphasis)
4. … in view of our … history Governments in Uganda should follow the rule of law in exercising legislative and other powers. To do so is a necessary process in developing a return to the rule of law which has been conspicuous in this country in breach than in observance by Governments and

citizens alike. In this process the Courts as the guardian of the Constitution….have an important role to play.

What was said of the national Resistance Council applies just as much to today's Legislative Body – Parliament.

If an individual is to ask the question: if indeed Parliament has the authority to go back and pass into law the provisions which were severed from the impugned Act and declared valid by the Constitutional Court, why the fuss? I would answer in the words of the persuasive Kenyan authority of **Njoya & Ors vs. the Attorney General of Kenya**[36] where Ringera J, stated that:

> **I have in the end formed the conviction that constitution-making is not an everyday or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound constitution-making should never be sacrificed at the altar of expediency.**

The pronouncements made in regard to the making of a new constitution are equally pertinent in the process of amending a

[36] **(2004) AHRLR 157**

constitution in peace time and in the context of an existing valid constitutional order as exist in today's Uganda. Applying the principle of severance goes against this profound statement.

And in the **Ssemwogerere vs. AG 2002** case **(Supra)**, **Kanyeihamba JSC** aptly said in his Lead Judgment:

> **... if Parliament is to successfully claim and protect its powers and internal procedures it must act in accordance with the constitutional provisions which determine its legislative capacity and the manner in which it must perform its functions.**

I now must now specifically make mention of the application of severance to the Certificate of Compliance which was presented to the President by the Speaker. Having found that the President assented to a Bill which was a nullity, I must hold that a court cannot sever a document which has no legal standing.

ISSUE 3: VIOLENCE

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?

This issue is based on two "events" to wit:

(i) What occurred in Parliament on 27th September 2018 and

(ii) Prevention of Members of Parliament from consulting outside their constituencies

Events in Parliament on 27th September 2017.

The Hansard shows that on 27th Wednesday September 2017, the Speaker welcomed Members to the day's session. The Speaker then informed the House that Parliamentary business had not been properly carried out since 21st September 2017 because Members were not willing to listen to each other. The Speaker also informed the House that she had received credible information that Hon. Kibuule endangered the safety of Members by bringing a firearm into the chamber of Parliament on 21st September 2017. The Speaker also stated that at the previous sitting of 26th Tuesday September 2017, Members were unruly and that therefore she had made a decision to exercise her powers under Rule 87 (2) as well as Rule 88 and suspended 25 Members of Parliament.

Rule 87(2) provides that:

> **The Speaker shall order any Member whose conduct is grossly disorderly to withdraw immediately from the House or Committee for the remainder of that day's sitting; and the Clerk or the Sergeant-at-Arms shall act on such orders as he or she may receive from the Speaker to ensure compliance with this Rule.**

Rule 88 provides as follows:

> **(1) If the Speaker considers that the conduct of a Member cannot be adequately dealt with under sub Rule (2) of Rule 87, he or she may name the Member.**

(2) Where a Member has been named, then-

(a) in the case of the House, the Speaker shall suspend the Member named from the service of the House.

(6) Where a Member who has been suspended under this Rule from the service of the House refuses to obey the direction of the Speaker when summoned under the Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force is necessary in order to compel obedience to his or her direction, and the Sergeant –at-Arms shall be called upon to eject the Member from the House.

After the Speaker naming the 25 suspended Members, she directed their immediate exit and adjourned the House for 30 minutes for the Members to oblige. There is no evidence in the Hansard to show whether the suspended Members were still in the House after the expiry of 30 minutes. What the Hansard shows is that when the Speaker exited the House unknown people entered the House and started evicting the named Members by force.

On record is a letter written by the Speaker on 23rd October, 2017 to H.E the President of Uganda raising concern as to where the unknown people emerged from. The letter states as follows:

"I took action to suspend 25 members of Parliament from the service of the House for 3 sittings. However, after I had requested the Sergeant Arms to remove the members from precincts unknown people entered the Chamber beat up the members, including those not suspended and fight ensued for over an hour. I have had the

opportunity to view camera footages of what transpired and noticed people in black suits and white shirts who were not part of the Parliamentary police or 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 explanation as to the identity, mission and purpose of the unsolicited forces. I am also seeking an explanation about why they assaulted Members of Parliament.

I am also seeking an explanation why the Members were arrested and transported and confined at police stations."

No response was made to the Speaker's letter. However, the evidence of the Chief of Defence Forces, (CDF) General David Muhoozi confirmed that the 'unknown people' constituted staff from the Uganda People's Defence Forces (UPDF).

In the Constitutional Court the present appellants alleged that **Article 24** which deals with respect for human dignity and protection from inhuman treatment was violated when members of the UPDF came into Parliament and manhandled some members of Parliament. That furthermore **Article 97** which provides for Parliamentary immunities and privileges was also violated.

In support of this allegation, Honourables: Munyagwa, Karuhanga, Ssewanya and Nambooze swore affidavits.

Hon. Betty Nambooze deponed that she was intercepted by security personnel and assaulted. That she was violently thrown

on the ground, beaten and kicked. Nambooze averred that this amounted to subjecting her to inhuman and degrading punishment. The Clerk to Parliament confirmed that Parliament footed Nambooze's medical bills when she went to India for treatment. The Clerk however denied knowledge of Hon. Nambooze being assaulted during the scuffle.

Honourable Munyagwa, Karuhanga and Ssewanyana deponed that although they were not among the suspended Members of Parliament, they too were assaulted and thus subjected to inhuman and degrading treatment.

Involvement of UPDF: findings of the Constitutional court

In reference to the intervention of the UPDF in the scuffle at Parliament, **Owiny-Dollo, DCJ** held that there was absolutely no reason for the intervention of the UPDF. In his view, proof of this is in the fact that the members of the UPDF who intervened went barehanded in civilian attire; something they would not have done had the situation been such as to warrant their intervention. The Learned Justice referred to Uganda's sad and painful history of military intervention in matters that are purely civilian. He then concluded that it was therefore a gross error of judgment on the part of the Army Chief to deploy the UPDF in a situation that did not, by any stretch of classification, warrant military intervention.

The judge however held that despite "the unwarranted and wrongful" intervention by the UPDF, there are extenuating circumstances that point to the fact that the ramifications of the

interventions did not in any way vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act.

Similarly Justice Elizabeth Musoke opined that the police force could have contained the situation at Parliament and the deployment of the army, albeit from the permanent establishment at Parliament/President's office, was not justified. The Judge noted that the Sergeant at Arms did not request for the back-up from the UPDF even when he knew they had a permanent establishment at the Parliament.

Justice Musoke then made a finding that the acts of the security agents at the Parliament premises constituted acts of security interference that contravened Articles 1, 2 and 8A, of the Constitution.

She nevertheless concluded that based on the fact that business went back to normal after the eviction of the offending Members of Parliament and also because on the day the Bill was passed into law, the House was full to capacity, the process leading to the enactment of the impugned Act was not negatively impacted.

According to Justice Remmy Kasule, this issue required the court to determine whether there was any violence both inside and outside Parliament, and if there was, whether that violence disabled members from freely enacting the impugned Act.

The Judge held that on the basis of the evidence availed to the court, there was no justification at all for the army and other security forces to join in this scuffle, which should have been handled by the normal police personnel and within the normal

security systems of Parliament. Kasule JCC also referred to the 1966 crisis when the Executive deployed the army under Idi Amin and other State security organs to suppress Parliament and to arrest and detain, without trial five Ministers of the Cabinet and other Ugandans. He then stated that it is because of such incidents that the Preamble to the 1995 Constitution implores us to recall "… **our history which has been characterized by political and Constitutional instability".** The Judge went further to point out that Ugandans, through the Constituent Assembly, made provision for the army to be represented in Parliament and that the force should restrict its role in political disputes through its representatives in Parliament. That to conduct itself otherwise, is to overlook and disregard the very painful lessons of the history of Constitutionalism in Uganda.

The Learned Justice nevertheless went on to make a finding that since Parliament thereafter carried on its business without any disruption or interference from any internal forces, the Constitution (Amendment) Act No. 1 of 2018 was not enacted as a result of violence.

Similarly **Kakuru JCC** held that there was no evidence pointing to the need for intervention of the UPDF as the Police Force in Uganda is equipped and professional enough to evict unarmed people from a building that is not even on fire. The Learned Justice pointed out that our history requires that the Army be kept out of partisan politics.

The Judge held that the action of the Police and the Army in forcefully evicting Members of Parliament from the Chambers and arresting them after man handling them violated the Constitution.

He nevertheless came to the conclusion that although there was indeed violence, intimidation and restrictions imposed on Members of Parliament and the public during the process of enacting the impugned Act, there is no evidence that the entire process was vitiated as a result.

It was only **Justice Cheborion** who opined that the involvement of the Army in the scuffle in Parliament was justified. In his view the intervention of Uganda Police and UPDF "to secure the precincts of Parliament by causing the eviction of the said Members of Parliament was a necessary avenue to enable Parliament to proceed with its Constitutional mandate. The Learned Justice based his opinion on Section 42 of the Uganda Peoples Defence Forces Act which allows the UPDF to be called in aid of civilians in situations of riots or disturbance of peace and Article 209(b) of the Constitution which enjoins the Uganda Peoples Defence Forces to co-operate with civilian authority in emergency situations and in cases of natural disaster.

According to the Judge, the question which needed to be answered was: was the situation in Parliament an emergency?

Cheborion JCC pointed to the unrebutted evidence of the Sergeant at Arms that the Speaker had to exit using the rear door and that MPs had started throwing chairs around and some of his staff were injured. That there was also evidence that a Member of Parliament had entered the chamber of Parliament with a gun. In the opinion

of the Learned Justice, these events were life threatening and constituted an emergency within the meaning of Article 209(b) of the Constitution and therefore the involvement of the army, an institution which is mandated to act in cases of emergencies, was justified.

The Learned Justice went on to point out that a Member of Parliament is entitled to enjoy the rights enshrined in Articles 1, 2, 3 (2), 8A and 97 to debate and be accorded the privileges under the 1995 Constitution and the Parliamentary (Powers and Privileges) Act. That nevertheless where the conduct of a Member of Parliament in the exercise of their aforementioned rights is inimical to the mandate of Parliament to conduct business, such right may be curtailed as long as the limitation does not go beyond what is acceptable and demonstrably justifiable in a free and democratic society.

The Learned Justice then stated that the next question to be answered therefore would be: Did the measures taken by the Sergeant at Arms and the security forces in implementing the order of the Speaker fall within those stated to be "acceptable and demonstrably justifiable" in a free and democratic society within the meaning of Article 43(2) of the Constitution?

The Judge held that the affected Members of Parliament's right to participate in the debate leading to the enactment of the Constitution (Amendment) Act was curtailed on account of their misconduct. And that therefore the curtailing of such rights did not amount to violation of Articles 1, 2, 3(2), 8A and 97 of the Constitution as it was necessitated by their rather unprecedented

misconduct, which was contemptuous of the Rules of Parliament and the orders of the Speaker of Parliament.

The Learned Justice however hastened to say that this finding is not intended to grant a *carte blanche* to the army and the Sergeant at Arms in Parliament to intervene in matters of Parliament without reasonable cause - each incident should has to be evaluated on its own merits and findings made accordingly.

The Judge also stated that although the intervention of security forces was warranted, the intervening forces used excessive force in stopping the scuffle in Parliament. The treatment of the Members of Parliament was inhuman and contravened Article 24 of the Constitution.

That nevertheless, after the said scuffle, the sitting of Parliament resumed when the Bill came for the 3rd reading, 439 Members of Parliament were present and the house was full. Many gave feedback on their consultations and voted on the Bill, there was no evidence of violence in Parliament and consequently, it cannot be said that the entire amendment process was tainted with violence.

The Judge concluded that consequently, it is could not be said that Parliament was legislating under duress.

The Mugenyi Directive

On 16th October 2017 Asuman Mugenyi, an Assistant Inspector General of Police issued a Directive to District Police Commanders throughout the country. The directive was to the effect that in the process of consulting the public on the proposed amendment of

Article 102 (b), Members of Parliament must be restricted to their constituencies. The police was to stop MPs from moving to other constituencies "in order to support their counterparts or to consult outside their constituencies."

Jonathan Odur deponed that in a letter dated 18th October and addressed to the Inspector General of Police, a group of members of Parliament from the Lango Sub-Region notified the police that they would address public rallies to consult the public about the proposed amendment of Article 102 (b). The letter gave the Police a detailed programme indicating where the group would be on particular dates and time. On 24th October 2017, Odur and 5 other Members of Parliament from the Lango Sub-region gathered to hold a joint consultation meeting in Lira District. However the police dispersed people who had gathered at Adyel Division by firing tear gas and live bullets. Hon Odur further deponed that he and other members of Parliament were arrested, beaten and subjected to torture by security forces (the Army, Police Force and other militia) while in their constituencies for purposes of consulting the people they represent in Parliament.

Hon. Winfred Kiiza similary deponed that public rallies by members of the opposition in Mbale, Lubaga South, Makindye East, Makindye West were dispersed with tear gas and live bullets by members of the Uganda Police Force.

Counsel for the petitioners contended that the directive violated the Constitution and vitiated the process of enacting the impugned Act.

In a strongly worded message to the Uganda Police Force, **Owiny-Dollo DCJ** in his judgment reminded the Police Force that it must exercise its national responsibility in a professional and non–partisan manner; and indiscriminately serve the people without any favour, malice, or ill will. That the Circular, which the leaders of the Police Force sent to the Police throughout the country to ensure that members of Parliament were restricted in their Constituencies … and intimating that this was to ensure members of the opposition did not interfere with the process of consultation, was most unfortunate.

That the Police Force does not belong to, and must never serve the interest of any political party, not even the political party in government. This is owing to the fact that our Constitution and democratic dispensation recognises that Parliament is one of the three arms of government alongside the Executive and the Judiciary; hence, since the opposition parties are also in Parliament, they are together in government with the political party that forms the executive arm of government. The Honourable Justice quoted Lord Hatherly in **Campbell's Trustees vs Police Commissioner of Leith (1870) LR 2HL (Sc) 1**, at p.3, thus:

> *"The courts will hold a strict hand over those to whom the legislature has entrusted large powers, and take care that no injury is done by extravagant assertion of them."*

Nevertheless the Learned DCJ declined to hold that the unlawful order had vitiated the whole legislative process. The Hon DCJ held that despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of

the members of Parliament, there are extenuating circumstances that point to the fact that the interventions did not vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act in any way. That the consultations took place fairly well.

The Learned Justice **Kakuru** stated that the Police had no powers to issue directives stopping Members of Parliament and specifically Members of the Opposition in Parliament from consulting the people of Uganda. That the act of the Police in issuing the letter in question violated Articles 1, 2, and 29 of the Constitution.

Kakuru JCC also stated that the police directive goes against every letter and spirit of the Constitution. The Learned Justice noted that the directive was aimed only at intimidating persons perceived to be against the removal of the Presidential age limit and therefore the police acted in a partisan manner. And that in the process it also criminalized an otherwise legitimate political issue, it criminalized a section of society - the people who did not support the amendment of the age restriction on eligibility for presidency. In this the police contravened Articles 1, 2, 21, and 29 of the Constitution.

The Learned Justice however held that nevertheless no sufficient evidence was adduced to prove that the directive, unconstitutional as it was, on its own vitiated the whole process of enacting the impugned Act.

Similarly **Justice Cheborion, JCC held** that the Mugenyi Directive contravened the Constitution. It restricted freedom of association and movement of Members of Parliament without any justification.

That in the current multiparty dispensation, most Members of Parliament belong to one party or another and they should therefore be expected to offer support for similar minded colleagues in their constituencies. Political parties exist to lobby the public for their causes and positions. Members of Parliament are therefore within their rights to solicit for support for their views and positions or carry out consultations not only from their constituencies but throughout the country.

That there was absolutely nothing unlawful about Members of Parliament lobbying different individuals beyond their own constituencies.

That furthermore, the directive was clearly ignorant of the fact that some Members of Parliament, such as the National Female Youth Representative, literally represent an electorate spread out all over the country. Other Members of Parliament such as representative for special interest groups also cover wide territories and regions with the possibility that they would hold joint consultative meetings with other Members of Parliament. The Learned Judge was of the view that the directive was recklessly and wantonly issued without any regard for the law more specifically Article 29(2) which guarantees the freedom of every Ugandan to move freely in Uganda.

That the directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi.

However, the Learned Justice declined to make a finding that the unlawful directive had a chilling effect. In his view, he could only arrive at such finding if it had been proved that the disruption of meetings was widespread. On the contrary evidence indicated that although in some cases meetings and rallies were dispersed, in some cases the directive was roundly ignored and in most parts of the country meetings went on without disruption. According to the Learned Justice, it could thus not be said that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory and the entire Bill a nullity.

Kasule JCC made a finding that the Mugenyi Directive was aimed at preventing MPs from exercising their freedom of association and movement within their respective constituencies, and elsewhere in Uganda. By the directive some MPS were prevented from seeking participation of Ugandans whom they represent in Parliament, on the proposed Bill. The directive was contrary to Article 29 (1) (d); 29 (1) (e) and (2) (a) of the Constitution as well as the Provisions of the Parliamentary (Powers and Privileges) Act.

The Judge pointed out that the court received no evidence that the Uganda Police acted as they did in consultation with the Speaker of Parliament, the head of the legislature, the second arm of State. The Learned Justice concluded that this was a subjugation of Parliament as the country's legislature to the unlawful orders of this police officer.

The Learned Justice however held that because the overwhelming number of Members of Parliament carried out consultations and

only a few were inhibited he could not hold that the Constitution (Amendment) Act No. 1 of 2018 was enacted as a result of violence having been exerted upon the Honourable Members of Parliament.

I note that at the Constitutional Court, it was the finding of 4:1 that the intervention of the Army was uncalled for. Nevertheless the Justices who made the above finding and who further held that the intervention contravened the Constitution went on to conclude that nonetheless the unlawful acts of the army did not invalidate the impugned Act.

I also note that it was the unanimous finding of the Constitutional Court that the directive issued by the Asuman Mugenyi was un-constitutional. The court however held that the unlawful directive and acts which ensued did not vitiate the legislative process which culminated into the impugned Act.

In arriving at the finding that the conduct of the security forces contravened the Constitution, the Learned Justices pointed out specific provisions which had been violated. For Justice Musoke **Articles 1, 2 and 8 A had been contravened**. Similarly, Kakuru JCC made a finding that **Articles 1 and 2** had been violated. As already discussed in this judgment, these articles are part of what constitutes the Constitution's bed rock or Basic Structure.

The findings of Owiny-Dollo DCJ, of Kasule JCC and of Kakuru JCC point us to our "sad and painful" history characterized by military intervention in civilian matters, political and Constitutional instability. As already discussed in this judgment, the Constitution's Preamble which captures our "sad" history

forms part of the Constitution's basic structure. The Justices also make findings that fundamental human rights such as the **freedom to assemble, to associate and to move freely throughout the country had been violated.** The court even made mention of the non-derogable right to be protected from inhuman and degrading treatment - **(Article 24**) - it was contravened.

In my view what this Court is called upon to determine is whether the proven violations of the Constitution and the proven violation of the rights of individuals had an impact on the validity of the Constitution (Amendment Act) No. 1 of 2018.

In my view, enactment of an Act of Parliament is not an event. It is a process. In the matter before this Court, the conduct complained of violated the rights of individuals who were engaged in activities directly connected to and/or necessary for the enactment of the impugned Act of Parliament. It was the Speaker who specifically sent out legislators to their constituents for the specific purpose of collecting the views of citizens on proposals which were before parliament. Members of Parliament accessed Public Funds for the purpose. The consultations were no doubt directly linked to the enactment process. The Mugenyi Directive specifically gave orders aimed at interfering with this very process. I find it inconceivable that the court could de-delink the proven violations from the legislative process which resulted into the impugned Act.

I find it incomprehensible that a court which found that the sovereignty of the people and the supremacy of the Constitution had been violated in that process, would go on to say that

"nevertheless" such violations did not vitiate the enactment process.

In my discussion of Issue 1, I stated that the Preamble to Uganda's Constitution reflects the country's history and that therefore it serves to specify the reasons for the Constitution's enactment, its *raison d'être* and eternal ideals. I find it inconceivable that a court which made a finding that the conduct of the security forces (conduct connected to activities linked to the legislative process) was a repeat of our sad history, can go ahead and conclude that acts which take us back to our sad history would not be held to have vitiated the enactment process.

Furthermore, it is on record that the Speaker of Parliament disassociated herself from the forces who entered Parliamentary Chambers on 27th September – *the forces were not part of the Parliamentary Police or staff of the Sergeant at Arms.* On the other hand, the Chief of Defence Forces confirmed that the 'unknown people' constituted staff from the Uganda People's Defence Forces (UPDF).

This is evidence that there was interference with the sovereignty of Parliament and a violation of the democratic principle of separation of powers - an essential feature of democracy.

Regarding the Mugenyi Directive it was the unanimous finding of the Constitutional Court that it resulted into disruption of consultations of some Members of Parliament. That the work of some MPS was interfered with thus preventing them from seeking

the participation of Ugandans whom they represent in Parliament, on the proposed Bill.

It is clear that the Constitutional Court concentrated on the rights of the members of Parliament and said little about the fact that scores of citizens were denied the right to actively participate in issues of governance since they were denied the opportunity to express their views on the proposed amendments. The court emphasized that it had not been proved that that the disruption of meetings was widespread throughout the country. It was for this reason that court declined to make a finding that the unlawful directive rendered the public participation in the Bill nugatory and the entire Bill a nullity.

I respectfully differ from the reasoning of the Constitutional court. I must emphasize that the rights in issue are granted to each and every individual citizen – it was violation of the fundamental right of each and every citizen who wanted their opinions listened to but was denied this right. The right of an individual cannot be rendered inconsequential just because other citizens were enabled to enjoy their rights. What occurred is contrary to **Objective II (i) of the National Objective and Directive Principles of State Policy** which states as follows:

> **The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.**

I must also add that as argued by the 3rd Appellants the Police Directive and what ensued therefrom also violated **Article 38** of the Constitution which deals with the Civic Rights of Citizens. I am in agreement with Counsel for the 3rd appellant that when Parliament chose to invoke consultations on Section 3 of the impugned Act, it brought itself under Articles 38 of the Constitution which and provides as follows:

(1) Every Ugandan has a right to participate in the affairs of government, individually or through his or her representatives in accordance with law.

(2) …….

The right to participate in the affairs of government no doubt accrues to **each and every citizen** and its violation cannot on the basis of numbers, be deemed "inconsequential".

Issue 4

Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition.

1st appellant's submissions (Mabirizi)

Mr. Mabirizi submitted that under Article 137 of the Constitution, the Constitutional court has no jurisdiction to apply the 'substantiality' test. That the Constitutional Court derives its power from **Article 137 of the Constitution** which does not give it jurisdiction and power to determine whether the contravention

affected the resultant action in a substantial manner. That the court's jurisdiction is to determine whether the actions complained against were in contravention of the Constitution and when it finds a contravention to declare so or give redress or refer the matter for investigation.

That since the court's role is limited to determining whether there was contravention of the Constitution or not, there is no way the Constitutional Court could go ahead to investigate the degree of contravention and whether the (process of enacting the impugned Act) contravened the Constitution in a substantial manner.

In the 1st appellant's view, it is only the Presidential and Parliamentary Elections Acts which provide for the 'substantiality test'. There is no law enabling the Court to apply the test in Constitutional petitions.

Similarly, the 2nd appellants submitted that the Justices of the Constitutional Court erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of procedure of Parliament. That whereas the substantiality test is expressly provided for in electoral laws, in Constitutional matters the test is totally different. That the Constitution being the supreme law of the land does not provide room for any scintilla of violation.

In support of their submission, the 2nd appellants relied on the decision of this Court of **Paul K. Ssemogerere & 2 Ors vs. Attorney-General SCCA. NO. 1 OF 2002,** where it was held that

the Constitutional procedural requirements are mandatory. They also relied on the Kenyan case of **Njoya & Ors vs. the Attorney General of Kenya**[37] where Ringera J, stated that:

> I have in the end formed the conviction that Constitution-making is not an everyday or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid Constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound Constitution-making should never be sacrificed at the altar of expediency.

Similarly the 3rd appellant submitted that the substantiality test is only applicable in electoral laws and faulted the Constitutional Court for applying the test to the unlawful directive of the police and to the invasion of Parliament by security forces. Counsel for the 3rd appellant argued that the wrongful application of the test prevented the court from applying the proper test which is whether the limitations imposed by the police were justified – it prevented the court from asking itself whether the directive passed the test set under Article 43 of the Constitution. Further argued that the substantiality test cannot be applied to violation of rights under Article 29 - it is impossible to measure the degree of curtailed speech or restricted movement of a Member of Parliament. A right

[37] **(2004) AHRLR 157**

cannot be quantified the same way votes can. It would be impossible to evaluate how the failure of a member to go to a particular constituency because of limitations affected the outcome/result of the consultations. And thus the substantiality test is not applicable.

The appellants pointed out that the case of **Col. Dr. Kizza Besigye versus Y.K Museveni & The Electoral Commission**[38] relied on by the Learned Justice Musoke dealt with the meaning of Section 59 (6) of the Presidential Election Act whereas what is applicable in a Constitutional Petition is Article 137(3) and (4) of the Constitution. That furthermore, the Supreme Court authority of **Charles Onyango Obbo and Andrew Mujuni Mwenda vs. Attorney General**[39] specifically provides for the evidential burden in respect of limitations of fundamental rights.

That what was in issue before court was infringement of Constitutional rights such as limitations to free speech and expression, movement and participation. The Court is not required and there is no legal basis for it to determine the effect proved facts (violations).

That furthermore, unlike it is in election petitions, it is impossible to prove the exigent of the Constitutional limits imposed by police, the degree of such limitations and the substantial effect they had on the outcome of the consultations.

[38] **Election Petition No.1 of 2001**

[39] Constitutional Appeal No. 2 of 2002.

That where a directive by any organ of the state is sent to all districts of Uganda requiring police officers all over the country to breach the Constitution and indeed there is evidence that the directive was complied with in any part of the country, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or that it was in public interest to do so. Where the respondent fails to do so, as was in this case, the petitioner has proved breach of the Constitution. All that remains is the remedy. That it cannot be argued that violations of the Constitution have to be widespread throughout the country for the Court to invalidate the Constitutional Amendment Act. That the appropriate test which ought to be applied is whether the violations contributed to or had the effect of contributing to the enactment of the Act. That once the Court found Constitutional violations as it did, it was required to make a declaration to that effect and grant relief.

The essence of the 3rd appellant's argument was that once a petitioner has adduced evidence that the police directive was complied with in any part of the country and court makes a finding that the directive resulted into violation of rights, the burden shifts to the respondent to prove that the limitations were either necessary to protect the rights of others or that it was in public interest to do so. This would be in line with Article 43 of the Constitution.

That in the matter before Court, the petitioner proved breach of the Constitution but the respondent failed to prove that the curtailment of rights under Article 29 was justified. Consequently

what remained for the Constitutional Court was to grant the petitioner a remedy.

Like the 2nd appellants, the 3rd appellant relied on the case of **Paul K Ssemogerere&2 Ors versus Attorney-General SCCA. No. 1 of 2002** for the proposition that Constitutional procedural requirements are mandatory and that the Constitution provides for no room of any scintilla of violation.

The appellants prayed that this Court substitutes the order of the Constitutional Court with one striking down section 3 of the Act.

Submissions of the Respondent AG

The AG conceded that indeed various Rules of Parliamentary procedure were violated and in some instances Constitutional imperatives were contravened. That nevertheless, since the court found that there was general compliance with the Constitutional requirements and procedure for the enactment of the impugned Act, the Justices of the Constitutional Court were justified in applying the substantiality test to arrive at the finding that the few instances of irregularities did not adversely affect the process of passing the impugned Act and subsequently applying the doctrine of severance to reach the decision that some of the sections of the impugned Act were validly passed by Parliament. That having arrived at this finding, the court was right to strike down sections of the impugned law which were tainted with illegal processes but saved that which was amended within the law.

That the question that begs an answer is therefore whether the Court was wrong to use that substantiality test and in so doing failed to properly evaluate the evidence and reached a wrong conclusion.

It was the argument of the AG that the Appellants posited evidence which the Trial Court properly evaluated, the court considered whether the Constitution was amended within the precincts of the law and it interrogated whether the alleged violations of the Constitution impacted the Constitutional making process.

To support their case, the respondent AG relied on the decision of Odoki, C.J in **Kizza Besigye vs. Yoweri Museveni Kaguta and & The Electoral Commission (supra)** where the court applied the substantiality test in a presidential election petition to determine whether the proven non-compliance with electoral laws would result in nullification of the election. Odoki CJ held that for an election to be nullified, the court has to evaluate the whole process for the election and it must be proved not only that the irregularities affected the result but also that the degree of the effect was substantial. It was also held that numbers are useful in making adjustment for irregularities.

After citing the learned CJ's pronouncements extensively the AG concluded that the substantiality test therefore is a tool of evaluation of evidence and that to fault the Court for applying the substantiality test in a Constitutional petition is to say that a court interpreting the Constitution should not apply a tool of evaluation in the determination of the matter before it.

It was further argued that the test is derived directly from the law or may be adopted by a Judge while evaluating the evidence. Therefore, whether a court is handling a constitutional dispute or an ordinary suit, it is trite that the matter be determined after a proper evaluation of evidence.

The respondent AG contended that the position of the law with regard to the application of substantiality test was canvassed in **Nanjibhai Prabhudas & Co. Ltd vs. Standard Bank Ltd[40].**

The respondent further argued that it is pertinent to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. That the court's evaluation of evidence and resulting decision was not exclusively based on the quantitative test. That the court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation was not sufficient to satisfy nullifying the entire process.

The Attorney General also argued that it was evident on the facts of the case that the process in Parliament was not negatively affected as observed by the majority Learned Justices of the Constitutional Court. The respondent noted that in applying the substantiality test, the Learned Hon Lady Justice Elisabeth Musoke, JCC applied both the Quantitative and Qualitative Test. It was submitted that the qualitative requirements appraise the entire legislative process.

[40] **[1968] E.A 670 at page 683.**

The respondent also sought to rely on the High Court case of **Winnie Babihunga vs. Masiko Winnie Komuhangi & Others**[41] as a case in which the qualitative and quantitative aspects of the substantiality test were expounded when the court stated that:

"The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test in most suitable where the quality of the entire process is questioned and the court has to determine whether or not the election was free and fair."

The AG argued that a perusal of the 1st appellant's pleadings shows that what was being sought was that the Constitutional Court determines the effect of certain events/actions that occurred during the process of enacting the impugned Act. That the Appellant pleaded and argued in the Constitutional Court that the entire process of amending the Constitution from the tabling of the Bill, to the passing thereof, were compromised and the whole process was marred/tainted with illegalities, irregularities and violence. That however, there was no credible evidence to show that such violence and intimidation affected the validity of the impugned Act.

The AG submitted that it was important to determine what the standard of proof in dealing with Constitutional matters is, most especially where the matters involve amendment and breaches of the Constitution. Is the standard of proof different from the usual on the balance of probabilities?

[41] HTC-OO-CV-EP-004-2001

The AG further made submissions on burden of proof in civil disputes. That that it is not in dispute that whoever desires any court to give judgment, as to any legal right or liability dependent on the existence of facts which they assert, must prove that those facts exist. That in the matter before court the Appellants bore the burden of proving to the required standard that the irregularities/violence that occurred affected the result of the entire passing of the Bill into law and that the impugned Act should therefore be nullified.

That the evidence adduced by the Petitioners at the lower court did not support their assertion that the proven irregularities and violence were so widespread/massive that the court ought to have nullified the entire resultant Act.

The AG supported the conclusion of the Constitutional Court that the evidence did not disclose any profound irregularity in the management of the legislative process for the enactment of the impugned Act, nor did it prove that the participation of some members of Parliament was gravely affected. That the parts that were so affected were rightly severed by the Court.

That the Constitutional court was right to inquire into the extent of the alleged massive irregularities and to apply the qualitative and quantitative test to consider whether the errors, and irregularities identified sufficiently challenged the entire legislative process so as to lead to a legal conclusion that the Bill was not passed in compliance with the requirements of the Constitution.

Prayed that this Court upholds the finding of the Constitutional court that certain irregularities/errors were mere technicalities

and were not so fatal as to invalidate the entire process of enactment of the impugned Act.

Consideration of Court.

Analysis of the judgments of Owiny-Dollo DCJ, Kasule JCC, Elizabeth Musoke, JCC and Cheborion JCC clearly indicates that each of the learned Justices applied the substantial effect test in arriving at the decision that the proven violations of the Constitution arising out of the violence in and outside parliament did not invalidate the process in Parliament which resulted into the impugned Act.

Elizabeth Musoke, JCC stated thus:

> *What this Court has to determine is whether the alleged police orchestrated violence affected the process of consultation and people participation thereby also negatively impacting the enactment of the Constitution(Amendment) Act, 2018, in a substantial manner such as to render the resultant Act null and void. It is important to decide whether the test to apply would be qualitative or quantitative, or both.*

I further note that the learned Justice Musoke was guided by the jurisprudence of this Court in **Kizza Besigye vs Yoweri Museveni Kaguta (Supra).** The case dealt with the applicability of Section 59 (6) (a) of the Presidential Elections Act in resolving a petition challenging the legality of an Election, on the basis that the

election was marred by irregularities and malpractices which violated the Presidential Election Act.

After analyzing the interpretation given to the section and its application to the facts of the petition, Musoke JCC, stated that the principles developed in the various Presidential Elections would apply to the incidents of violence alluded to by the petitioners in the Constitutional Court - the appellants before this Court.

In regard to the Police Directive issued by AIGP Asuman Mugenyi **Cheborion, JCC** made a finding that:

The directive in issue was clearly calculated to muzzle public participation and debate on the proposed amendments in the original Bill tabled by the Honorable Raphael Magyezi. … In some places MPs were violently and unlawfully stopped from consulting their people, live bullets and teargas were fired and fear was instilled. Though isolated, this was most unfortunate. … However, in some cases the directive was rightly and roundly ignored. … There was no evidence to prove that throughout the country, the police unduly restricted consultative meetings thereby rendering the public participation in the Bill nugatory. … The evidence presented by the Petitioners fell woefully short of demonstrating that this directive had that chilling effect in actual fact.

The import of the learned Justice's decision was that arising from the fact that the majority of members of Parliament had been able to consult their constituents, he could not invalidate the impugned Act.

And **Kasule JCC** held as follows:

"… By the directive of this very senior police officer, a number, however few, Honourable Members of Parliament were prohibited from … seeking support outside each one's Constituency, thus preventing them from seeking participation of Ugandans whom they represent in Parliament, on the proposed Bill. The directive was contrary to Article 29(1)(d)(e) and (2)(a) as well as the Provisions of the Parliamentary (Powers and Privileges) Act.

The Court, however received no sufficient evidence that the … directive was carried out throughout the country. … The overwhelming number of Members of Parliament held and carried out their meetings of consultations of the people uninterrupted.

The interference by police with the meetings of the Honourable Members of Parliament seems to have been rather isolated and affected only a few … During the debate on the Bill, Members one after the other reported having consulted their electorates throughout the country."

In conclusion, the answer to this issue is that the Constitution (Amendment) Act No. 1 of 2018 was not enacted as a result of violence having been exerted upon the Honourable Members of Parliament."

And according to **Owiny Dollo DCJ**,

"… despite the unwarranted and wrongful intervention by the UPDF, and the Police interfering with the consultation of some of the members of Parliament, in the manner that came out in evidence, there are extenuating circumstances that point to the

fact that the ramifications of the interventions did not vitiate the process in Parliament that resulted in the enactment of the Constitution Amendment Act in any way. The consultations took place fairly well."

Did the Constitutional Court err in law when they applied the substantiality test in determining the petition?

In Uganda's jurisprudence, the substantial effect test is a creation of statute and is found in Section 59 (6) of the Presidential Elections Act and Section 62 (1) (a) of the Parliamentary Elections Act. Section 59 (6) (a) of the Presidential Elections Act provides that:

> 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 (that there was) —
>
> *non-compliance with the provisions of this Act,* if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and *that the non-compliance affected the result of the election in a substantial manner;* (my emphasis)

But in analyzing the issue at hand, I must start off with bringing clarity to what may be considered a preliminary issue – the need to understand the legal character of the substantiality effect test.

The Respondent Attorney General submitted that the substantiality test is a tool of evaluation of evidence. The

respondent's submissions also suggest that the issue at hand calls for a discussion of the burden as well as standard of proof required in Constitutional disputes. The respondent seems to have understood the arguments of the appellants as contentions which in effect faulted the Constitutional Court for applying *the burden and standard of proof applicable in elections laws to Constitutional matters*.

My understanding of the test is that it does not define which party bears the burden. It does not depart from the trite legal principle that places the duty of proving a fact on the party who alleges its existence. The import of the test is that it establishes **what** must be proved by a party who wants to prove a disputed fact. What the test places on the party is not only the duty to prove what he alleges to have occurred but also to prove that the act had significant effect/consequences on something else – the outcome of a process. I do not therefore see how the test can be referred to as a tool for evaluation of evidence. Furthermore, the phrase "standard of proof" refers to the level/degree of certainty of evidence necessary to establish a disputed fact or to establish the occurrence of an event. Consequently, whether or not the substantiality test is applicable in Constitutional adjudication is not in any way linked to the standard of proof required for determining that a Constitutional imperative was contravened. Since the matter before court was a civil dispute – albeit of a Constitutional nature - the standard of proof applicable was the same as required in other civil suits including elections petitions. The applicable standard is proof on a balance of probabilities. The petitioners did not aver anywhere that the court had erred in

applying to a Constitutional dispute, the standard of proof applicable to election disputes. I therefore respectfully find that the AG's submissions that in resolving the issue at hand, it was important to determine what the standard of proof in dealing with Constitutional matters is were misplaced. Linking the applicability of the substantiality test to the burden and the standard of proof is evidence of a misunderstanding of the legal nature of the test.

Be that as it may, in answering the question whether the substantial effect Rule is applicable in Constitutional disputes, one must among other things interrogate what the purpose of that test is.

Analysis of the value attached to the test by courts from across the globe[42] while dealing with presidential election petitions can be summarized into this: "given the national character of the exercise **where all voters in the country formed a single constituency,** can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the free choice and true will of the majority of voters?" Did the proven irregularities decisively show that the conduct of election was so devoid of merit as not to reflect the expression of the people's electoral intent? If a court answers the question in the negative, it refrains from annulling the election. As I sated in my judgment in **Kizza Besigye vs. The Attorney General (supra)**: The import of the test for Uganda therefore is that it enables the

[42] Kizza Besigye vs. Yoweri Museveni Kaguta, Election Petition No.1 of 2001; Anderson Kambela Mazoka and 3 others vs. Levy Patrick Mwanawasa and 3 Others, Presidential Petition No.SCZ//01/02/03/2002, the Zambian Supreme Court); Nana Addo Dankwa Akufo-Addo & 2 others vs. John Dramani, Presidential Election Petition Writ No.J1/6/2013, (Ghana)

court to reflect thus: did the proved irregularities distort the election to the extent that the ensuing results did not reflect the choice of the majority of voters envisaged in Article 1 (4) of Uganda's Constitution? Did the non- compliance negate the voters' intent? It is the individual preferred by the majority who has the legitimacy to be in leadership. This is the very philosophy on which Article 1 (4) of the Constitution is founded – giving power to voters to choose who is to govern them.[43]

The test has a quantitative and a qualitative aspect. From the quantitative aspect, the substantial effect test deals with numbers and is based on the proportionality test. It is rooted in the philosophy that in a democratic system constituted strictly on the basis of majoritarian expression through the popular vote, the essence of an election is that the election of a leader is the preserve of the voting public and that the court should not tamper with results which reflect the expression of the population's electoral intent. The question which is in effect asked is: if the irregularities had not occurred, would the declared winner have garnered enough votes to lead and lead with the percentage legally required to be declared president?

However, the substantial effect test is not exclusively quantitative, it has a qualitative aspect. The qualitative aspect is best articulated in the U.K persuasive authority of **Morgan and Others v Simpson**

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[43]**Constitutional Petition no. 0013 of 2009.**

and another [1974] 3 All ER 722 in which the Court of Appeal held that:

> … **if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected.**

In **Kizza Besigye vs The Attorney General (Supra)** where Section 59 (6) was unsuccessfully challenged for contravening the constitutional, I analyzed both the quantitative and qualitative aspects of the substantial effect test and their import in understanding the meaning Section 59 (6) (a) of the Presidential Elections Act. Specifically in regard to the qualitative test, I held as follows:

> **… if there is evidence of substantial departure from Constitutional imperatives that the process could be said to have been devoid of merit and rightly be described as a spurious imitation of what elections should be, the court should annul the outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election ….**

The above opinion was adopted with approval by the Supreme Court of Kenya in **Raila Amolo Odinga and Another vs. Independent Electoral and Boundaries Commission.**[44]

[44] Presidential Petition No. 1 of 2017 [2017] eKLR.

The import of the qualitative test is that the process is as important as the outcome – the process is as important as the numbers. As stated by Stephenson L.J in **Morgan and Others v Simpson (supra):**

> **For an election to be conducted substantially in accordance with the law there must be a real election ... and no such substantial departure from the procedure laid down by Parliament as to make the ordinary man condemn the election as a sham or a travesty of an election.**

But perhaps even more important is the differentiation between contravening the Constitution on the one hand and violating provisions of an Act of Parliament on the other hand**.** In **Kizza Besigye vs The Attorney General (ibid)** I noted as follows:

> **But perhaps even more important is the need to point out that the wording of Section 59 (6) (a) is *silent in regard to non-compliance with provisions of the Constitution* and only refers to non-compliance with the provisions of the Presidential Elections Act. The Section provides that: "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 (that there was) —**
>
> ***non-compliance with the provisions of this Act,* if the court is satisfied that the election was not**

conducted in accordance with the principles laid down in those provisions and *that the non-compliance affected the result of the election in a substantial manner;"* (my emphasis)

Consequently there may/would be no need to prove that the substantial departure from the Constitutional imperatives had substantial effect on the results in circumstances where fundamental Constitutional imperatives have been violated.

It is therefore clear in my mind that even in presidential elections where the substantial effect test is applicable, the test is not extended to violations of Constitutional imperatives. It is limited to violations of an Act of Parliament.

The appellants filed petitions in the Constitutional Court under Article 137 of the Constitution which provides as follows:

137. Questions as to the interpretation of the Constitution.

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional court.

(2) When sitting as a Constitutional court, the Court of Appeal shall consist of a bench of five members of that court.

(3) A person who alleges that—

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional court for a declaration to that effect, and for redress where appropriate.

The Constitutional Court made findings that the Police Directive which interfered with the consultations by some members of Parliament violated various Articles in the Constitution. This would be in line with Article 137 (3) (b) since the police had engaged in **acts** (conduct) which contravened provisions of the Constitution.

Kasule JCC made a finding that the Police Directive violated Articles 29 (1) (d) (e) and 2 (a) were violated. I note that these are human rights guaranteed to individuals.

The learned Justice however held that since the overwhelming number of MPs carried out consultations with their people without interruption, the impugned Act was not enacted as a result of violence exerted upon MPs.

Owiny-Dollo, DCJ held that the interference by the Police with the consultations of some MPs, targeted at opposition MPs was unwarranted and most unfortunate. In regard to the intervention of the UPDF in Parliament, the Honourable DCJ also found that it was a gross error of judgment on the part of the Army Chief to deploy the UPDF in a situation that did not, by any stretch of classification, warrant military intervention. The DCJ linked this to what he referred to as our sad and painful history of military intervention in matters that are purely civilian. He however

concluded that the ramifications of the interventions did not in any way vitiate the process in Parliament that resulted in the enactment of the impugned Act.

Musoke JCC also made a finding that the deployment of the army during the scuffle in Parliament was not justified, especially because the Sergeant at Arms did not request for their assistance. She concluded that on the 26th September, 2017, the interference of Security UPDF contravened Articles 1, 2 and 8A of the Constitution. She nevertheless held that the process leading to the enactment of the impugned Act because business went back to normal after the eviction of the "offending" members of Parliament and on the day the Bill was passed into law, the House was full to capacity.

Cheborion JCC held that the Asuman Mugenyi directive was very arbitrary and unconstitutional. It restricted freedom of association and movement of Members of Parliament without any justification and contravened Article 29 (2) of the Constitution which guarantees the freedom of every Ugandan to move freely in the country. The learned Justice however held that however, since the majority of Members of Parliament had been able to consult their constituents, he could not invalidate the impugned Act because the illegal acts had not occurred throughout the country.

So does the test apply to matters which come to court under Article 137 of the Constitution?

Is a party who has successfully proved that their Constitutionally guaranteed rights were violated expected to further prove that the

effect of the violation(s) were substantial or in this particular matter that had the violations not occurred, the Act of Parliament would have been different or would never have been passed?

The case for the appellants is that the process which brought the impugned Act into existence was tainted with Constitutional contraventions and violations of Parliamentary procedure. The essence of their argument is that a right granted to an individual by the Constitution can only be limited in line with Article 43. Once a complainant has adduced evidence and successfully proved that a right guaranteed by the Constitution has been interfered with, the complainant will have done their part. The evidential burden the shifts to the respondent, in this case the Attorney General, to bring the actor's conduct within the purview of Article 43 which provides as follows:

> **43. 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.

In the matter before us, the AG did not adduce any evidence to prove that the curtailment of rights in question was justified so as to protect the rights and freedoms of others and/or for purposes of preserving public interest. The AG did not prove that the nature of curtailment of the rights involved was such as is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution. It is for this reason that the court made findings (declarations) that rights had been violated.

The question which should have been asked by the court is: what is the effect of the proven irregularities and or contraventions of the Constitution on the validity of the impugned Act? The question should not have been: did the contravention of the law have substantial effect on the process of enacting the Law?

The substantial effect test cannot be applied to a violation of a Constitutional right - the right of an individual or even of a community.

We should even take cue from the fact that even under Section 59 (6) (a) of the Presidential Election Act from where the substantiality test is derived, the test is not extended to violations of Constitutional imperatives. It is limited to violations of an Act of

Parliament. And yet the Constitutional Court applied the test to violations of Article 29 and even to violations of articles which are part of the Basic Structure of the Constitution – 1, 2 and 8A!

Arising from the above, I respectfully hold that the Justices of the Constitutional Court erred when they applied the substantiality test in determining the petition.

Issue 5

Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act, 2018 on the removal of age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution.

Appellants' submissions

1st appellant (Mabirizi)

Mr. Mbabrizi submitted that removal of the age limit by Section 3 of the Constitutional (Amendment) Act amounted to 'Constitutional replacement' which has no place in a Constitutional democracy. In support of this argument, Mabirizi relied on Carlos Bernal's article[45] in which he laid down the seven-tiered test as the standard for determining Constitutional Replacement.

[45] Unconstitutional Constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the Constitutional replacement doctrine, Published in International Journal of Constitutional Law, Volume 11, Issue 2, 1 April 2013, Pages 339–357.

Mbabrizi submitted that, in the instant case, the essential element of the Constitution which is at stake is the age qualification attached to the office of the President.

That the element of qualifications of the President is essential because of the immense powers and duties vested in that office. Those powers were balanced in such a way that the President is neither too young nor too old. Removal of such a balance may have grave consequences on exercise of such powers. That the age qualification can only be amended in a compliant way so as not to destroy the entire Constitutional system.

Mabirizi also argued that the powers to remove the age limit only rests in a constituent assembly not Parliament.

In order to curb the Parliament's actions, Mabirizi contends that the courts have a role to play. He relied on Carlos Barnel's article (supra) in which he stated that, "*the Constitutional Court began to exercise innovative forms of control over the government with the purpose of compensating for the predominance of the president and the deficit of political control by the Congress. Judicial review of the content of Constitutional amendments by means of the Constitutional replacement doctrine is one of these new forms of control.*"

That it is therefore diversionary for court to base its decision on the fact that the Constitutional Commission and the Constituent Assembly did not entrench age limitations. That the majority of the learned Justices of the Constitutional Court justified their decision not to nullify Section 3 on the reasoning that the framers of the Constitution never treated the provisions of Article 102 on age limit

for the office of President as a fundamental feature of the Constitution. In this, they underestimate the decision of the framers to include it in the Constitution.

Mabirizi contented that, upholding of Section 3 of the impugned Act will disharmonize the Constitution so as to render among others Articles 51(3), 144(1)(a), (b), 146(2)(a) and 163(11) unconstitutional. Furthermore, that it will open a flood-gate of private members' Bills to amend those Articles which have age restrictions.

2nd appellants' (MPs) submissions

Counsel for the 2nd appellants contended that the Constitutional Court ought to have found that by amending Article 102 (b) of the Constitution, Parliament was usurping the sovereignty of the people and thereby amended Article 1 of the Constitution by infection. Counsel further contended that Parliament also amended **Article 21 (3) of the Constitution** by creating 'age' as another form of discrimination. That the Constitutional Court however erroneously held that accepting this proposition amounts to over stretching the application of the amendment by infection principle which would in the end render the principle superfluous.

That the purpose of the impugned Act was to pave way for the indefinite eligibility of the sitting. That this Court should execute its noble duty of striking down such nefarious legal instrument which has got far reaching implications in the political trajectory of the nation.

Furthermore, that the provisions which removed the age limits from the Constitution amended Articles 1, 8A and 21 of the Constitution by infection and hence the requirements under Article 263 (1) of the Constitution were mandatory.

3rd appellant's (ULS) submissions.

Counsel for the 3rd appellant first and foremost faulted the Constitutional Court for making a finding that the 3rd Appellant did not challenge the removal of age restrictions. That under paragraph 1(d) of their petition, Section 3 of the impugned Act was challenged.

Counsel argued that as a result, the Constitutional Court limited its answer to Articles 1 and 21 of the Constitution. Articles 8A and 38 which were raised by the 3rd appellant in addition to Article 1 were not considered. That had the court properly considered the appellant's pleadings, it would have come to a different conclusion.

Counsel stated that when Parliament chose to consult citizens on removal of age restrictions for presidency it brought itself under Articles 1, 8A and 38 of the Constitution. Parliament 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 in which he extensively alluded to the mandate of the Constitutional Review Commission. That the Commission is 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. In their affidavits

supporting the appeal, Professor Ssempebwa, Professor Latigo and Francis Gimara averred that there was abuse of human rights, violence, harassment, humiliation, assault, detention and these human rights violations negated a conducive atmosphere to genuinely seek the views of the people.

AG's reply

The Attorney General submitted that the Justices of the Constitutional Court rightly held that amendment of Articles 102(b) and 183(2) (b) did not in any way infect Article 1 of the Constitution.

He cited Article 1 which states that, all power belongs to the people who shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.

Parliament is enjoined to make laws under Articles 79 and 259 of the Constitution. This power is exercised through Bills passed by Parliament and assented to by the President.

The Attorney General submitted that the Justices of the Constitutional Court unanimously held that the power to make laws extends to the amendment of Articles 102 and 183 through established Constitutional procedures.

In contrast to the appellants' arguments, the effect of Section 3 is to open up space and widen the scope of persons who are eligible to stand for election for the office of the President. That in fact 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.

In response to Mabirizi's arguments that Section 3 of the impugned Act amounted to Constitutional replacement, the Attorney General agreed with the learned Justices of the Constitutional Court that the amendment of Article 102 (b) does not amount to a Constitutional replacement. Parliament had the power through the established Constitutional procedures to amend the provisions of Articles 102 (b) and 183 (2) (b). The Attorney General cited **Article 259** of the **Constitution** which vests Parliament with powers to amend by way of addition, variation or repeal, any provision of this Constitution in accordance with the procedure laid down in Chapter Eighteen. He added that the appellant's argument that upholding Section 3 of the impugned Act will disharmonize Articles 51(3), 144(1)(a) and (b), 146(2)(a) and 163(11) of the Constitution is speculative and lacks merit. According to the Attorney General, the Section is not against the spirit of the Constitution. However, that upholding the appellant's argument would instead curtail the right of Members of Parliament to bring Bills in accordance with Article 94 (4)(b) of the Constitution.

Furthermore, the Attorney General argued that the amendment of Article 102 (b) was not a Constitution making process that required a Constituent Assembly. It was an amendment process which the peoples' representatives (MPs) are empowered to do in accordance with Chapter Eighteen of the Constitution.

Consideration by Court

The contentions of the appellants regarding the link between Article 102 (b) on the one hand and **Articles 1 and 8A** on the other have been discussed under Issue 1 and need not be repeated here.

Article 38 raised by the 3rd Appellants which deals with the civic rights of citizens and entitles every Ugandan citizen to participate peacefully in the affairs of government has been handled under issue 3 which dealt with of the unlawful Police Directive issued by ASP Asumani Mugenyi.

The value of the philosophy of Constitutional replacement was also discussed under Issue 1.

What remains to be resolved under issue 5 therefore is the contention by the appellants that the amendment of Article 102 (b) on the removal of the age restriction which resulted into allowing persons aged above 75 years and below thirty five years to stand for election as president amended **Article 21 (3)** of the **Constitution** by infection.

Article 21(3) lists factors on the basis of which an individual cannot be discriminated. These factors are: sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion and disability.

The argument of the appellants as I understand it is that by removing the age restriction for purposes of eligibility to stand for Presidency or District Chairperson, Parliament added age to the list of factors mentioned in Article 21 (3).

I find the argument incomprehensible. It is not only in the area of elective office that the law in Uganda treats people differently based on age. Ugandan law prohibits an individual who has not attained the age of 18 years to participate as a voter in Presidential Elections (Article 103 of the Constitution); the law prohibits an individual from entering marriage before attaining the age of 18 years (Article 31 (1); a person serving as a Chief Justice must vacate office on attaining the age of 70 years (Article 144 (1) (a)) and Section 12 of the Pensions Act provides for the compulsory retirement of a Public Officer on attaining the age of 60 years. The list is endless.

It cannot be said that the removal of age restrictions for purposes of standing for Presidency has the ripple effect of removing age as a parameter or factor for determining rights legal capacity in all areas of the law.

I am in agreement with the Constitutional Court that the appellants have misconstrued and over stretched the application of the amendment by infection principle.

Issue 6: Vacation of the office of President.

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

I take note of the fact that although the issues before Court were jointly framed by all parties, it is only the first appellant (Mr. Mabirizi) who addressed this issue.

Article 102 of the Constitution before its amendment provided as follows:

> **Qualifications of the President.**
>
> **A person is not qualified <u>for election</u> as President unless that person is—**
>
> **(a) …**
>
> **(b) <u>not less than thirty-five years and not more than seventy-five years of age;</u> and**
>
> **(c) a person qualified to be a member of Parliament.** (My Emphasis)

The Constitutional Court held that the petitioners' arguments on this point were misconceived. Owiny Dollo, DCJ in particular held that the relevant Constitutional provision to answer the issue is **Article 105(3)** which provides for the circumstances when the office of the President falls vacant as follows:

> **Tenure of office of a President.**
>
> **(1) …**
>
> **(2) …**
>
> **(3) The office of President shall become vacant—**
>
> **(a) on the expiration of the period specified in this article; or**
>
> **(b) if the incumbent dies or resigns or ceases to hold office under Article 107 of this Constitution.**

Article 107 provides for the circumstances under which the President may be removed including: abuse of office, misconduct and mental incapacity.

Owiny Dollo, DCJ interpreted the above Constitutional provisions to mean that, "*a President who attains the age of 75 years, while serving a 5 year term would still continue in office until the expiration of the term. We find the requirement of age as a qualification for being elected President is at the point of election; and not at the end or during the incumbency. A President who is elected on the day he or she attains the age of 74 years would be entitled to stay in office for the next five years. This means he or she can stay in office up to the age of 79 years!*"

Similarly, Justice Kakuru, JCC (dissenting) held that, *the words used in* ***Articles 83(1) (b) and 102(b)*** *are plain and ought to be given their natural and ordinary meaning. The age limit of the President applies only at the time of election and not otherwise. That had the framers of the Constitution intended that the President and Members of Parliament have same qualifications, they would have stated so but they did not. The factors that disqualify Members of Parliament are not applicable to the President. This is simple and clear. Therefore, I find that, this ground is misconceived and devoid of any merit whatsoever. The issue is resolved in the negative.*

In summary, the learned Justices of the Constitutional Court unanimously held that the age limit qualification of 75 years for the office of the President in Article 102 is a threshold only at the point of election.

Consideration by Court

I am in agreement with the unanimous decision of the Constitutional Court that the age limit of the President applies only at the time of election. Where words of the Constitution are clear and unambiguous, they ought to be given their primary, plain, ordinary and natural meaning.

It is the term of office provided for in Article 105 (supra) that marks the time when a person holding the office of President should vacate that office. The 1st appellant's arguments are therefore not sustainable.

Issue 6 is answered in the negative.

Issue 7:

(a) 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.

(b) If so, what is the effect of the procedural irregularities on the decision of Court?

Appellants' submissions

1st appellant

Mabirizi (1st appellant) argued that the Constitutional Court committed the following procedural irregularities:

(i) Violation of the right to a fair hearing by:

(a) Failing to determine the petition expeditiously and violating the renowned principle that: *"justice delayed is justice denied.* The appellant argued that evidence of this was the fact that the petition which was filed in the Constitutional Court on December 2017 was heard in April 2018. He submitted that the hearing was in a relaxed manner because the court would break for weekends starting from Friday up to Tuesday.

In addition, Mabirizi argued that the Court's failure to give its judgment within 60 days from the hearing date of 19th April 2018 was against **Rule 33(2)** of **The Court of Appeal Rules** which provides that, "*Judgment or an order may be given at the close of the hearing of an appeal or application or reserved for delivery on some future day which may be appointed at the hearing or subsequently notified to the parties and which shall, in any case, be without delay."*

(b) Evicting the appellant from court seats and relegating him to the dock infringed on his right to a fair hearing. He cited the Canadian Supreme court decision of **Andrews vs. Law Society of British Columbia**[46], where Mcintyre J stated that discrimination arises where a Rule or standard is adopted which has a discriminatory effect upon a prohibited ground because of some special characteristic.

[46] [1989] 1SCR 143

2nd appellants (MPs)

Counsel for the 2nd appellants submitted that the right to a fair hearing was compromised by the Constitutional Court in a number of ways.

First, that the learned Justices of the Constitutional Court declined to invoke their powers under the law to summon key government officials and individuals who played a pivotal role in the process leading to the enactment of the impugned Act to appear and testify in the matter. In particular, the Constitutional Court declined to summon the Speaker of Parliament, the Rt. Hon. Kadaga Rebecca, without assigning any reason.

In the appellant's view, there were other witnesses who were competent to testify before the Constitutional Court on the enactment process of the Act but the court failed to summon them. These were:

a) The Deputy speaker who would testify on his role during the enactment of the impugned Act, the discrepancies in the certificate of compliance, procedural irregularities, arbitrary suspension of the honourable Members of Parliament from Parliament, the unprecedented mayhem and violence that ensued in the precincts and chambers of Parliament, etc.

b) The Minister of Finance to testify on the contradictory Certificates of Financial Implication which were issued from his Ministry in regard to the impugned Act.

c) The Hon. Magezi Raphael who was the sponsor of the impugned Act to testify on the conceptualisation and mischief he intended to cure by moving Parliament to enact the said Act.

d) The President who assented to the Bill which was not accompanied with a valid certificate of compliance.

e) The Chairperson and Deputy Chairperson of the Legal and Parliamentary Affairs Committee who processed the Bill at Committee stage.

Counsel contended that the court should have exercised its powers *under* **Rule 12 (3) of the Constitutional Court (Petitions and References) Rules** and summoned the above witnesses. The Rule provides as follows:

> **The Court may, of its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence of the witness is likely to assist the Court to arrive at a just decision.**

The second procedural irregularity was that the Constitutional Court restricted the appellants and their counsel on what to ask the witnesses during cross-examination. That the Court limited the cross-examination to the averments that were made in the affidavits of the respective witnesses. The 2nd appellants' counsel contended that this contravened **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 during examination –in- chief.

The third alleged procedural irregularity is that the Constitutional Court adopted a materially defective mode for presenting submissions during the hearing of the petition; for instance:

a) The learned Justices of the Constitutional Court erroneously directed the appellants' counsel to make submissions before cross examining the relevant witnesses.

b) The learned Justices of the Constitutional Court erroneously denied the appellants' counsel a right to a rejoinder after the representative of the Attorney General had made their submissions in reply.

The 2nd Appellants' counsel further contended that the learned Justices of the Constitutional Court erred in law and fact when they injudiciously exercised their discretion in awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which is manifestly meagre considering the nature and significance of the matter.

That all the above irregularities contravened the natural principle of fair hearing which is a non-derogable right under **Article 44** of the Constitution. That this right has received judicial consideration in a number of authorities for example: **Bakaluba**

Peter Mukasa vs. Nambooze Bakireke[47] where Katureebe JSC (as he then was) observed that:

"Fair trial, … is one of the fundamental rights guaranteed by the Constitution."

Issue 7 (b)

Both the 1st and 2nd appellants contended that the above procedural irregularities led to a miscarriage of Justice. Furthermore, the 2nd appellant contended that the irregularities limited the Constitutional Court's scope of investigation and thereby failed in its duty vested under **Article 137 (1)** of the **Constitution**. That this duty was emphasized by Kanyeihamba, JSC in **Ssemwogerere (supra)** wherein he observed that:

"In Uganda, courts and especially the Constitutional Court and this Court were established as the bastion in the defence of the rights and freedoms of the individual and against oppressive and unjust laws and acts. Courts must remain constantly vigilant in upholding the provisions of the Constitution."

Consideration by Court

The essence of the arguments of the 1st appellant and the 2nd appellants is that the Constitutional Court abused the right to a fair hearing in various aspects and thereby came to a wrong conclusion.

[47] Supreme Court Election Petition Appeal No. 04 of 2009.

In order to answer the appellants' arguments comprehensively, I will answer the issue on the right to a fair hearing under three sub-headings as follows:

(i) Cross-examination and interjections by the court

The appellants arguments seek to address the question *whether the limitations on the cross-examination of witnesses resulted into an unfair trial.*

Section 136 of the **Evidence Act** defines cross-examination as the examination of a witness by the adverse party.

On Monday 9th April 2018, which was the first day of the hearing, Mabirizi and the MPs' counsel - Erias Lukwago - made an oral application to the Constitutional Court seeking the leave of court so that several named witnesses could be summoned and cross-examined.

In its preliminary ruling, the court granted leave to have several witnesses appear for cross examination. The court however stated that they found no reason to have the Speaker of Parliament appear in court. Court then stated that the detailed reasons for their decision would be in their final judgment.

I have carefully studied the judgments and found that none of the learned Justices gave the detailed reasons as promised. This was an error. Court must always give reason for exercising its discretion in a particular manner. The only way that a litigant can gauge whether or not the court exercised its discretion judicially is if reasons are given.

Nevertheless, it cannot be said that the said error - failure to give reasons for the court's decision not have the Speaker testify in court- - prejudiced the appellants' right to a fair hearing. I must emphasize that it cannot be said that there was any particular evidence which could only be accessed by the appellants through the testimony of the Speaker. The procedural irregularities and violations which occurred during the process of enacting the impugned Act could be and were in fact identified from the Hansard. I am therefore of the view that the non-appearance by the Speaker in court did not prejudice the case of the appellants.

Furthermore, the appellants argued before this Court that the Constitutional Court interjected in the cross-examination of the witnesses which limited them from asking questions to the witnesses. On the other hand, the Attorney General contended that the cross-examination should be restricted to the averments made in the affidavits.

The relevant part of the court record indicates as follows:

"Justice Owiny Dollo*: So the individual summon will be served on this counsel; the one for the Attorney General will be served on the Attorney General here, the one for the other counsel will be served accordingly. So on Tuesday we expect these witnesses, we finish with them and continue.*

Mr. Rukutana (Attorney General):

Much obliged my lords. We have received your ruling with respect and we shall comply, however we are seeking guidance, isn't it prudent for the petitioners who have applied to summon these

witnesses to indicate to us the areas on which they intend to examine each and every witness so that we can prepare them?

Mr. Lukwago:

My lords we take it that these are competent witnesses, by the time they took oath they knew what they were testifying on. The only assurance we can give we shall not thereof what they have presented before court [sic]. *So our cross examination will be restricted to their averments but of course one question leads to another. We shall restrict ourselves to what is relevant to this case.*

Justice Owiny Dollo:

No that is wrong. You will restrict yourself to what has been deponed to in the respective affidavit.

Mr. Mabirizi:

My lords my concern is there are concealments, he may have made an affidavit but concealed some pertinent facts. So when we are so restrictive on what they deponed you may find that we may be closing out concealments because most of them conceal what would be on the table."

In discussing this issue I will be guided by **Sections 137 and 147** of the **Evidence Act. Section 137** provides that, "*the examination and cross-examination must relate to relevant facts, <u>but the cross-examination need not be confined to the facts to which the witness testified on his or her examination-in-chief</u>."* (My emphasis)

It is therefore clear that the Court erred in its *"ruling" that the petitioners "will restrict yourself to what has been deponed to in the respective affidavit."*

But although the right to cross-examine a witness is part and parcel of a fair hearing, the right of a party to cross-examine a witness is not absolute. The exercise remains in control of the trial court. **Section 147** of the **Evidence Act** provides that the court can exercise its discretion and decide whether or not to compel a witness to answer a question. In exercising this discretion, the court shall have regard to whether the questions asked convey an imputation of truth which would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he or she testifies or whether the questions are improper such that the imputation which they convey relates to matters so remote in time that the truth or imputation would not affect the opinion of court.

I however note that the Court's restrictions were pronounced before any of the petitioners had posed any questions to any witness. So it cannot be said that the restrictions were in line with Section 147 of the Evidence Act. The Constitutional court therefore acted in error.

(ii) Denial of the right to a rejoinder

Rejoinder is the opportunity for the side that opened the case to offer limited response to evidence presented during the rebuttal by the opposing side.[48]

The sequence of presentation of a Constitutional petition is governed by the **Constitutional Court (Petitions and References) Rules**. Rules 4-12 detail the order in which each party to the petition presents their arguments. This order can be summarized as follows:

First, the petitioner presents his or her case; the respondent then makes a reply. The petitioner then makes a rejoinder to the reply/submissions made by the respondent.

The 1st appellant alleges that the above sequence was not followed by the court which made him loose out on the opportunity to make a rejoinder.

The record indicates that after the Attorney General made his submissions in reply, Justice Owiny Dollo, DCJ stated as follows:

"Thank you. In view of what the AG has said as concluding remarks not submissions, would you like to say something? You will be given the opportunity to say by way of concluding remarks, apart from that do you have anything to say?

Mr. Ogalo: *My Lords, we request your indulgence that you allow a rejoinder. My Lords, in the course of submissions by the learned*

[48] https://definitions.uslegal.com/r/rejoinder, USLegal.com accessed on 4/1/2019 at 12:14p.m.

Attorney General we are of the view in this side that in those arguments new matters were raised.

Justice Owiny Dollo: *What is the new matter?"*

The petitioners' counsel then went ahead to make rejoinders as follows:

Counsel Byamukama: *"My lords I have just a short point on issues No.1 to 4 on the seven year term that they gave themselves and on that issue the learned AG at the end of all their arguments said that anyway they are entitled to make retrospective laws under Article 92 and all I want to do in connection with that argument is provide to court an authority that might be useful on the issue of retrospective legislation. It is a House of Lords decision;* ***Wilson & Others vs. Secretary of State for Trade****. It was filed and the respondent was given a copy yesterday. My lords I am seeking validation of it.*

Justice Owiny Dollo replied: *Okay"*

Counsel Lukwago then stated: "*My Lords, mine is just two matters. One arose out of the first as we were addressing the first set of issues, it was on the doctrine of basic structure. When the AG argued that it is an academic theory, it is not a legal doctrine and so on."*

Mabirizi then stated as follows*:* "*My lords I have a few, first of all I want this court to note that in the pleadings and submissions the respondent has not refuted the fact that there was colourable legislation."*

Justice Owiny Dollo:

No, that is not new.

Mr. Mabirizi: *My lords, I am moving to issue 6A and B and have one point to make. I am defining the word charge. The word charge is defined by Black's Law dictionary 8th edition at page 701 under definition 7 as the price, cost or expense.*

Again on issue No.13 there was a submission that that issue is moot because the act has been already assented to. My lords, I rely on the authority of ***Ssemwogerere vs. AG*** *a decison of Kanyeihamba, he said that an Act of Parliament which is challenged under Article 137 remains uncertain until the appropriate court has pronounced itself upon it. Therefore, at the time my lords of you considering this, the issue is not moot because this act is still uncertain and 5 therefore my lords you can determine it."*

I find that the Constitutional Court used a wrong phrase "concluding remarks" instead of "rejoinder". However, the gist of what was thereafter submitted by the petitioners in response to the submissions of the respondent constituted a rejoinder.

I therefore find that no miscarriage of justice occurred as a result of the court's error.

(iii) Meagre award of costs to the appellants

I will resolve this sub-issue under the heading of costs.

Having answered Issue 7 (a) and (b) in the negative, I find that this issue should fail.

Issue 8

Remedies

All the appellants prayed that the appeal be allowed in the terms and prayers specified in their Memoranda of Appeal.

In particular, the appellants prayed that Constitution (Amendment) Act No. 1 of 2018 be annulled and that the respondent pays costs of this Appeal and in the Court below.

In the alternative but without prejudice to the foregoing, if court answers issue 7 in the affirmative, a retrial should be ordered.

Consideration by Court

I will start with the alternative prayer for a retrial which is hinged on the finding in issue 7 above. Since issue 7 has been answered in the negative, it follows that the prayer for a retrial should fail.

Costs

I will first address the issue raised by the appellants that the award of twenty million (Ushs.20, 000,000/=) given by the Constitutional Court as costs was little.

Section 27 of the Civil Procedure Act is to the effect that costs follow the event. The appellants' counsel partially succeeded in the Constitutional Court. It follows that they were entitled to an award in the form of costs. However, the amount awarded remains in the discretion of court. An appellate court can only interfere with the lower court's discretion in the award of costs if that discretion was

exercised arbitrarily, based on wrong principles of law or if the award is so excessive or so low.[49]

In this Court's recent decision of **Muwanga Kivumbu vs. AG**[50], it was held that, "*where costs are awarded in Public interest litigation cases, the award should be nominal."*(My emphasis)

Following from the above, I find no reason to vary the award given. It was neither excessive nor so low.

Conclusion

1. **For the reasons given above, I would allow the appeal.**
2. **Since this is a Public Interest Litigation matter, I would order that each party bears its own costs.**

Dated at Kampala this ..... day of ..... 2019.

.....
PROF.LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

[49] Kwizera vs. Attorney General Supreme Court Constitutional Appeal N0. 1 of 2008.
[50] Supreme Court Constitutional Appeal No.6 of 2011.

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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

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

[CORAM: KATUREEBE, CJ; ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; TIBATEMWA-EKIRIKUBINZA; & MUGAMBA, JJ.S.C.; TUMWESIGYE; AG.JSC]

CONSTITUTIONAL APPEAL NO 02 OF 2018

BETWEEN

1. MALE H. MABIRIZI K. KIWANUKA

2. (i) KARUHANGA KAFUREEKA GERALD
(ii) ODUR JONATHAN
(iii) MUNYAGWA S. MUBARAK
(iv) SSEWANYANA ALLAN
(v) SSEMUJJU IBRAHIM
(vi) WINFRED KIIZA

3. UGANDA LAW SOCIETY

:: APPELLANTS

AND

THE ATTORNEY GENERAL :::::::::::::::::::::::::::: RESPONDENT

[Appeal from the Judgment of Justices of the Constitutional Court (Owiny-Dollo, DCJ, Kasule; Kakuru; Musoke & Cheborion JJ.CC) dated 26th July 2018 in Consolidated Constitutional Petitions No. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018]

JUDGMENT OF TUMWESIGYE, Ag. JSC

Introduction

The appellants filed 3 separate appeals against part of the majority decision of the Constitutional Court in consolidated Constitutional

Petitions Nos. 49 of 2017, 03 of 2018, 05 of 2018, 10 of 2018 and 13 of 2018. The appellants were dissatisfied with the part of the majority Judgment of the Constitutional Court upholding Sections 1, 3, 4, and 7 of the Constitution (Amendment) (No. 01) Act, 2018. (hereinafter referred to as "the Amendment Act") The main complaint in their respective petitions was that the process of enacting the Amendment Act as well as the provisions of the Act itself were unconstitutional since they violated various provisions of the Constitution providing for: (i) the procedure of amending the Constitution; and (ii) development of democracy in Uganda.

Background:

On 27/09/2017, Hon. Raphael Magyezi, Member of Parliament of Uganda representing Igara West Constituency tabled before Parliament a motion seeking leave to introduce a Private Member's Bill entitled '*The Constitution (Amendment) Bill, 2017*' .

The main purpose of the Bill (there were other minor purposes) was to amend Article 102(b) of the Constitution which provided that a person to be qualified for election as President shall not be less than thirty-five years and not more than seventy-five years of age. It also sought to amend Article 183(2)(b) which provided for the same age qualification as that of the President. The Amendment Bill sought to remove the above age limits altogether.

Before Hon. Magyezi's motion was introduced to Parliament there was commotion in the House resulting in the suspension of 25 members of the opposition by the Speaker, who ordered the suspended members to vacate the House. When they refused to

get out the Speaker ordered the Sergeant-at-Arms to use force to eject them. She suspended the sitting and left the Chamber.

The eviction of members from the House was not done by the Sergeant – at- Arms and his officers alone. They were joined by men from Uganda People's Defence Forces. The ejection was effected violently and some members were injured. Members who were ejected were bundled and thrown onto security vehicles and detained.

When the House resumed Hon. Magyezi's motion was debated and passed on 28th September, 2017. A certificate of Financial implications was issued in respect of Hon. Magyezi's Bill by the Minister of Finance.

After the Bill received its first reading, the Speaker sent it to the Committee of Legal and Parliamentary Affairs for consideration. The Speaker emphasized the need for Members to consult the people on the provisions of the Bill. Parliament facilitated all members of Parliament with money to go and consult the people.

On 18/12/2017 the Bill was given a second reading. The Speaker invited the Chairperson of the Legal and Parliamentary Affairs Committee to present the Committee's Report.

In the course of presentation of the Committee Report by the Chairperson, some Members of Parliament kept interrupting the presentation with points of procedure ranging from the authenticity of the Committee Report to whether the Report had been tabled before Parliament. The Speaker addressed these

issues and directed the Committee Chairperson to continue with his presentation.

After the presentation of the Committee Report was completed, the Hon Deputy Attorney General moved a motion to suspend Rule 201(2) of the Rules of Procedure so that debate on the Report could commence. A question was subsequently put to the House regarding the Attorney General's motion. The question was agreed to and debate on the Report commenced.

On 20/12/2019, voting on the second reading was done. The Speaker after tallying the results announced that 97 members had voted against the motion and 317 for the motion. She therefore held that the motion for the second reading had been carried.

The Bill then proceeded to the Committee of the Whole House where each clause of the Bill was debated. During the Committee Stage, new clauses to the Bill were introduced. These related to: (i) extension of the term of the 10th Parliament by two years; (ii) extension of the term of the current Local Government by two years; and (iii) re-introduction of Presidential term limits.

On the same day (20/12/2017) a motion for the third reading of the Bill was tabled by Hon Raphael Magyezi. The question was put and agreed to by the House. Voting on the third reading then commenced. Voting was by roll call.

Having tallied the results, the Speaker announced the results as follows: (i) Abstentions were 2; (ii) 63 were against; and (iii) 315 were in favor of the Bill. In light of these results, the Speaker

declared to the House that the Bill had been passed as more than two – thirds of all the members had supported it.

Subsequently the Bill as passed by Parliament was sent to the President accompanied by the Speaker's Certificate for Presidential assent. The Bill received Presidential assent on 27/12/2017 and became part of the laws of Uganda as Constitution (Amendment) (No. 01) Act, 2018.

Believing that both the process of enacting the Amendment Act and its contents contravened various provisions of the Constitution, the appellants lodged petitions in the Constitutional Court. These were Constitutional Petitions Nos. 49 of 2017; 03 of 2018; 05 of 2018; 10 of 2018 & 13 of 2018. The appellants' main contention in these petitions was that because the process of passing the Amendment Bill and enacting the Amendment Act and the provisions therein were unconstitutional, the Amendment Act should be nullified in its entirety.

At conferencing 14 issues were agreed for determination by the Constitutional Court.

Having considered these issues, the majority Justices of the Constitutional Court (4 to 1) found that whereas some of the provisions of the Amendment Act were unconstitutional, other provisions were compliant with the Constitution. Therefore, applying the principle of severance, the majority of the members of the Constitutional Court struck out those provisions of the Amendment Act that were inconsistent with the Constitution and

retained those provisions they found to be consistent with it. On that basis the court declined to grant the main relief sought by the appellants to nullify the whole Amendment Act.

Dissatisfied with the holding of the majority Justices of the Constitutional Court, the appellants filed separate Appeals to this Court. The appellants' combined Memoranda of Appeal contained a total of 112 grounds.

At the pre-hearing conference the parties with the guidance of the Court agreed to consolidate their appeals. From the 112 grounds of appeal, 8 issues were framed for this Court to determine. These were:

1. ***Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.***

2. ***Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?***

3. ***Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it***

inconsistent with the 1995 Constitution of the Republic of Uganda?

4. ***Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?***

5. ***Whether the learned majority Justices of the Constitutional Court misdirected themselves when they held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?***

6. ***Whether the Constitutional Court erred in law and in fact in holding that the President elected in 2016 is not liable to vacate office on attaining the age of 75 years?***

7a. ***Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, un-judiciously exercised their discretion and committed the alleged procedural irregularities.***

7b. If so, what is the effect of the decision of the Court?

8. What remedies are available to the parties?

Representation

The appellant, Mr. Male H. Mabirizi, in Constitutional Appeal No. 02 of 2018 represented himself. Mr. Elias Lukwago of M/S Lukwago & Co. Advocates together with Mr. Ladislaus Rwakafuzi of M/S Rwakafuzi & Co. Advocates appeared on behalf of the

appellants in Constitutional Appeal No. 03 of 2018. Mr. Wandera Ogalo represented the appellant in Constitutional Appeal No. 04 of 2018. The Attorney General who was the respondent represented himself and appeared together with the Deputy Attorney General, the Solicitor General and several other senior legal officers from the Attorney General's Chambers.

All parties filed written submissions and were allowed to give oral highlights of their cases during the hearing of the consolidated appeals.

Preliminary objections raised by the Attorney General.

The Attorney General raised two preliminary objections in regard to Constitutional Appeal No. 2 of 2018, Male Mabirizi vs. Attorney General.

He contended that the grounds of appeal contained in Mr. Mabirizi's memorandum of appeal offended rule 82 of the Judicature (Supreme Court) Rules Directions S.I No. 13-11 for being speculative, argumentative, and narrative. He argued that the grounds of appeal also fell short of stating in precise terms the manner in which the Constitutional Court decision was wrong.

He prayed this court to strike out the appeal for noncompliance as it was an abuse of court process.

In response, Mr. Mabirizi argued that the respondent was barred by rule 98(b) to raise such an objection without the leave of court.

Rule 82 states as follows;

Contents of memorandum of appeal.

(1) A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and nature of the order which it is proposed to ask the court to make.

I agree with the learned Attorney General that the grounds of appeal filed by Mr. Mabirizi were argumentative, narrative and not concise. I will pick two examples from Mr. Mabirizi's grounds of appeal to demonstrate this point.

Ground 23:

"The majority justices of the Constitutional Court erred in law when they upheld part of the Act in total defiance of the binding Supreme Court decision (s) that a law is null and void upon a finding that the procedure of enacting and assenting to it was incurably defective and flouted."

Ground 24:

"The majority justices of the Constitutional Court erred in law when they upheld part of the Act in total departure from Constitutional Court decisions to the effect that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it."

It is clear from the foregoing grounds of appeal that the grounds lack precision and are argumentative. They state the alleged error of the Constitutional Court and go further to explain how the Constitutional Court made the error. The grounds also make arguments by putting the views of the appellant in the grounds of appeal.

According to rule 82 of this Court's rules, all the appellant is required to do is to state in the ground of appeal the error that the court allegedly made and leave it to the Supreme Court to decide whether it was an error or not.

I find that the Attorney General's Preliminary Objection is well founded. Therefore this court should have struck out Mr. Mabirizi's appeal on this ground. However, this is a very important constitutional matter that touches on the governance of this country. It would not be appropriate to strike out the appeal on a Preliminary Objection.

This court has invoked its inherent powers under rule 2(2) of the Rules of this court to overrule such Preliminary Objections using the same reason in the cases of **Attorney General vs. Major General David Tinyefuza** SCCA No. 1 of 1997, **John Ken Lukyamuzi vs. Attorney General & Anor** SCCA No. 2 of 2007.

I would, therefore, allow Mr. Mabirizi's appeal to proceed inspite of his breach of rule 82(1) of the rules of this court.

The Attorney General's 2nd Preliminary Objection was that the appellant filed his petition before the Constitutional Amendment Bill had been signed by the President to become an Act of

Parliament. He submitted that Article 137 (3) (a) of the Constitution provides that a person can only challenge an Act of Parliament and not a mere proposal in the form of a bill. He therefore argued that both the petition and the appeal were incompetent.

In response, Mr. Mabirizi contended that this preliminary point is unfounded in law, belated and offended rule 98(a) of the Judicature (Supreme Court Rules) Directions.

He argued that Article 137((3(b)) gives a petitioner right to seek redress where any act or omission by any person or authority becomes inconsistent with the Constitution and that his cause of action arose on the day he was prevented from entering Parliament.

The appellant further argued that the Attorney General was raising matters that were not pleaded and considered by the lower court and therefore, he should not have raised them on appeal in this court. He relied on the case of **Bitamisi vs. Rwabuganda** SCCA No. 16 of 2014 to support his argument.

I agree with the appellant's argument that the Attorney General should have brought this Preliminary Objection in the Constitutional Court and not in this court. In the case of **Bitamisi vs. Rwabuganda** (**supra**) the appellant raised new matters regarding 3rd party interests in the suit land that were not part of her pleadings in the lower courts on appeal. This court held that it could not consider new matters that were not part of the parties' pleadings on appeal.

I would therefore, overrule the Attorney General's 2nd Preliminary Objection and allow the appellant to proceed with his appeal.

Determination of the issues

I will now proceed to determine the issues raised in this appeal. I will consider issue 1 first, followed by issue 5. Thereafter I will consider issues 2, 3, 4, 6, 7 and 8 in that order.

Issue 1

Whether the learned Justices of the Constitutional Court misdirected themselves on the application of the basic structure doctrine.

Mr. Elias Lukwago, learned counsel for the appellants adopted his submissions in the Constitutional Court and the submissions of the appellants filed in this court. In his highlights during the hearing he further elucidated what the basic structure doctrine was, how applicable it was in Uganda setting, and how the learned majority Justices of the Constitutional Court had misapplied it and thus reached a wrong conclusion that amending Article 102(b) of the Constitution did not affect the basic structure of the Constitution of Uganda.

Counsel set out a brief background of the basic structure doctrine and relied on several authorities from different jurisdictions which included **Kesavananda Bharati v. State of Kerala**, AIR 1973, SC, **Minerva Mills v. Union of India**, AIR 1980 SC 1789, **Anwar Hossain Chowdhury v. Bangladesh**, 1041 DLR 1989 App Div 169, **Executive Council of Western Cape Legislature v. The President of the Republic of South Africa & Others** (CCT27/95

[1995] ZACC 8; and **Njoya vs. Attorney General and others** (2004) AHRLR 157.

The Attorney General in his reply submitted that the learned Justices of the Constitutional Court identified provisions of the Constitution which they considered to be fundamental features of the Constitution and which, therefore, formed the basic structure of the Constitution, and further, that the framers of the Constitution entrenched those provisions by safeguarding them from irresponsible amendment. Such safeguards include the requirements of at least two thirds majority of Parliament and holding a referendum.

According to the Attorney General Parliament was within its powers to enact sections 3 and 7 of the Amendment Act.

Understanding The Basic Structure Doctrine

According to Aqa Kazza in his essay "**The Doctrine of 'Basic structure' of the Indian Constitution: A critique**" the Indian Supreme Court which coined the doctrine was inspired by the writings of a German professor, Prof. Conrad Dietrich, in his lecture on **'Implied Limitation of the Amending Power**' in 1965 where he stated:

> "**Any amending body organized within the statutory scheme, howsoever verbally unlimited its power cannot by its very structure change the fundamental pillars supporting its constitutional authority."**

In the **Kesavananda** case (supra) the Indian Supreme Court while acknowledging the power of Parliament to amend the Constitution under Article 368 of the Indian Constitution held, by majority of 7 to 6, that this power could not be exercised to abrogate or take away the fundamental freedoms guaranteed under the Constitution. The court held that Parliament could not amend the Constitution to alter its basic structure. Sikri, CJ, held:

> **The learned Attorney-General said that every provision of the Constitution is essential; otherwise it would not have been put in the Constitution. This is true. But this does not place every provision of the Constitution in the same position. The true position is that every provision of the Constitution can be amended provided the result the basic foundation and structure of the Constitution remains the same...**
>
> **It was the common understanding that fundamental rights would remain in substance as they are and they would not be amended out of existence. It seems also to have been a common understanding that the fundamental features of the Constitution, namely, secularism, democracy and the freedom of the individual would always subsist in the welfare state. In view of the above reasons, a necessary implication arises that there are implied limitations on the power of Parliament that the expression "amendment of this Constitution" has consequently a limited meaning in our Constitution and not the meaning suggested by the respondents...**

The respondents, who appeal fervently to democratic principles, urge that there is no limit to the powers of Parliament to amend the Constitution. Article 368 can itself be amended to make the Constitution completely flexible or extremely rigid and unamendable. If this is so, a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamendable or extremely rigid. This would no doubt invite extra-constitutional revolution. Therefore, the appeal by the respondents to democratic principles and the necessity of having absolute amending power to prevent a revolution to buttress their contention is rather fruitless, because if their contention is accepted the very democratic principles, which they appeal to, would disappear and a revolution would also become a possibility.

However, if the meaning I have suggested is accepted a social and economic revolution can gradually take place while preserving the freedom and dignity of every citizen. For the aforesaid reasons, I am driven to the conclusion that the expression "amendment of this Constitution" in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles.

The question of application of the basic structure doctrine again arose before the Indian Supreme Court in the case of **Minerva** (supra) where the validity of the amendments to the Constitution giving unlimited power to Parliament to amend the Constitution and prohibiting judicial review of Constitutional amendments was challenged. The court held that judicial review was part of the basic structure of the Constitution and struck down clause (4) of Article 368 that had been included as an amendment to the Constitution.

Bhagwati, J, held thus:

> **Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.**

In the case of **Anwar Hossain Chowdry** (supra) the Parliament of Bangladesh through its 8th constitutional amendment amended its Constitution by incorporating a provision therein for six permanent Benches of High Court in six of its districts. It was also provided in that amendment that the President could by notice fix the territorial jurisdiction of these permanent Benches. The petitioner challenged the constitutionality of the amendment in the Supreme Court arguing that the framers of the Constitution never

intended to provide for permanent decentralization of the High Court in the Constitution of Bangladesh. The court by majority found that such permanent Benches of the High Court with mutually exclusive jurisdictions was entirely outside the contemplation of the Constitution. Their finding was based on the fact that the High Court as originally set up in the Constitution had judicial power over the entire Republic and so formed a basic structure of the Constitution. In the court's view the basic structural pillar had been destroyed and the judicial power of the Republic vested in the High Court had been taken away. Hence the amendment of Article 100 was ultra vires as it had destroyed the essential limb of the judiciary by setting up rival courts to the High court in the name of Permanent Benches.

B. H. Chowdhury, J, one of the members of the coram, expounding on the basic structure doctrine held:

> **Call it by any name-'basic feature' or whatever but that is the fabric of the constitution which cannot be dismantled by an authority created by the Constitution itself namely the Parliament. Necessarily, the amendment passed by the Parliament is to be tested as against Article 7 because the amending power is but a power given by the Constitution to Parliament; it is a higher power than any other given by the Constitution to parliament but nevertheless it is a power within and not outside the Constitution.**

The application of this doctrine has also been recognized on the African continent. In the South African case of **Executive Council**

of Western Cape Legislature (supra) the court struck down a section in a statute directing the reform of local government, which empowered the President to amend sections of the Act by proclamation. A majority of the court held that the constitutional framework of separation of powers meant that Parliament could not delegate primary legislative power to the executive, such as the power to amend or repeal Acts of Parliament.

Sachs, J observed as follows:

> **There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life - the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.**

In Kenya, the Court of Appeal in the case of **Njoya vs. Attorney General and Others** (supra) held:

Parliament may amend, repeal and replace as many provisions as it desired provided that the document retains its character as the existing constitution and the alteration of the Constitution does not involve the substitution thereof of a new one or the destruction of the identity or the existence of the Constitution.

The doctrine of basic structure has not yet gained universal acceptance. For example, in the Tanzanian case of **Attorney General vs. Rev. Christopher Mtikila**, Civil appeal No. 45 of 2009, the Court of Appeal (the final court of appeal in Tanzania) reversed the decision of the High Court which had applied the doctrine to strike down a constitutional amendment that barred independent candidates from standing in elections for political office. The Court of Appeal held:

Let us now examine our Constitution of 1977. We have already seen that Art 98(1) provides for the alteration of any provision of the Constitution, that is, there is no article which cannot be amended. In short there are no basic structures. What are provided for are safeguards. Under Art 98(1)(a) constitutional amendments require two-thirds vote of all Members of Parliament while Art. 98(1)(b) goes further that:

A Bill for an Act to alter any provisions of the Constitution or any provisions of any law relating to any of the matters specified in List Two of the Second Schedule to this Constitution shall be passed only if it is supported by the votes of not less than two-thirds of all

Members of Parliament from Mainland Tanzania and not less than two-thirds of all Members of Parliament from Tanzania Zanzibar.

List Two of the Second Schedule of the Constitution enumerates eight matters, to wit: (i) The existence of the United Republic; (ii) The existence of the Office of the President of the United Republic; (iii) The Authority of the Government of the United Republic; (iv) The existence of the Parliament of the United Republic; (v) The Authority of the Government of Zanzibar; (vi) The High Court of Zanzibar; (vii) The list of Union Matters; (viii) The number of Members of Parliament from Zanzibar.

These eight matters could have been basic structures in the sense that Parliament cannot amend them. However, they are amendable once the procedure for amendment is followed. So, there is nothing like basic structures in our Constitution.

It is our considered opinion that the basic structures doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case only persuasive, when considering our Constitution.

In **Teo Soh Lung v. Minister for Home Affairs [1989] 1 S.L.R. (R) 461**, H.C. the High Court of Singapore rejected the application of the basic structure doctrine holding that the doctrine which limits Parliament's power to amend the Constitution, did not apply

in Singapore as this would amount to usurpation of Parliament's legislative function contrary to Article 58 of the Constitution.

Chua, J, reasoned that a constitutional amendment, being part of the Constitution itself, can never be invalid if the procedure for its amendment is complied with. He further observed that if the framers of the Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations. Furthermore, that if the courts were allowed to impose limitations on the legislative power to amend, they would be usurping Parliament's legislative function, contrary to Article 58.

Whether the Doctrine of Basic Structure applies to Uganda

It is of significance to note that the jurisdictions which have applied this doctrine have not laid down what provisions of the Constitution should constitute its basic structure or what criteria the Courts should apply in determining provisions of the Constitution that should constitute its basic structure. All that the authorities tend to show are hypothetical examples to justify the applicability of the basic structure doctrine.

It is also important to note that the individual Courts themselves did not agree on the applicability of this doctrine. In the **Kesavananda** case, which seems to have originated this doctrine, the Court decided the case by majority of 7 to 6. Even the Bangladesh case of **Anwar Hossain** (supra) the Court was divided.

I should further observe that the circumstances in which Courts have applied this doctrine do not exist in Uganda. For example in **Kesavananda**, the issue at hand was the policy of the Government in power at the time to develop a welfare state in India. To this extent, the Indian Parliament had, among other things, passed

constitutional amendments: (i) aimed at redistributing the land from the barons to the peasants and (ii) ousted the power of the Courts to review the adequacy of the compensation given to the barons. In Uganda the law does not allow the ousting of courts from reviewing constitutional amendments.

Another example is in the South African case of **Executive Council of Western Cape Legislature (supra).** In this case, the Constitutional Court of South Africa applied the basic structure doctrine to strike down a section in a statute directing the reform of local government, which empowered the President to amend sections of the Act by proclamation. A majority of the court held that the constitutional framework of separation of powers meant that Parliament could not delegate primary legislative power to the executive, such as the power to amend or repeal Acts of Parliament. Again, this is not the case under our Constitution. We do not have any provision under our Constitution or any law for that matter which empowers the President to carry out legislative duties.

Constitutions differ, both in terms of content and the circumstances that led to their emergence. Thus the factors that might have led to the creation of the Indian Constitution or the inclusion of the provisions it contains therein are clearly different from the factors that led to the enactment of the Uganda Constitution.

The political instability that Uganda went through over several years led to the Preamble that begins our Constitution. The framers of the Constitution specifically embedded the values contained in the Preamble and the National Objectives and Directive Principles of State Policy within the Constitution.

The Constitution therefore builds strict safeguards and procedures which must be followed in amending the Constitution. For example Article 260 of the Constitution spells out provisions which Parliament, supported by two-thirds majority of all members, can amend subject to a Referendum being held to support them. Article 261 spells out provisions which Parliament, supported by two-thirds majority of all members, can amend subject to ratification by two-thirds of all members of the district council in each of at least two-thirds of all the districts of Uganda.

Lastly, Article 262 provides for those provisions which Parliament can amend, but can only do so by a majority of two-thirds of all Members of Parliament.

Furthermore, Article 255 gives citizens the right to demand the holding of a referendum on any issue. This Article provides as follows:

(1) Parliament shall by law make provision for the right of citizens to demand the holding by the Electoral Commission of a referendum, whether national or in any particular part of Uganda, on any issue.

(2) Parliament shall also make laws to provide for the holding of a referendum by the Electoral Commission upon a reference by the Government of any contentious matter to a referendum.

(3) Where a referendum is held under this article, the result of the referendum shall be binding on all organs and agencies of the state and on all persons and organizations in Uganda.

(4) A referendum to which clause (3) applies, shall not affect

(a) the fundamental and other human rights and freedoms guaranteed under Chapter Four of this Constitution; and

(b) the power of the Courts to question the validity of the referendum.

Accordingly, if the citizens of Uganda feel that a matter should be decided through a referendum they will demand the holding of the referendum. Therefore in my view, the necessity of applying the doctrine in Uganda does not arise.

On the face of it, it may appear that there are provisions which are fundamental but not contained in either Article 260 or 261 and therefore Parliament, with two-thirds of its members in support can amend them without taking into account peoples' wishes on the matter. However, it is important to note that these important provisions are connected to other provisions of the Constitution either directly or by infection. For example in **Paul K. Ssemogerere v. Attorney General, Constitutional Appeal No. 01 of 2002**, Parliament had made amendments to Articles 88, 89, 90 and added Article 257A to the Constitution. This Court found that these amendments had an adverse effect on other fundamental provisions of the Constitution like Articles 2(1) 28, 41(1), 44(c), 128 (2) & (3) and 137 (3) of the Constitution. The Court observed that in enacting the impugned constitution amendment Act, Parliament had by infection amended these Articles. Kanyeihamba, JSC who wrote the lead judgment of the Court observed as follows:

> ***On the other hand, Section 5, in so far as it prescribes new clauses (2) and (3) of Article 97 which are intended to restrict a citizen's unhampered "access to information in the possession of the state or any other organ or agency of the State" when the Constitution of Uganda in Article 41 guarantees and entrenches that right, is not only in conflict with that same article but constitutes a blatant attempt to clothe Parliament with supremacy***

which in Uganda lies in the majesty and sanctity of the Constitution.

...

Consequently, in my opinion, in so far as section 5 of Act 13 of 2000 purports to restrict that access unconstitutionally, it conflicts with the Constitution and therefore, is null and void.

...

Under Article 28(1), a person is entitled to the right of a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. Consequently, by subjecting that right to the exigencies of Parliament and the whimsical discretion of its personnel, Section 5 attempts to amend Article 28(1) by implication and Article 44(c) by infection. Article 128 prescribes and guarantees the independence of the Judiciary. In my view, the provisions of Act 13 of 2000, while not affecting that independence, whittle away the importance of Article 28(3). Clause 3 of Article 28 enjoins all organs and agencies of the State which include Parliament, Members of Parliament, the Speaker and the Clerk of Parliament to accord to the Courts such assistance as may be required to ensure the effectiveness of the Courts. By giving Parliament, the Speaker and the Clerk of Parliament the sole discretion as to who and what may assist the Court and when, the function of the Courts to administer justice fairly, speedily and impartially would be so severely restricted

by the provisions of Act 13 of 2000 as to be rendered illusory. Similarly, in so far as Section 5 of Act 13 of 2000 restricts the right of Members of Parliament and the use of Hansard and other Parliamentary records to assist petitioners, the Constitutional Court and other courts to proceed effectively, the provisions of Article 137(3) and those others guaranteeing the administration of justice would be amended by infection.

Pursuant to this finding, the Court struck down the Constitution (Amendment) Act 13 of 2000. The court did not use the doctrine of basic structure to do so.

Furthermore, I note that the principle of separation of powers is such an important principle that it should not be allowed to be undermined by one arm of the Government applying doctrines which are ill defined to interfere with the legislative function of Parliament.

I find the words of Prof. Conrad Dietrich apposite on this. In one of his essays carrying the title "**Basic Structure of the Constitution and Constitutional Principles**", he observes as follows:

Finally, a note of caution might not be out of place. The jurisprudence of principles has its own distinct dangers arising out of the flexibility and lack of precision of principles as well as their closeness to rhetorical flourish. This might invite a loosening of judicial discipline in interpreting the explicit provisions of the Constitution. ... Tightening of judicial scrutiny would be

necessary in order to diminish the dangers of opportunistic use of such principles as mere political catchwords.

I would therefore agree with majority Justices of the Constitutional Court and the Attorney General that all the basic structure provisions are embedded in the Constitution and the procedures for amending them are provided for in the Constitution and therefore the doctrine of basic structure does not apply to the Constitution.

Whether Article 102(b) and 183(2) are part of the basic structure of the Constitution.

The second question is whether Articles 102(b) and 183(2)(b) on age limit for the President and district Chairperson form part of the basic structure of the Constitution. Mr. Elias Lukwago contended that the learned Justices of the Constitutional Court erred when they misapplied the basic structure doctrine and found that the qualifications of the President and district Chairperson did not form part of the basic structure of the Constitution.

Counsel submitted that the learned Justices restricted the application of the basic structure doctrine when they held that it only applied to amendments which required a referendum and specifically to the extension of the term of Parliament and not to the age limit under Article 102(b) and 183(2)(b) of the Constitution.

Counsel relied on the dissenting judgment of Kasule, JCC, in **Saleh Kamba and Others vs. Attorney General and Others**, Const. Petition No. 16 of 2013 for the proposition that in interpreting the Constitution, court ought to take into account the

history of the country and that the history of Uganda is clearly captured in the preamble of the Constitution and National Objectives and Direct Principles of State Policy which should have been relied upon to find that the age limit constituted part of the basic structure of the Constitution.

Counsel Lukwago referred court to the case of **President Alvaro Uribe** of Colombia who, he stated, spearheaded a constitutional amendment with the purpose of making him eligible to run for president for a third time contrary to the two terms permitted by the Constitution. The amendment was struck down as it was considered by court to be a violation of the basic structure of the Constitution.

Mr. Mabirizi also contended that the Amendment Act was no different from the **Alvaro Uribe** case as it was purposely enacted to enable the President, who by the next election would be aged above 75 years and therefore not be eligible, to contest.

Counsel further argued that age limit as envisaged in Article 102(b) was among the provisions designed to guarantee orderly succession to power and so its removal destroyed one of the basic features of the Constitution. Further, that it was the intention of the framers of the Constitution not to entrust the top most office of our country in the hands of a very young person aged below 35 years of age or a senile person aged above 75 years.

Learned Attorney General supported the decision of the Constitutional Court and argued that sections 3 and 7 of the Amendment Act did not amend Article 1 of the Constitution by infection. The Attorney General contended that contrary to the

appellants' argument the amendment did not in any way take away the people's right to choose who leads them.

The Attorney General further argued that the amendment of Article 102(b) is in line with orderly succession of Government with every President strictly observing his or her own term. He cited various articles of the Constitution to support his argument that point to orderly succession and peaceful transfer of power such as Articles 1(1) and (4), 17(1), 59, 103(1), 105(1) and 107.

The Attorney General also argued that the amendment to Articles 102(b) and 183(2)(b) will enable citizens who were denied opportunity to aspire for those offices to do so.

Consideration of the Issue

There is no doubt that the Office of the President is the supreme Office in the land. The President is the leader of the People of Uganda who are the sovereign. Article 1 of our Constitution is very clear on the issue of sovereignty of the people of Uganda. Sub article 4 of this Article is more emphatic when it comes to who shall govern the people of Uganda. The sub article makes it categorical that the people of Uganda shall **'express their will and consent on who shall govern them...through regular; free and fair elections.**' Thus the power of the people to elect their leaders is very fundamental to our Constitution.

Having stated so, the Constitution is also quite clear on how the President of the Republic is elected. It is by universal adult suffrage through a secret ballot. Thus the people have a final say on who shall govern them. It therefore follows that removal of the

qualification as to age on who can stand for President does not in any way take away the power of the people to ultimately decide which person should hold the Office of the President of the Republic. Regardless of the age of the person standing for election, the people will always have the ultimate say on who shall govern them. This power of the people to choose who governs them, a matter that is so fundamental to our Constitution, was not taken away by amending the clause on age limit.

Further, a review of the Odoki Constitutional Commission Report that led to the enactment of the 1995 Uganda Constitution shows that the issue of imposing a maximum age on who can stand for President was never taken to be essential by the people. I agree with the view of Kasule, JCC, where he stated in his judgment relating to the petition that -

> **I also note that there is nothing in the Constitutional Commission Report proposing that the age limits of the President or other local government leaders should be entrenched provisions of the Constitution. The Report only proposed minimum age limit of 40 years for one standing for the office of President and never put a maximum age limit of the President, reasoning that:**
>
> > **"Since we have proposed the minimum age, we are of the view that there is no need to fix the maximum age; the electorate will decide on the appropriate candidate.**

Nowhere did the people during consultation by the Odoki Constitutional Commission express the view that a person aged 75 years or above would be unable to govern because of advanced age. There are examples all over the world which show that persons

aged above 75 years are heads of government and their countries are not suffering on account of it. On the other hand Uganda's political instability and turmoil happened when those who were in charge of government were very much below 75 years of age.

The appellants argued that the learned Justices of the Constitutional Court overlooked the significance and importance of the preamble in deciding that the amendments as to qualification did not affect the basic structure of the 1995 Constitution.

A review of the Judgments of the learned Justices of the Constitutional Court shows that they were well aware that the preamble of our Constitution was also a factor to consider in deciding whether the basic structure of the Constitution had been eroded. For example Musoke, JCC, observed as follows:

> **"In the process, Courts have suggested various guidelines which can be relied on to determine whether an amendment touches the basic structure of a particular Constitution and is, therefore, void. Whether or not a provision is part of the basic structure varies from country to country, depending on each country's peculiar circumstances, including its history, political challenges and national vision. Importantly, in answering this important question, <u>Courts will consider factors such as the Preamble to the Constitution</u>, National Objectives and Directive Principles of State Policy (in countries which have them in their constitutions, such as Uganda), the Bill of rights, the history of the Constitution that led to the given provision, and the likely consequences of the amendment."**

Similarly, Cheborion, JCC observed as follows:

> **In light of the above provision and the Directive Principles of State Policy, can Parliament effect a Constitutional amendment seeking, for instance, to do away with certain rights by scrapping this provision? I will not speculate but clearly, faithful interpretation of our Constitution given its historical background as earlier detailed and <u>in light of its preamble favour the position that the basic structure doctrine, to a restricted extent, be upheld as applicable in our legal system to govern amendments to the Constitution.</u> We must also take into account our shared values as a country which are alluded to in the Directive Principles of State Policy.**

Thus contrary to the contention of the appellants the learned Justices of the Constitutional Court did not overlook the Preamble or the Directive Principles of State Policy in interpreting the Amendment Act vis-à-vis the provisions of the Constitution.

It is therefore my view that the removal of these two clauses that is removing the age limit of who can be elected President Uganda and District Chairman did not violate the basic structure of the Constitution and further did not amend by infection Article 1 of the Constitution.

<u>Issue 5</u>

I will now proceed to consider issue 5 since, in my view, it is closely related to issue 1 above. Issue 5 was framed as follows:

> ***"Whether the learned majority Justices of the Constitutional Court misdirected themselves when they***

held that the Constitution (Amendment) Act No. 1 of 2018 on the removal of the age limit for the President and Local Council V offices was not inconsistent with the provisions of the 1995 Constitution?"

The appellants' arguments on this issue are premised on their contention that the amendments as to age of the President and district Chairperson were unconstitutional because: (i) Parliament usurped the power of the people in passing the amendments and thus interfered with the basic structure of the Constitution; (ii) the amendments granted indefinite eligibility for the sitting President to offer himself for re-election in the subsequent election cycles; (iii) there was noncompliance with Article 263(1) of the Constitution since the amendments by infection amended Articles 1, 8A and 21 of the Constitution; and (iv) the amendments effecting the removal of age limits amounted to constitutional replacement.

In my resolution of issue 1, I comprehensively dealt with the issue of the amendments with regard to the qualifications of a person who can run for President or District Chairperson in relations to the basic structure doctrine. It was my view that the amendments did not: (i) alter the basic structure of the Constitution; and (ii) did not take away the power of the people guaranteed under Article 1 since the people remained the ultimate deciders of who would govern them. They retained the mandate to vote for the person they wanted to be President or District Chairperson. It is noteworthy that Article 102(b) was one of those Articles that Parliament had power to amend without necessarily referring the matter to the people by way of a Referendum. The above notwithstanding, as I have highlighted in issue 2, the people were

consulted by members of Parliament on the proposed amendments.

Furthermore, if the people felt that this matter is so fundamental to the governance of this country that it should not be left to Parliament alone to decide it, they have the right, under Article 255 to demand the holding of a referendum to decide it.

Regarding the appellants' argument that the amendments were unconstitutional because they gave the sitting President an opportunity to offer himself for re-election in the subsequent election cycles and that this would have far reaching implication in the political trajectory of Uganda, under Article 1 of the Constitution, the people of Uganda remain the ultimate deciders on who shall be their President. Indeed I pointed out in my consideration of issue 1 that Article 103(1) of the Constitution is clear on how the President of the Republic is elected. It is by universal adult suffrage through a secret ballot. This right to vote in elections (in this case for the person to hold the Office of President) is reserved for the people of Uganda. Thus it is not a guarantee that when the present office holder presents himself to run for President, he will automatically get elected. The people will exercise their right to choose who will be their President.

On the appellants' contention that Article 263(1) of the Constitution was not complied with since Articles 1, 8A and 21 of the Constitution were amended by infection, I have already found that the amendments did not in any way amend by infection the provisions of Article 1 since the people of Uganda remain the ultimate deciders on who shall be their President. With regard to Articles 8A and 20, it is also my view that the amendments with regard to age did not amend these two articles by infection. Besides, these two articles are not among those listed under Articles 260 and 261 that require a separation of 14 days between

the 2nd and 3rd reading of the bill amending these provisions as required under Article 263(1). The appellants' arguments with respect to the amendments vis-à-vis the provisions of article 263(1) are therefore untenable.

Lastly, I will now turn to the appellants' argument that the amendments effecting the removal of age limits amounted to constitutional replacement.

The doctrine of constitutional replacement was pioneered and developed by the Colombia Constitutional Court. In his Article entitled **'Unconstitutional Constitutional Amendments in the Case study of Columbia: An analysis of the justification and meaning of the constitutional replacement doctrine'**, Associate Professor Carlos Bernal observes that:

> ***The Constitutional Court first referred to the constitutional replacement doctrine in its judgment C-551/2003. Along with the statement of the doctrine, the Court offered a justification for it and outlined some ideas concerning the kind of judicial review required by this doctrine. The Court ruled that the power to amend the constitution comprises the power to introduce changes to any article of the constitutional text. Nonetheless, these changes can neither imply a derogation of the constitution nor its replacement by a different one. The Court justified this assertion mainly on the basis of the distinction between original and derivative constituent powers. The point of departure of this distinction is the concept of constituent, or constitution-making, power.*** [Emphasis mine].

It appears from the above excerpt that the doctrine of constitutional replacement is almost on all fours with the basic structure doctrine that was considered in issue 1.

I also note that according to the Article the Colombia Constitutional Court developed, the doctrine of constitutional replacement *'**aims to justify the power of the Court to review the content of Constitutional Amendments despite the fact that the Constitution only grants the power to review constitutional amendments exclusively on procedural grounds**.'* Thus the Colombia Constitutional Court developed the constitutional replacement doctrine in order to circumvent this constraint.

However, this is not the position in Uganda. Under Article 137(3) of our Constitution an Act to amend the Constitution can be reviewed on other grounds than procedural grounds. For example, the Constitutional Court can review and indeed declare such a Constitution Amendment Act null and void if its contents are inconsistent with the provisions of the Constitution even if the procedure as outlined in the Constitution has been duly complied with.

The essential elements of the constitution under review concern the qualifications of a person to be elected President of the Republic of Uganda or District Chairperson.

It is evident that the Amendment Act neither abolished the Office of the President nor did away with the qualifications on who could be elected the President of Uganda. All that the amendments did was to effect some qualification changes on eligibility for the office

of the President of Uganda or District Chairperson. In my view the amendments could be said to amount to constitutional replacement if they abolished the Office of the President altogether or completely. In my view qualifications of the President do not go to the foundation of the Constitution.

In conclusion on issue 5, it is my finding that the learned Justices of the Constitutional Court did not err when they held that the amendments to Articles 102(b) and 183 (2) (b) effected by sections 3 and 7 of the Amendment Act did not contravene the Constitution.

Issue 2

"Whether the learned majority Justices of the Constitutional Court erred in law and fact in holding that the entire process of conceptualizing, consulting, debating and enactment of Constitutional (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda and the Rules of Procedure of Parliament?."

The appellants under this issue argue that there were procedural irregularities committed by Parliament in the course of passing the Amendment Act. They assert that these procedural irregularities contravened both the Constitution and the Rules of Procedure of Parliament. They therefore contend that the learned majority Justices of the Constitutional Court erred in holding that Parliament properly followed the provisions of the Constitution and its Rules of Procedure in the course of passing and enacting the Amendment Act.

I will consider each alleged procedural violation alone in the course of resolving this issue.

i. Consideration of the Bill against the provisions of Article 93 of the Constitution.

Appellants' Submissions

Counsel for the appellants relied on the provisions of Article 93 (a) (ii) and submitted that Parliament was prohibited from proceeding with a bill or motion, including an amendment Bill, unless introduced on behalf of the Government, that had the effect of imposing a charge on the consolidated fund or other public fund of Uganda or the alteration of any such charge otherwise than by reduction. Counsel further argued that this prohibition equally applied to an amendment to a motion, the effect of which would be to make provision for any of the purposes specified in Article 93(a).

Counsel submitted that whereas the Constitutional Court made a finding that the Amendment Act violated the provisions of Article 93 of the constitution, it declined to nullify the entire Act on ground that non-compliance only affected Sections 2, 6, 8 and 10 of the Amendment Act since they were introduced by way of amendments that imposed a charge on the consolidated fund.

Counsel argued that the entire Act ought to have been struck out because Article 93 (a) (ii) and (b) of the Constitution prohibited Parliament in absolute terms from proceeding on a private member's bill or a motion including amendments thereto which had the effect of creating a charge on the consolidated fund. In counsel's view, Parliament flagrantly violated Article 93 of the

Constitution when it proceeded to consider and enact into law the Amendment Bill with its amendments which had the effect of imposing a charge on the consolidated fund as found by the Constitutional Court. Counsel contended that it was therefore erroneous for the Constitutional Court to apply the doctrine of severance into a Bill which was considered and passed as an integral legislation in the same process.

It was also counsel's contention that under Article 128(5) of the Constitution administrative expenses of the Judiciary including all salaries and allowances are charged on the consolidated fund. He argued that the Amendment Act added an extra 15 days within which the Supreme Court could decide an election Petition. In counsel's view this translated into more allowances and thus a charge on the consolidated fund.

Counsel argued further that the Certificate of Financial Implications in respect of the Bill stated that the planned expenditure would be accommodated within the medium term expenditure framework for ministries departments and agencies concerned. In counsel's view, by so stating, the minister appeared to concede that the Bill would have some sort of expenditure, especially when one notes that the Minister thereafter then states that there are no additional financial obligations beyond what is provided in the medium term.

With regard to the 29,000,000/= facilitation given to each Member of Parliament, counsel argued that the learned Justices of the Constitutional Court erred in holding that this facilitation did not make the enactment of the Amendment Act inconsistent with

Article 93. Relying on the affidavits of Hon. Winnie Kiiza, Hon. Ssemujju Ibrahim Nganda, Hon. Jonathan Odur and Hon. Gerald Karuhanga, counsel submitted that a charge was made on the consolidated fund by paying Members of Parliament including ex officio members to carry out consultations with the public regarding the Bill.

It was also argued that Article 156 of the Constitution required Parliament to prepare estimates which are included in a Bill to be known as an Appropriation Bill *"which shall be introduced into Parliament to provide for issue from the Consolidated Fund of the sums necessary to meet that expenditure ...."* Furthermore that Article 154 of the Constitution also provided that no monies would be withdrawn from the Consolidated Fund except….where the issue of those monies has been authorized by an Appropriation Act."

According to counsel, the Appropriation Act was in this respect a conduit from the Consolidated Fund. Counsel submitted that it was erroneous for the Constitutional Court to hold that the 29 million shillings did not come from the Consolidated Fund but the account of Parliament. He argued that the decision to pay that money was a result of the motions for the 1st and 2nd second reading of the Bill. Those motions therefore had the effect of unconstitutionally removing 29 million shillings from the Consolidated Fund.

In counsel's view, to hold otherwise would mean that expenditure on the Magyezi bill was provided for in the 2016/17 Budget since it was introduced in September 2017. Further that it would mean

that at the time of preparing budget estimates in 2016 Parliament was aware of this bill and made provision for it. Counsel submitted that this did not seem logical. The logical conclusion, according to counsel, was that the Ministry of Finance provided the money. He added that, if it was not so, Parliament would have presented evidence of both its estimates for the financial year 2016/17 together with the Appropriation Act, which the Attorney General failed to do.

Counsel invited this Court to make a finding that this ex gratia payment imposed a charge on the consolidated fund and therefore violated Article 93 (a) (ii) (iii) and (b) of the constitution.

Respondent's Submissions

The Attorney General begun by pointing out that Article 93 of the Constitution provided for restrictions on financial matters and specifically prohibited Parliament from proceeding with a bill, except when introduced on behalf of Government that had financial implications as provided therein.

The Attorney General further pointed out that the above notwithstanding, Article 94 of the Constitution guaranteed the right of a Member of Parliament to move a private member's bill. Relying on the decision of this Court in **P.K. Ssemwogerere & Anor Vs Attorney General, Constitutional Appeal No. 1 of 2002**, the Attorney General submitted that the above two provisions of the Constitution had to be construed harmoniously with each sustaining the other and not destroying the other.

The Attorney General submitted that pursuant to Article 94 of the Constitution, Parliament made Rules of procedure governing the way it conducted business. Referring this Court to Rule 117 of the

Parliamentary Rules of Procedure, the Attorney General contended that it was a requirement for every bill introduced in Parliament to be accompanied by a Certificate of Financial Implications. In the Attorney General's view, this served as a guarantee to the Speaker and/or Parliament that the Bill did not have financial implications and did not contravene Article 93 of the Constitution.

The Attorney General further contended that Rule 117 of the Rules of Procedure of Parliament was in *pari materia* with Section 76 of the Public Finance Management Act of 2015.

Having laid out the legal provisions above, the Attorney General submitted that the evidence on record [at page 601 Para 8 Vol 1] shows that on 27th September 2017, Hon. Raphael Magyezi, a Member of Parliament representing Igara County West constituency, tabled in Parliament a motion for leave to introduce a private Members' Bill entitled: The Constitution (Amendment) (No. 2) Bill of 2017.

The Attorney General further submitted that Hon. Magyezi's evidence [at page 613 para 26 Vol 1 of the record] shows that on 3rd October 2017, he moved the House so that the bill could be read first time and the same was seconded and laid on the table of Parliament, accompanied by a Certificate of Financial Implications as required under section 76 of the Public Finance Management Act, 2015 and the Rules of Procedure of Parliament.

The Attorney General was emphatic that Parliament only proceeded with the bill presented by Hon. Raphael Magyezi after the Speaker and the House were satisfied that the bill did not create a charge on the consolidated fund. He further argued that

this position was confirmed by the Constitutional Court. The Attorney General referred this Court to the Judgments of some Justices of the Constitutional Court as Justice Kasule, Justice Cheborion, Justice Kakuru and Justice Musoke which shows that Hon. Magyezi's bill complied with Article 93.

The Attorney General further submitted that the Justices of the Constitutional Court were right to strike out the provisions of the Amendment Act that did not comply with Article 93 and maintain the provisions of the Act that complied with the Article by applying the principle of severance.

The Attorney General further argued that the sections 1, 3, 4 and 7 of the Amendment Act did not contravene Articles 66(3), 106(3) and 128(5) since they did not affect any expenses, payments and emoluments in the institutions they referred to.

On the issue of the Certificate showing some form of expenditure, the Attorney General submitted that the role of the Certificate of Financial Implications was to appraise the Speaker and/or Parliament whether the Bill had financial implications or not. He referred to Page 43 vol 3 of the Record of Appeal where the Secretary to the Treasury stated that the rationale of the Certificate issued was to show that the Bill had no financial implications. The Attorney General further submitted that the Certificate issued showed that the Bill was budget neutral. Referring to the testimony of the Secretary to the Treasury at page 43, the Attorney General argued that this phrase meant that as far as the budget was concerned, there were no extra resources or a charge and that is what the Ministry was confirming.

Regarding the UGX 29,000,000/= given to Members of Parliament, the Attorney General submitted that during cross examination [at pages 309 Vol. 3 of the Record], the Clerk to Parliament ably

pointed out in her evidence that the above sum was appropriated for use by the Parliamentary Commission and not drawn from the consolidated fund.

The Attorney General further observed that the majority Justices of the Constitutional Court found that the said facilitation to Members of Parliament did not make the enactment of the Amendment Act inconsistent with Article 93 of the Constitution.

In conclusion on this point, the Attorney General submitted that Article 93 of the Constitution only prohibited Parliament from proceeding with a bill, unless introduced on behalf of Government, that had financial implications. In his view, the Article did not concern itself with the money used in processing the bill, allowances/facilitations that was paid out to the Members of Parliament to process the Bills.

Consideration of the issue

The appellants contend that Article 93 prohibits Parliament from proceeding with a Bill or motion including an amendment Bill or motion brought by a private member that has the effect of imposing a charge on the consolidated fund or any public fund of Uganda. According to the appellants, the Bill from which the Amendment Act emerged had the effect of imposing a charge on the consolidated fund because: (i) it contained provisions therein that would require a charge on the consolidated fund in order for them to be validly enacted; (ii) the facilitation of UGX 29,000,000/= given to each Member to consult on the Bill was drawn from the consolidated fund; (iii) the additional 15 days given to the Supreme Court to hear and determine a Presidential Election Petition could require additional funds drawn from the consolidated fund; and (iv) the Certificate issued by the minister of finance in respect of the Bill showed that there would be some form of expenditure.

The appellants contend that the above four instances clearly show that the Bill contravened Article 93. They therefore argue that the learned Justices of the Constitutional Court erred in holding that the Bill did not contravene the Constitution. The Attorney General on the other hand supports the Constitutional Court's finding on this issue.

Section 76 of the Public Finance Management Act, 2015 provides the relevant parts as follows:

> *(1)* ***Every Bill introduced in Parliament shall be accompanied by a certificate of financial implications issued by the Minister.***
>
> ***(2) The certificate of financial implications issued under subsection (1) shall indicate the estimates of revenue and expenditure over the period of not less than two years after the coming into effect of the Bill when passed.***
>
> ***(3) In addition to the requirements under subsection (2) the certificate of financial implications shall indicate the impact of the Bill on the economy.***

The requirement for a certificate of financial implications is re-emphasized by the Rules of Procedure of the Parliament of Uganda. Rule 107 of the 2012 Rules [then applicable when the Bill was introduced before Parliament] provided for the same as follows:

> *(1)* ***All bills shall be accompanied by a certificate of financial implications setting out—***
>
> ***(a) the specific outputs and outcomes of the Bill;***
>
> ***(b) how those outputs and outcomes fit within the overall policies and programmes of government;***
>
> ***(c) the costs involved and their impact on the budget;***
>
> ***(d) the proposed or existing method of financing the costs related to the Bill and its feasibility.***

(2) The certificate of financial implications shall be signed by the Minister responsible for finance.

On 03/10/2017, Hon. Raphael Magyezi laid on the table of Parliament, the Constitution (Amendment) (No.2) Bill of 2017. This Bill was accompanied by a Certificate of Financial Implications as required by the above provisions. This Certificate was issued on 28/09/2017. The appellants do not contend that the Bill was not accompanied by a Certificate of Financial Implications or that the Certificate issued was defective.

It is not in dispute that in the course of debating the Bill introduced by Hon. Magyezi, other provisions were introduced, which in my view, had the effect of creating a charge on the consolidated fund and thus were contrary to Article 93 of the Constitution. In determining whether the Bill introduced by Hon. Magyezi was inconsistent with Article 93 of the Constitution, recourse should be had on reviewing the provisions contained therein at the time Hon. Magyezi tabled it before Parliament and when Parliament first proceeded with it.

The Constitution (Amendment) (No.2) Bill of 2017 as originally laid before Parliament by Hon. Magyezi on 03/10/2017 provided in the relevant parts as follows:

1. ***The object of the bill is to amend the Constitution of the Republic of Uganda with articles 259 and 262 of the Constitution-***

(a) to provide for the time within which to hold Presidential, Parliamentary and local Government Council elections under article 61;

(b) to provide for eligibility requirements for a person to be elected as President or District Chairperson under article 102(b) and 183(2)(b);

(c) to increase the number of days within which to file and determine a presidential election petition under article 104(2) & (3);

(d) to increase the number of days within which the Electoral Commission is required to hold a fresh election where a Presidential Election is annulled under Article 104(6); and

(e) for related matters

In my view, the above provisions did not have the effect of imposing any additional charge on the consolidated fund as envisaged under Article 93 of the Constitution. I fail to see how providing time within which to hold Presidential, Parliamentary and local Government Council elections, or providing eligibility requirements for a person to be elected President, or increasing the number of days within which to file and determine a presidential, or increasing the number of days within which the Electoral Commission is required to hold a fresh election in case the presidential election is annulled would impose a charge on the consolidated fund. Therefore, in my view, Hon. Magyezi's bill as originally tabled did not have the effect of imposing a charge on the consolidated fund. It therefore follows that at the time of proceeding with the Bill as tabled by Hon. Magyezi, no provisions existed that had the effect of imposing a charge on the consolidated fund. The provisions that had this effect were brought in much later, at the Committee stage.

It is not in contention that the provisions which had the effect of imposing a charge on the consolidated fund were those which were added to the bill at Committee Stage. Those provisions were rightly struck down by the Constitutional Court for contravening the provisions of Article 93 of the Constitution.

The appellants also contended that each Member of Parliament was given UGX 29,000,000/= to go and consult on the Bill. The

appellants contend that this money was got from the consolidated fund and therefore constituted an additional charge prohibited under Article 93 of the Constitution.

The Secretary to the Treasury, in paragraph 9 of his affidavit in reply to the Petitions, deponed that this facilitation was already existing in the budget of the Parliamentary Commission. His assertion was also supported by the Clerk to Parliament who testified that the money given to members for facilitation had already been appropriated for use for Parliamentary activities by the Parliamentary Commission in the financial year 2017-2018. The appellants' argument concerning money provided to members of Parliament to consult on Hon. Magyezi's bill would lead to a conclusion that if public funds are spent on consultation of a private member's bill by members of Parliament including committees of Parliament, that money spent would be a charge on the consolidated fund and render the bill unconstitutional. This argument cannot be accepted. I respectfully do not accept the view that money spent by Parliament in taking any bill through all its stages constitutes a charge on the consolidated fund envisaged under Article 93 of the Constitution. If it were so, no private member's bill would ever be passed. In my view, what Article 93 requires is for the Minister to indicate, among other things the likely expenditure the bill is likely to cause on the national budget through once the provisions contained in the bill are brought into force as Act of Parliament.

Concerning allowances likely to be spent as a result of the 15 extra days given to the Supreme Court to determine a presidential election petition, my view is that this is a matter that is purely speculative and trivial which should not have been raised by the appellants.

The third ground in support of the contention that the Bill contravened Article 93 of the Constitution was grounded on the fact that the Certificate of financial Implications issued shows there was going to be some sort of expenditure, which was inconsistent with Article 93.

Having found that the provisions in Hon. Magyezi's bill did not in any way have the effect of imposing a charge on the consolidated fund, and having also found that the shs. 29,000,000/= given to each Member of Parliament to carry out consultation on the bill did not impose a charge on the consolidated fund, I find it superfluous and therefore unnecessary to consider the issue of the Minister's certificate allegedly showing that there was going to be some sort of expenditure.

I therefore find that the learned Justices of the Constitutional Court did not err by holding that the Constitution (Amendment) (No.02) Bill as originally introduced by Hon. Magyezi was not inconsistent with Article 93 of the Constitution of Uganda.

No one disputes the fact that the amendments which were introduced at Committee stage were unconstitutional. These amendments included the reintroduction of the president's term limits and entrenching of the same, and extending the term of Parliament and local councils, and other consequential amendments.

All these amendments were fundamental to the Constitution yet the people were not consulted on them; some of the amendments had financial implications since they required a referendum, yet they were not accompanied by the Minister of Finance's certificate of financial implications; the votes relating to those amendments required a separation of 14 days between the second and third readings in accordance with Article 263(1) since they fell under

Article 260 either by infection or directly yet this was not done, and after their passing by Parliament they were excluded by the Speaker from her certificate of compliance under Article 263(2)(a). these are all constitutional irregularities and therefore the Speaker should not have allowed them to be introduced in the bill at Committee Stage.

The appellants' argument, however, is that these late amendments were an integral part of the bill that was passed by Parliament and assented to by the President and so the Constitutional Court erred when it applied the doctrine of severance to strike out of the Amendment Act only those sections of the Act that related to the amendments that were introduced at the Committee Stage instead of declaring the whole Amendment Act as unconstitutional.

The Attorney General, on the other hand, argued that the learned Justices of the Constitutional Court were right to apply the doctrine of severance to nullify those provisions of the Amendment Act that did not comply with the provisions of the Constitution and the Rules of Procedure and to uphold the provisions of the Amendment Act that did.

Consideration of the doctrine of Severance

A review of the majority judgments of the Constitutional Court shows that the doctrine of severance was applied by the court in three instances: (1) in respect of violation of Article 93 vis-à-vis the Amendment Act, (2) in respect of violation of Article 263(1) relating to the 14 days rule that are required to separate the second reading from the third reading and (3) in respect of the Speaker's certificate of compliance.

The doctrine of severance has been addressed by written law as well as case law. Article 2 of the Constitution itself provides for severance. It states:

> **(1) This Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**
>
> **(2) If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of inconsistency, be void.** [my emphasis]

The above constitutional provision is what the Constitutional Court relied on to sever the Amendments by striking down those provisions that were unconstitutional and preserving those that were Constitutional.

Review of case law from different jurisdictions and scholarly writings shows that courts prefer this approach as opposed to nullifying the law in its entirety. In determining when or not to apply the doctrine of severance Courts are guided by various factors. However, the major consideration is the desire to ensure that the intention of the legislature in enacting a Statute is not defeated.

In **Prabagaran a/l Srivijayan v. Public Prosecutor, [2017] SGCA 67**, the Singaporean Court of Appeal approached the issue of severance as follows:

> ***"In the exercise of severance, legislative intent is paramount. The reason for this is clear: to allow the courts to do so in a manner that is contrary to the intent underlying the passage of the provision in question***

would effectively confer upon the judiciary legislative powers and violate the principle of separation of powers. […] it must be shown to be Parliament's intention behind the enactment of an Act that is found to be partially in breach of the Constitution that it should nevertheless continue to be given effect even after the severance and invalidity of some portions."

In reaching this conclusion the Singaporean Court of Appeal first identified the test of severability. It called in aid the US Supreme Court decision in **Alaska Airlines Inc v. Brok**, **480 U.S. 678, 684** and held that a legislative provision is:

a. Severable if 'the truncated statute, with the unconstitutional portion excised, will operate in the manner that the legislature intended'

b. Severable if the legislature 'would have enacted the truncated statute with only the remaining provisions.'

c. But, conversely, not severable if the truncated statute "cannot function without [the unconstitutional part], at least in a manner that Parliament could not have contemplated

In the South African case of **Johannesburg City Council v Chesterfield House (Pty) Ltd, 1952 (3) SA 809 (A) 822** it was held as follows:

[W]here it is possible to separate the good from the bad in a statute and the good is not dependent upon the bad, then that part of the statute which is good must be given

effect to, provided that what remains carries out the main object of the statute . . . however, where the task of separation is so complicated as to be impracticable, the whole statute must be declared ultra vires.

In **Farieda Coetzee v. Government of the Republic of South Africa and Matiso & Ors v. the Commanding Officer, Port Elizabeth Prison, & Ors, 1995 (4) SA 631 (CC)**, a two-stage on determining whether to apply the doctrine was advanced. Kriegler, J observed as follows:

Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?

It has also been argued that for the doctrine to apply, the parts of the statute where it is to be applied should clearly stand out. Thus, in **Premier Limpopo Province v. Speaker of the Limpopo Provincial Legislature & Ors (CCT 94/10) [2012] ZACC 3**, it was observed as follows:

It cannot be over-emphasized that severance should be reserved for cases where it is clear from the outset

exactly which parts of the statute need to be excised to cure the constitutional deficiency.

In **Halsbury's Laws of England (VOLUME 1(1) (2001 REISSUE) UPDATE 25** at **page 131**, the following passage appears:

25. <u>Severance of partly invalid instruments or actions</u>. An order or other instrument or an action may be partly valid and partly invalid. Unless the invalid part is inextricably interconnected with the valid, such that to sever it would be to alter the substance of the valid part, a court is entitled to set aside or disregard the invalid part, leaving the rest intact. The courts' approach to severance is that it is generally appropriate to sever what is invalid if what remains after severance is essentially unchanged in purpose, operation and effect: this is the test of substantial severability. Severance need not be limited to cases in which it can be accomplished by judicial surgery or textual emendation by excision...

Prof. Kevin C. Walsh in his article **'Partial Unconstitutionality'** observes as follows:

"Current law and scholarship answer that severability doctrine is the exclusive way to deal with partial unconstitutionality. Severability doctrine governs whether a Court may first separate out or 'sever' the unconstitutional provisions or applications of a law, and then subtract or 'excise' them, so the constitutional

remainder can be enforced going forward. Thus conceived, this judicial operation creates a new law that consists of the old law 'minus' its unconstitutional provisions or applications."

The learned author further proceeds to analyze when to apply the severance test. He relies on two US authorities [**Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 330 (2006)** and **Alaska Airlines, Inc. v. Brock** (supra)] and opines as follows:

"The lodestar for this severability determination is legislative intent. Because a court must not 'use its remedial powers to circumvent the intent of the legislature', the Court must ask before severing: 'would the legislature have preferred what is left of its statute to no statute at all?' If the answer is 'no', then the Court should declare the Statute entirely invalid and enjoin its enforcement in all applications."

In the **Alaska Airlines, Inc.** case, the Court held that '***Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.'***

Lastly, it has also been argued that the doctrine of severance should be invoked where third parties interests have been created as a result of a legislation. In his essay entitled **'Two Tests of Severance: Procedural and Substantive Constitutional**

Violations and the Legislative Process in Missouri[1]' Johnathon Whitefield observes that severance is justified:

> ***When innocent third parties rely on the passage and implementation of a law in good faith, and invalidation of the law would have collateral effects that outweigh the need to ensure consistent legislative practice.***

Later in his article, he also opines as follows:

> ***'For procedural constitutional violations, "the entire bill is unconstitutional unless [the court] is convinced beyond reasonable doubt that one of the bill's multiple subjects is its original, controlling purpose and that the other subject is not."*** *To determine whether or not the provisions that are part of the added subject pass this test, the court considers "whether the additional subject is essential to the efficacy of the bill, whether it is a provision without which the bill would be incomplete and unworkable, and whether the provision is one without which the legislators would not have adopted the bill." [*Emphasis mine].

In support of his opinion, the writer relied on the decision of the Missouri Supreme Court of **Hammerschmidt v. Boone Cnty., 877 S.W. 2D 98, 103**. In regard to this decision, the learned author opined thus:

> ***Historically, the Supreme Court of Missouri has applied severance as a remedy in several cases involving the single-subject rule, starting with Hammerschmidt. In that case, severance was discussed as a potential***

remedy for the constitutional infirmities of House Bills 551 and 552. Specifically, the court indicated that severance is a "more difficult issue" when procedural mandates of the constitution are violated. Despite the stated difficulty of such an analysis, the court in Hammerschmidt had "no difficulty in divining the primary subject" of the bills in question and found that the "title indicates the bill relates to elections." The court stated that a comparison of the "bill's passage through the House prior to the addition of amendments [with the] contents as finally passed and presented to the governor shows that the bill is about election procedures."

Application of the doctrine of severance in Uganda

I shall proceed to highlight briefly where this doctrine has been applied by this Court. I however note from the onset that in some instances, this Court has pointed out that its application of the doctrine was to ensure that the legitimate objective of Parliament in enacting the Act was realized. For example in **Attorney General v. Salvatori Abuki,** Constitutional Appeal No. 01 of 1998, this Court set aside the order of the Constitutional Court nullifying the whole of section 7 of the Witch Craft Act. The Constitutional Court had found the section inconsistent with Article 24 of the Constitution, a finding that this Court agreed with. However, this Court pointed out that there were legitimate grounds why the legislature enacted it. Wambuzi, CJ (as he was then) while applying the principle of severance observed as follows:

"I may add here that Article 2 of the Constitution that the Constitution is the supreme law of Uganda and under clause (2) of the article,

> ***"If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void"***
>
> ***It was open to the Constitutional Court to find that section 7 of the Witchcraft Act is void to the extent that it authorizes the making of an exclusion order excluding a person from his or her home which would be a violation of a fundamental right of the petitioner.***
>
> ***...***
>
> ***However, in Uganda I would think that whatever the language is "reading down" or "constitutional exemption" the impugned law is not to be declared void merely because one aspect of its application offends a provision of the Constitution. Otherwise the words 'shall be void to the extent of the inconsistency' are meaningless.***

Again this Court in **Paul K. Ssemogerere & 2 Ors v. Attorney General,** Constitutional Appeal No. 01 of 2002, appears to have impliedly recognized the severance doctrine provided under Article 2(2) of the Constitution. Kanyeihamba, JSC (as he was then) opined as follows:

> ***Consequently, in my opinion, insofar as section 5 of Act 13/2000 purports to restrict that access [of information] unconstitutionally, it conflicts with the Constitution and therefore is null and void.*** [Emphasis mine.]

It would follow from the interpretation of this holding that if there was a restriction that was constitutional, for example on grounds of national security, then such amendment could not be declared null and void. Thus the bad would be thrown out and the good retained without necessarily striking out the impugned provision or Act.

Lastly in **Col. (Rtd) Dr. Besigye Kiiza v. Museveni Yoweri Kaguta & anor, Election Petition No. 01 of 2001** and **Rtd. Col. Dr. Kiiza Besigye v. Electoral Commission & Anor, Election Petition No. 01 of 2006**, this Court invoked the severance doctrine to truncate affidavits so that only those parts of the affidavit that were compliant with the law could be retained while the offending parts could be excluded. Karokora, JSC observed that:

> ***it seems to me that the proper practice should be that whenever it is possible, court which is faced with an affidavit which contains some inadmissible matter which can be severed and discarded without rendering the remaining part of the affidavit meaningless, the court should severe the offending part and use the rest of the affidavit.***

The present case

Having examined this doctrine, I will now proceed to determine whether it is applicable to the Amendment Act.

The major contention of the appellants is that the procedural irregularities manifest in the passing of the Amendment Act cannot let it stand. There are two kinds of procedural irregularities involved in this case. The first one which is major in my view involves the failure by Parliament to comply with procedural

requirements provided in the Constitution. The second one relates to Parliament's failure to comply with its own Rules of Procedure.

I am aware that in **Paul K. Ssemogerere case** (supra) this Court emphasized the need for compliance with the provisions of chapter 18 when it comes to amending the Constitution. Kanyeihamba, JSC who wrote the lead judgment of the Court held as follows:

> ***"In my opinion, the requirements of chapter 18 are mandatory and cannot be waived, not even by Parliament. Consequently, and with the greatest respect, the majority of the learned Justices of the Constitutional Court erred in law in holding that those provisions could be waived and that in any event, they were not essential to validating any constitutional amendment."***

In light of this holding, the court proceeded to strike out the impugned Amendment Act on grounds that: (i) the Bill was not accompanied by a certification of the Speaker (ii) voting by use of shouts "ayes" and "nays" could not help in determining whether the two-thirds majority had been attained; and (iii) there was no compliance with the 14 days rule between the 2nd and 3rd reading of the Bill since it had by infection amended provisions of the Constitution that required compliance with a 14 days rule.

The case of **Paul K. Ssemwogerere** (supra) must be distinguished from the instant case. In **Ssemwogerere's** case the bill was not accompanied by the Speaker's certificate of compliance. In the instant case the bill, was accompanied by the Speaker's certificate of compliance though defective. In **Ssemwogerere's** case Parliament had no quorum and furthermore members who were

present and voted to pass the bill voted by voice so the will of Parliament was unascertainable. In the instant case Parliament had quorum and members voted by roll call.

In deciding the petition leading to this appeal, by a unanimous decision, the Constitutional Court, rightly in my view, struck down sections 2, 5, 6, 8, 9 and 10 of the Amendment Act which provided for the extensions of the tenure of Parliament and Local Government Councils by two years, and for the reinstatement of the Presidential term limits, provisions that had been unconstitutionally introduced to the bill at Committee Stage.

By majority the Court applied the severance doctrine and retained sections 1, 3, 4, and 7, of the Constitution as being compliant with the Constitution.

Courts' duty among other things, is to be faithful to the Constitution. Courts must not only guard against infringement of the Constitution but must also uphold provisions of legislation that are compliant with it. To strike out constitutionally complaint provisions of legislation in Parliament starting the process of enacting the same provisions all over again would, in my view, be unnecessary especially knowing that the bill was passed by Parliament with over whelming support at 2nd and 3rd reading of the bill. In my view, it would be a waste of national resources for Parliament to have to repeat the process all over again.

Accordingly, the Constitutional Court did not err in applying the doctrine of severance to the Amendment Act to strike out the offending provisions and retain the ones that were passed in accordance with the Constitution.

i. Alleged Smuggling of the Motion to introduce Constitutional (Amendment) (No. 2) Bill onto the Order Paper.

Appellants' Submissions

Counsel submitted that the Bill leading to the enactment of the Amendment Act was presented in contravention of Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Procedure of Parliament by virtue of the fact that the same was smuggled onto the Order Paper.

Counsel found fault with the finding of the Constitutional Court that the Speaker enjoyed wide, and almost unfettered, discretionary powers to determine the Order of Business in the House and as such that no wrong was committed by the Speaker in amending the Order Paper to include the motion seeking leave to introduce a private member's Bill.

Counsel submitted that the above finding was at variance with the express Rules of Procedure of Parliament. He contended that Rule 174 vests power to arrange the business of Parliament and the order of the same in the Business Committee. Counsel argued that in the proviso to the said rule, the Speaker was only given a prerogative to determine the order of business in Parliament. He contended that the evidence on record specifically under paragraphs 12, 13, 14, 15 and 16 of Hon. Semujju Nganda's Affidavit in support of the Petition demonstrates that on 19th September 2017, the Deputy Speaker assured the House that: (i) there was not going to be any ambush to Members of Parliament

as far as handling the Amendment Bill was concerned; and (ii) the Order Paper would reflect the day's business.

Counsel contended that on 20th September 2017 the Deputy Speaker repeated the same thing and assured Members that nothing would be done in secrecy since all business had to go through the Business Committee under Rule 174.

Counsel argued that the bill was never presented in the Business Committee for appropriate action and consideration. In his view, Members of Parliament were taken by surprise on the 26th day of September 2017 when the Speaker amended the order paper on the floor of the House to include a motion by Hon. Magyezi that sought leave to introduce a private member's Bill to amend the constitution.

Counsel further pointed out that efforts made by the shadow Minister of Justice and Constitutional Affairs, Hon. Medard Sseggona and other MPs to raise procedural matters specifically that there were other motions which had preceded Hon. Magyezi's motion were futile.

Counsel argued that under Rule 27 of the Rules of Procedure of Parliament, the Speaker and Clerk to Parliament were enjoined to give the Order Paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. Further, that under Rule 29 there must be a Weekly Order Paper including relevant documents that must be distributed to all Members through their pigeon holes and where possible, electronically. Counsel argued that all these Rules were flagrantly violated.

Respondent's Submissions

The Attorney General refuted the appellants' contention that the Bill from which the Amendment Act emerged was smuggled into the House. He submitted that in the exercise of its legislative powers set out in Art. 91, Parliament has power to make law. Further, that under Article 94(1), it had powers to make rules to regulate its own procedure, including the procedure of its committees.

The Attorney General further pointed out that under Article 94(4) the Speaker had powers to determine the order of business in Parliament; and that a Member of Parliament had a right to move a private members Bill.

The Attorney General contended further that on 27th September 2017, in exercising his powers under Article 94(4)(b), Hon. Raphael Magyezi tabled in Parliament a motion for leave to introduce a private Members Bill entitled, The Constitution (Amendment)(No. 2) Bill, 2017. The Attorney General submitted that the inception, notice of motion and tabling of the motion were undertaken well within the Rules. In the Attorney General's view, there was no smuggling of the Bill on the Order Paper as alleged by the appellant.

The Attorney General also argued that there was an amendment of the Order Paper by the Speaker as authorized in Article 94 (4) and Rule 24 (Old Rules) (New Rules 25) wherein she had power to set the Order of Business and that under Rule 7 the Speaker presides at any sitting of the house and decides on questions of order and practice. Furthermore, that while doing this, the Speaker made a

ruling on the various motions before her including the motion by Hon Nsamba. In the Attorney General's view, the Speaker was aware of Rule 25(s) new and 24(q) old that provide for an Order of precedence which makes a Private Members Bills come before all others.

The Attorney General also asserted that the Magyezi Bill met the test mandated by Rule 121 and was lawful as Rule 120 (1) allows for every Member to move a Private Members Bill. He pointed out that the bill was introduced by way of a Motion to which was attached the Proposed Bill noting that the other two Bills, that is the Nsamba and Lyomoki Bills had no attachments and one was a mere Resolution.

The Attorney General further contended that the Speaker had [under Rule (47 old) 55 new] been given written Notice of this Motion three days before. In his view, the Speaker as the custodian of what gets onto the Order Paper under Rule 24(Old) Rules gave a go ahead to the Magyezi Bill.

In conclusion, the Attorney General submitted that the appellants' contention that the Magyezi Bill was smuggled into proceedings of the House was therefore unfounded. He called on this Court to uphold the Constitutional Court finding that the Bill followed the required procedure, up to its enactment.

Constitutional Court holding on the alleged Smuggling of the Notice to introduce the Bill on the Order Paper

A review of the Judgments of the Justices of the Constitutional Court shows that: (i) Two of the Justices (Owiny-Dollo, DCJ and

Kasule, JCC) were categorical that the Speaker enjoyed discretion under Rules 24(1) and 165(1) of the old Rules to determine the order of business; (ii) One member of the panel (Musoke, JCC) acknowledged that the Speaker failed to comply with the Rules regarding the addition of the Magyezi Bill on the order paper. She was however of the view that this procedural irregularity did not contravene any of the provisions of the Constitution since the members were able to proceed and debate on the issue; (iii) One Member (Kakuru, JCC) found that the Speaker's actions contravened the Parliamentary Rules of Procedure with the result that the whole process of enactment was vitiated; (iv) One member (Cheborion, DCJ) did not make a finding on this issue.

Consideration of the Issue

The appellants' contention under this issue is that the motion to introduce the Constitution (Amendment) (No.02) Bill was smuggled on the order paper of Parliament of 27/09/2017 and that this was inconsistent with Article 94 of the Constitution and Rules 8, 17, 25, 27, 29 and 174 of the Rules of Parliament. The Attorney General on the other hand contends that the motion to introduce the Bill was properly admitted and tabled on the floor of Parliament.

I note that the appellant has cited the provisions of the 2017 Rules. However, at the time of tabling the Bill on 27/09/2017, it is the 2012 Rules that were still in force. I will therefore refer to the 2012 Rules in my resolution of this issue.

Counsel for the appellants contend that Rule 174 vests power to arrange the business of Parliament and the order of the same in

the Business Committee. Further, that in the proviso to the said rule, the Speaker is only given a prerogative to determine the order of business in Parliament. By this, counsel seems to argue that it is only when the Business Committee has sat and approved the business of the House that the Speaker can then exercise his or her power to determine the order of business as approved by the Business Committee of the House.

This interpretation by the appellants is, in my view, erroneous. Rule 165 (1) of the 2012 Rules provided for the powers of the Committee as follows:

> ***It shall be the function of the Business Committee subject to rule 24, to arrange the business of each meeting and the order in which it shall be taken; except that the powers of the Committee shall be without prejudice to the powers of the Speaker to determine the order of business in Parliament and in particular the Speaker's power to give priority to Government business as required by clause (4)(a)of article 94 of the Constitution.***

A review of this Rule shows inter alia that it is subject to Rule 24 of the 2012 which provides as follows:

> *(1)* ***The Speaker shall determine the order of business of the House and shall give priority to Government business.***
>
> ***(2) Subject to sub rule (1), the business for each sitting as arranged by the Business Committee in consultation***

with the Speaker shall be set out in the Order Paper for each sitting and shall whenever possible be in the following order..."

A clear reading of these two provisions, in my view, shows that the power of the Business Committee to arrange the business of each meeting and order in which it shall be taken is subject to the powers of the Speaker to determine the order of business in the House. My reasoning is further fortified by the provisions of Article 94(4) (a) of our Constitution which provides as follows:

The rules of procedure of Parliament shall include the following provisions- (a) <u>the Speaker shall determine the order of business in Parliament</u> and shall give priority to Government business.

It therefore follows that the powers of the Business Committee to generate business of the House is subject to the powers of the Speaker to determine the order of business of the House.

I also note that under Rule 47 of the old Rules, no motion can be moved unless the Member moving it has given written notice of the motion to the Speaker and the Clerk to Parliament of not less than three days previous to the sitting at which it is intended to move the motion. It is not clear from the record whether and when (if at all) Hon. Magyezi gave his written notice to the Speaker of his intention to move a motion to table a private member's bill. It would therefore ordinarily follow that if Hon. Magyezi did not give this Notice in accordance with the above Rule, then it would be a breach of the rules.

The appellants have also contended that under Rule 27 [Rule 26 of the 2012 Rules], the Speaker and Clerk to Parliament were enjoined to give the order paper in case of the first sitting at least 2 days before the sitting and in any other case, at least 3 hours before the sitting without fail. Further that there must be a weekly order paper including relevant documents that should be distributed to all Members through their pigeon holes and where possible, electronically. All this is in not dispute. However, this, in my view, does not take away the powers of the Speaker to determine the order of business of the House. This power, in my view, extends to amending the order paper to include matters that have not been previously included.

Before I take leave of this matter, I note that both the 2012 and 2017 Rules have provisions for urgent matters which may not necessarily follow the procedure as laid down in those Rules, but nevertheless can be brought before the House on short Notice. Thus, if we were to take the appellants' arguments that all Business to be discussed in the House must pass through the Business Committee or be brought to the attention of the Business Committee which must then circulate the order paper to all members, without which the business shall not be discussed, we would be misinterpreting the intention of Rule 26 [27 new]. The framers of this Rule clearly must been aware of it when they included in the same Rules provisions relating to urgent business that may require immediate attention of Parliament.

In conclusion on this point, it is my view that the Speaker did not breach Article 94 of the Constitution and the Rules of Procedure

when she allowed the Hon. Magyezi to table his motion on the floor of Parliament.

ii. No requisite Consultation and/or Public Participation in the course of enacting the Bill.

Appellants' Submissions

Counsel for the appellants submitted that the learned majority Justices of the Constitutional Court erred in law and fact when they held that there was proper consultation of the people of Uganda on the Constitution (Amendment) Bill, 2017. He submitted that the requisite consultation and public participation of the people, which is mandatory, was not conducted. He argued that public participation is one of the basic structures of our Constitution and therefore this being a matter which touched the foundation of the Constitution specifically Articles 1, 2 and 8A, public participation was of paramount importance.

In support of his submissions above, counsel relied on two persuasive authorities from Kenya, that is **Law Society of Kenya v. Attorney General, Constitutional Petition No. 3 of 2016** and **Robert N. Gakuru & Others v. Governor Kiambu County & Others**. Petition No. 532 of 2013.

Counsel submitted that the significance of consultations, a fundamental value of our Constitution, was not appreciated by the majority Justices of the Constitutional Court. Counsel argued that they dismally failed in their duty of evaluating the evidence on record and as a consequence arrived at a wrong decision that the

people were consulted on the Constitution (Amendment) (No. 2) Bill, 2017 whereas not.

Counsel argued that there was overwhelming and cogent evidence on record indicating that;-

a. The process leading to the enactment of the Constitution (Amendment) Act was not preceded by a Consultative Constitutional review exercise as was the case with the promulgation of the 1995 Constitution and the 2005 amendments.

b. The Constitution (Amendment) Bill was presented in Parliament by a private member, Hon. Raphael Magyezi, and there was no evidence on record that he consulted the people of Uganda let alone his constituents in Igara West Constituency before tabling the same before Parliament.

c. Much as the Speaker directed that consultations should be conducted, Parliament as an institution never designed a structured framework or process for public participation or consultation which may have included Parliamentary *barazas*, public rallies, radio and Television broadcastings among others.

d. The Committee on Legal and Parliamentary affairs which was assigned the duty of processing the Bill did a very shoddy work in terms of consultation.

e. The opposition Members of Parliament were denied the opportunity and right to engage the people over the aforesaid bill. The public gatherings for opposition members of

Parliament which had been organized countrywide were blocked, ruthlessly and violently dispersed by the police and other security agencies and many Members of Parliament and other citizens were arrested, tortured and subjected to inhuman and degrading treatment.

In breaking up the opposition Members of Parliament's rallies, Police relied on the directive issued by Asuman Mugyenyi, the Director of operations, Uganda Police Force, which directive was unanimously declared unlawful, arbitrary, and unconstitutional by the Constitutional Court. Ironically, the Constitutional Court held that there was no evidence to demonstrate that the aforesaid illegal directive was ever implemented and that it had adversely affected the entire consultation process. Counsel argued that this finding was untenable, both in law and fact, as there was overwhelming evidence on record to show that the said directive was enforced as illustrated. Counsel further argued that indeed during cross examination Asuman Mugyenyi admitted that his directive was enforced by all the police officers countrywide.

f. Despite the fact that Members of Parliament were given ex gratia facilitation of UgX29m (save for those who returned it) the purported consultation as argued by the Respondent was illusory and ineffectual.

Counsel invited Court to uphold the findings of the learned dissenting Justice of the Constitutional Court that Parliament

failed to encourage, empower and facilitate public participation of citizens in the process of enacting the Amendment Act.

Respondent's Submissions

The Attorney General submitted that the majority Learned Justices of the Constitutional Court made a proper finding that there was public participation and consultation in the process of conceptualization and enactment of the impugned Act.

The Attorney General also argued that unlike the Constitutions of South Africa and Kenya and the County Governments Act, 2012 of Kenya, the 1995 Constitution of the Republic of Uganda did not provide a standard measure or parameters for consultative constitutional review. Rather it recognizes various roles of people and bodies in the constitutional amendment process and in so doing, permits amendment of the Constitution in various ways as provided in Articles 259, 260, 261 and 262.

The Attorney General further submitted that other than what is contained in the 1995 Constitution and as rightly observed by the Constitutional Court, Parliament has never enacted a law to guide consultation or set parameters or standard measures against which effective consultation or public participation can be measured, be it at pre-legislative stage, legislative stage, and post legislative stage. The Attorney General observed that the only exception was in Article 90(3)(a) which gives the committees of Parliament the power to call any Minister or any person holding public office and private individuals to submit memoranda or appear before them to give evidence.

The Attorney General submitted that in light of this there is no yardstick upon which to measure the extent of the public consultation required to validate an amendment of the Constitution. He argued further that it was dependent on Parliament to determine how best to achieve the participation objective.

The Attorney General also distinguished two cases on public consultation relied upon by the appellants. He argued that the **Doctors For Life** Case which provided for what to look at while gauging whether a Parliament has met the consultation or public participation requirement, was decided basing on the South Africa Constitution which had mandatory provisions [under section 72] that required public participation in the law making process which is not the case in Uganda.

In relation to the case of **Robert Gakuru and others v. Governor Kiambu County** (supra), the Attorney General submitted that while it was elaborate on public participation and consultation it was limited in its application to the Ugandan setting because unlike the provisions in the Constitution of Uganda, public participation is elaborately and illustratively provided for in the Constitution of Kenya and in the County Governments Act, 2012 of Kenya. Further, that these requirements were clearly stipulated in a mandatory manner in articles 10, 94, 118, 174, 196 and 201 of the Constitution of Kenya. Furthermore, that the yardsticks to be used to measure compliance with the public participation and consultation requirements were also provided in section 87 of the County Governments Act, 2012 which is not the case for Uganda.

In the Attorney General's view, because of the different legal regimes in these countries, it would be erroneous for the cited cases and standards set therein to be similarly applicable to Uganda in the absence of a clear legal regime on public participation.

The above notwithstanding, the Attorney General submitted that at pages 620 – 640 Vol. 3 of the record, that he detailed what the Parliamentary Committee on Legal and Parliamentary Affairs did to comply with the requirement for public participation. The Attorney General further submitted that the law is not that all persons must express their views or that they must be heard or that the hearing must be oral. Similarly, he argued, the law does not require that the proposed legislation must be brought to each and every person wherever the person might be. In his view, what was required was that reasonable steps should be taken to facilitate the said participation. In other words, what was required was that a reasonable opportunity should be afforded to the public to meaningfully participate in the legislative process.

The Attorney General also argued that the appellants' attack on the Committee's nature of consultations in terms of quality and quantity was not factual. He argued that notices of invitation [as submitted at pages 620 – 640 Vol. 3 of the record] were published in the print media inviting all persons who wished to participate in the process to do so. He argued further that fifty four groups of persons, legal and natural, heeded the invitation, including the President of Uganda and registered political parties. The Attorney General also argued that Parliament could not deny them

audience. He however argued that Parliament could not force unwilling participants to come to the committee.

It was also the Attorney General's contention that the committee operated within its powers and conducted open hearings as a means of accomplishing its mandate in relation to legislation.

He further argued that there was no merit in the appellants' contention that because only seven out of 455 members adduced evidence of consultation the Act should be nullified for lack of public participation. The Attorney General submitted that an examination of the relevant Hansard clearly showed that the reports of Members of Parliament through their debating and voting was representative of the consultations carried out.

The Attorney General invited this Court to uphold the majority Judgment of the Constitutional Court that in the circumstances proper consultation was carried out.

Constitutional Court holding on the issue of Public Participation/Consultation regarding the Bill

A review of the Judgments of the Justices of the Constitutional Court shows that: (i) Majority Justices found that there was proper consultation carried out in light of the legal provisions prevailing; (ii) whereas there was some stifling of consultations by the Police, there was no sufficient evidence to prove that throughout the country, the police unduly restricted consultative Meetings.

Consideration of the Issue

The appellants' major contention under this issue is that there was no sufficient consultation of the public (if any) in the course of

gathering views regarding the proposed amendments in the Bill. The appellants further contend that the Police frustrated their consultation with unnecessary interruptions and that in some cases they did not consult their constituents at all.

There is no doubt that the authorities cited by the appellants properly illustrate the concept of public participation and the yardstick for determining whether public participation has been achieved in respect of a proposed enactment of Parliament. However, it is worthwhile noting that these authorities are from countries which have in their Constitutions and Statutes elaborate provisions guiding on public consultation. This is not the case with Uganda. Be that as it may, since the people of Uganda are the source of all power under our Constitution, it is very important that they should be consulted whenever there is a proposed amendment to the Constitution or any law proposed to be enacted by Parliament. Public participation is therefore of paramount importance in this respect.

In my view, it is a fundamental part of the legislative process reflective of good governance and has been recognized as such at various levels. For example, at the international level various international human rights instruments emphasize the importance of public participation in governance. For instance, under the **Universal Declaration of Human Rights of 1948**, Article 21 is to the effect that everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Furthermore, in the **International Covenant on Civil and Political Rights (ICCPR)**, Article 25 thereof provides as follows:

> ***"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions;***
>
> ***(a)To take part in the conduct of public affairs, directly or through freely chosen representatives;..."***

In **Kiambu County Government & 3 ors v. R. N. Gakuru & Ors,** (supra), the Kenyan Court of Appeal emphasized the need to involve the public in the legislative process. It emphasized this participation as follows:

> ***The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation***.

Lastly, in **Doctors for Life International v. the Speaker of the National Assembly and 11 ors, Case CCT 12 of 2005**, the South African Constitutional Court set down the following test with regard to public participation in the legislative process.

> ***To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional***

obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.

Would it be correct to argue that in regard to the Amendment Bill there was no public consultation or that it was inadequate?

Review of the Hansard shows: (i) that the Chairperson of the Legal and Parliamentary Affairs Committee while presenting his report before the House informed the House that they had made wide consultations. For emphasis, he attached a list of those the Committee had consulted along with their memorandum; (ii) the Committee made announcements in print and electronic media inviting people to give their views on the proposed amendments; (iii) Some of the stakeholders invited by the Committee entered appearance while others did not; (iv) Each Member of Parliament was given 29,000,000/= by the Parliamentary Commission to go to their Constituencies and consult their constituents on the Bill; (v) Almost all members of Parliament informed the House in the course of debating that they had consulted their people on the matter. Clearly, this, in my view, shows that there was consultation of the people by those whom they had elected to represent them.

No one can deny that the Police Director of Operations wrote a letter restricting consultation. The Constitutional Court rightly condemned this as a blatant violation of fundamental human rights and freedoms.

The appellants' major evidence on the issue of lack of consultation on the provisions of the Bill as a result of violence was contained in the affidavit evidence of 5 members of Parliament.

The first was **Hon. Winfred Kiiza**, Woman MP for Kasese District. She deponed in the relevant part as follows:

> *13 That I wish to state and contend that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were inconsistent with and in contravention of the Constitution as hereunder:-*
>
> *(v) That when the Constitutional (Amendment) Bill No. 02 of 2017 was introduced, the Clerk to Parliament dispatched me and other Members of Parliament to conduct nationwide consultations in our respective constituencies concerning the said impugned Constitution Amendment Bill.*
>
> *(w) That given my position as the leader of the Opposition in Parliament, I and other Members of Parliament leaning to the opposition met and agreed to conduct joint nationwide consultative meetings and rallies regarding the impugned Constitution (Amendment) Bill.*
>
> *(x) That based on the above decision, I joined the Hon. Ssewanyana Allan, Member of Parliament for Makindye West, Hon. Kasibante Moses, Member of Parliament for Rubaga North, Hon. Kato Lubwama, Member of Parliament for Rubaga South and Hon. Jack Wamai Wamanga, Member of Parliament for Mbale Municipality among others. That while in the process of consulting*

the people in the above mentioned constituencies on different occasions, the Police disrupted our consultation meetings by beating, torturing the people, using tear gas and firing live bullets in an attempt to disperse the people who had gathered to give us their views regarding the Constitution (Amendment) Bill.

(y) That I have been advised by my lawyers which advice I verily believe to be true that the arbitrary actions of the Uganda Police Force in beating, torturing and arresting Members of Parliament and their electorates during the consultation meetings on the Constitution (Amendment) Bill, 2017 were inconsistent with and in contravention of articles 1, 3, 8A, 24, 29, 44(c), 79, 2018(2), 209, 211(3), and 259 of the Constitution

The second direct evidence was in the Affidavit of **Hon. Ssewanyana Allan, Member of Parliament for Makindye West** who deponed in the relevant parts as follows:

16 That I wish to state and contend that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were inconsistent with and in contravention of the Constitution as hereunder:-

(l) That I am aware that the Committee on Legal and Parliamentary Affairs did not consult the people of Uganda for them to present their views on the impugned Constitution (Amendment) Act and as such, the national interest of the people was ignored.

(m) That I am advised by my lawyers that the failure to involve the people of Uganda in the process leading to the enactment of Constitution (Amendment) Bill No. 02 of 2017 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution and as such was inconsistent with and in contravention of Articles 1, 2, 8A, 79, and 91 of the Constitution.

The third deponent was **Hon. Odur Jonathan, MP Erute County South** who deponed as follows:

15 *That I wish to state and contend that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were inconsistent with and in contravention of the Constitution. The use of violent means at the time of the enactment of the impugned Act arose as hereunder:-*

(r)That on 24th October, 2017, I and Hon. Atim Joy Ongom (Woman MP Lira District), Hon. Abacacon Angiro Gutomoi Charles (MP Erute County North), Hon. Akello Sylvia (Woman MP Otuke District), Hon. Okot Felix Ogong (MP Dokolo South) and Hon. Atim Barbara Cecilia Ogwal (Woman MP Dokolo District also Commissioner of Parliament) on 24th October 2017 were violently and unlawfully stopped from consulting the people and that Police dispersed people who had gathered at Adyel Division in Lira District for the consultation on Constitution (Amendment) Bill No.2 of 2017 by firing live bullets and teargas inflicting severe fear in me…

(s) That the actions of the armed forces of Special Forces Command, the Uganda Police Force and other militia in beating, torturing arresting and subjecting me and other Members of Parliament while in our various constituencies to consult the people on the Constitution (Amendment) Bill, 2017 were inconsistent with and in contravention of articles 1, 3, 8A, 24, 29, 44(c), 79, 208(2), 209, 211(3) and 259 of the Constitution.

The fourth deponent was **Hon. Munyagwa S. Mubarak, MP Kawempe South Constituency** who deponed as follows:

16. *That I am reliably advised by my lawyers which advise I verily believe to be true that the use of violence and unlawful means at the time of tabling and actual enactment of the Constitutional (Amendment) Bill No. 02 of 2017 were*

inconsistent with and in contravention of the Constitution as hereunder:-

(j) That I am aware that the Committee on Legal and Parliamentary Affairs did not consult the people of Uganda for them to present their views on the impugned Constitution (Amendment) Act and as such, the national interest of the people was ignored.

(k) That I have been advised by my lawyers which advise I verily believe to be true that the failure to involve the people of Uganda in the process leading to the enactment of Constitution (Amendment) Bill No. 02 of 2017 was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National objectives and Directive Principles of state policy and other constitutional provisions and as such was inconsistent with and in contravention of Articles 1, 2, 8A, 79, 91, 259 and 260 of the Constitution.

Lastly, **Hon. Betty Nambooze Bakireke, MP Mukono Municipality** deponed as follows:

19. That I have been advised by the Petitioner's advocates, which advise I verily believe to be true that the purported decision of the Committee on Legal and Parliamentary Affairs to ignore the need for participation of the people of Uganda and present their views on the impugned Constitution (Amendment) Act was against the spirit and structure of the 1995 Constitution enshrined in the preamble of the Constitution, the National objectives and Directive Principles of state policy and other constitutional provisions and as such was inconsistent with and in contravention of Articles 1, 2, 8A, 79, 91, 259 and 260 of the Constitution.

The above-mentioned Members of Parliament deponed in their affidavits that there was no consultation or that there was interference with the process of consultation as I highlighted above.

Hon. Winfred Kiiza deponed her affidavit in her dual capacity as Woman MP for Kasese District and as Leader of the Opposition. In her affidavit she avers that she joined some Members of Parliament in their Constituencies in the course of the consultation. These members were the Hon. Allan Ssewanyana, MP Makindye West, Hon. Kasibante Moses, MP Rubaga North, Hon. Kato Lubwama. MP Rubaga South and Hon. Jack Wamai Wamanga, MP Mbale Municipality. She does not depone in her affidavit that in her own constituency, her consultations were interfered with.

A review of the Hansard shows that save for Hon. Kasibante Moses, MP Rubaga North, the rest of the mentioned members did not air out their views during the debate on the Committee's Report at the second reading. However, save for Hon. Allan Ssewanyana, MP Makindye West, the rest of the members voted at the second reading and third. With regard to Hon. Kasibante Moses, MP Rubaga North, his submissions on the floor of Parliament appear to contradict the statements deponed by Hon. Winfred Kiiza. In his submissions on the floor of Parliament during debate on the Committee's Report, he stated as follows:

> *…Madam Speaker, the Constituency I represent is a home to very senior officials of this Government, including the Vice President and this is what they have sent me to say…'*

He then proceeds to state what his constituents told him. This is captured at page 5222 of the Hansard. When this is compared to what the Hon. Winnie Kiiza stated in her affidavit, it is clear that contrary to what she alleged in her affidavit, there was consultation of the people in Rubaga North. It suffices to note that save for Hon. Ssewanyana Allan, the rest of the other Members of Parliament she mentioned in her Affidavit did not depone affidavits of their own.

Turning to the **affidavit of Odur Jonathan**, I note that he also mentions different MPs from Lango region whose consultations were interfered with by the Police and other security personnel. These were: (i) Hon. Atim Joy Ongom (Woman MP Lira District), (ii) Hon. Abacacon Angiro Gutomoi Charles (MP Erute County North), (iii) Hon. Akello Sylvia (Woman MP Otuke District), (iv) Hon. Okot Felix Ogong (MP Dokolo South) and (v) Hon. Atim Barbara Cecilia Ogwal (Woman MP Dokolo District also Commissioner of Parliament).

None of these MPs deponed their own affidavits. This notwithstanding, a review of the Hansard of Parliament of 20/12/2019, shows that by the time the Speaker closed the debate on the Committee's Report, two members (Hon. Atim Joy Ongom and Hon. Okot Felix Ogong) had made submissions on the Report. At page 5203 the Hon. Atim Joy Ongom submitted as follows:

> *Thank you so much, Madam Speaker, for giving me this opportunity. Thank you also for giving us the opportunity to go and consult with our constituencies.*
>
> *I consulted my people-Lira District has got three constituencies: Erute South, Erute North and Lira Municipality. In Lira Municipality alone, I had over 6,000 people in one gathering but it was unfortunate that we were dispersed with teargas and that was the circumstance where you heard that Hon. Cecilia Ogwal was beaten.*
>
> *The voters gave me their information and my people said, 'No' to the amendment of Article 102(b). They said I should not touch it…'*

Clearly, the above shows that the Hon. Atim Joy Ongom consulted contrary to what Hon. Odur Jonathan alleged.

With regard to the Hon. Okot Felix Ogong, pages 5171 and 5172 of the Hansard show that he aired his views in the course of the debate of the Committee's Report. Suffice to say, the record shows that at the time of being timed out, he had not mentioned anything about his consultations being frustrated. The other members mentioned in the affidavit of Odur Jonathan show that they participated in the voting process.

The record also shows that the Hon. Winfred Kiiza and Hon. Betty Nambooze had not contributed by the time the Speaker closed the debate on the Committee's Report. However the record shows that when voting on whether the Bill should go for the third reading, both of them participated. They also participated during voting on the 3rd reading.

Further review of the Hansard shows that majority of the members of opposition in Parliament debated the Committee's Report during the second reading. Indeed each member who rose to speak on the Report categorically stated that they had consulted their constituents and that the views they were presenting were those of their constituents. These members included inter alia Hon Kyagulanyi (Page 5161), Hon Lilly Adong (5162), Hon. Mafabi (5186), Hon. Odongo Otto (5225) and Gilbert Olanya (5220).

While taking note of the affidavit evidence that in a few parts of the country some consultation rallies were violently dispersed, which again was clearly unconstitutional as it was in violation of Article 23 of the Constitution, I do not accept the view that because of the unlawful incidents that happened in limited parts of the country (for that is what the evidence on record show) the court should

declare the whole process of enacting the Amendment Act unconstitutional on account thereof.

Accordingly, it is my view that the people of Uganda were consulted by their members of Parliament with regard to Hon. Magyezi's bill as tabled in Parliament. I, therefore, agree with the finding of the majority Justices of the Constitutional Court in this respect.

iii. Non Observance of Rule 201: Bill not tabled, Non observance of three days Rule and Motion to suspend Rule 201 not seconded.

Appellants' Submissions

Under this issue, counsel for the appellants submitted that: (a) hard copies of the Committee Report were not tabled as required under Rule 201(1); (b) there was nonobservance of Rule 201(2) which requires debate of a Committee Report to take place three days after it had been laid on the table; and (c) the motion to suspend Rule 201 was never seconded.

Counsel faulted the learned Justices of the Constitutional Court for holding that the motion to suspend Rule 201(2) was at the Committee stage of the whole House. He argued that the evidence on record shows that the motion was made during plenary. In his view, the failure to second the Deputy Attorney General's motion to suspend rule 201 was an illegality that rendered subsequent proceedings invalid.

Respondent's Submissions

The Attorney General refuted the Appellants' assertion that the suspension of Rule 201 (2) of the Rules of Procedure of Parliament and non secondment of the motion to waive Rule 201 adversely affected the whole process of enacting the impugned Act. He further disputed the appellants' assertions that the suspension of Rule 201(2) deprived Members sufficient time to debate the report of the Legal and Parliamentary Affairs Committee in that they were given only 3 minutes to debate and that hard copies were not duly tabled before the house as provided in Rule 201 (1).

The Attorney General submitted that the evidence [at page 719 of the record] shows that on 18th December, 2017 the Speaker informed the House that on the preceding Thursday, she had directed the Clerk to upload the committee's report on their ipads and that therefore the highlighted Rule did not apply. The Attorney General further submitted that at page 263 of the record, wherein the motion to suspend Rule 201 (2) was moved and debated, the said motion was supported by Hon Janepher Egunyu at Page 761 of the record and other members who rose up to debate and support the motion.

Relying on the decision of Alfonso Owiny-Dollo, DCJ [at page 176] and Cheborion, JCC [at Page 95], the Attorney General submitted that Members of Parliament had adequate notice as to the contents of the report (four days before debating the same) and therefore the purpose of Rule 201(2) was achieved

He prayed that since the Members of Parliament received the report of the Committee three days before the debate, this Court

should uphold the finding of the Constitutional Court that no prejudice was caused to the members.

Regarding the issue of secondment of the motion by the Deputy Attorney General, the Attorney General submitted that this issue was extensively interrogated by the learned Justices of the Constitutional Court before making their findings. He argued that all the Justices of the Constitutional Court found that since Parliament was proceeding as a Committee of the Whole House, the failure to second the motion of Hon Mwesigwa Rukutana offended no Rule at all.

The Attorney General asked this Court to find that the Constitutional Court came to the right decision as far as the secondment of the motion for suspension of Rule 201 was concerned. He invited this court to reject the assertion by the Appellants and uphold the findings of the majority Justices.

Without prejudice to his submissions above, the Attorney General submitted that Rule 59 of the Rules of Procedure of Parliament does not prescribe the manner of seconding a motion. Rather that it simply required a motion to be seconded. In the Attorney General's view, considering that the Rules are silent on the manner of secondment, the practice that has been adopted by the House is for Members who are seconding a motion to either rise up in support when a motion is proposed or if the motion is with notice, the designated Members stand up and speak to the motion in support.

Constitutional Court holding on Rule 201

A review of the Judgments of the Justices of the Constitutional Court shows that by majority [4 to 1], the learned Justices found that: (i) Parliament properly suspended Rule 201 (2) via a motion presented by the Deputy Attorney General; (ii) the requirement for secondment of the Deputy Attorney General's motion was not necessary since it was moved when Parliament was proceeding as a Committee of the whole House; (iii) the purpose of 'tabling' the Bill was achieved by uploading the Committee's Report on the Members' Ipads four days prior to the presentation of the Committee Report. The Justices observed that the purpose was to give the Members adequate notice of the contents of the Report, so that they could debate from an informed point of view.

Consideration of the Issue

The relevant provisions of the contentious Rule 201 for purposes of resolving this issue are as follows:

(1) ***A report of the Committee shall be ... laid on the Table...***

(2) Debate on a report of the Committee on a bill, shall take place at least three days after it has been laid on the table...

The appellants contend that there was a violation of this Rule because: (i) the Committee Report was never tabled on the floor of Parliament; (ii) the debate on the report commenced before three days passed; and (iii) the motion to suspend Rule 201 (2) was not seconded and thus the Rule was still applicable.

(i) <u>The Committee Report was never tabled on the floor of Parliament</u>

A review of the Hansard of Parliament of 18/12/2017 shows that the Chairperson of the Committee on Legal and Parliamentary Affairs, Hon. Jacob Oboth tabled on the floor of Parliament a copy of the Committee Report and copies of stakeholder submissions [See Page 718 Vol 1]. Further review of the Hansard shows that immediately after tabling the Report, the Hon. Gerald Karuhanga raised a procedural point regarding Rule 201(2). He submitted as follows:

> *"Madam Speaker, the procedural point I am raising is specifically from Rule 201(2). The Chairperson of the Committee laid the report a few minutes ago and the rule instructs that once the report of the Committee on a Bill is laid on the Table by the Chairperson…, the debate shall ensue three days later."*

Clearly, what can be discerned from the above is that the Committee Report was indeed tabled in the literal sense of the word as used in Rule 201.

However, failure to give members hard copies was not fatal. The record of the Hansard is clear that the members were given electronic copies of the same. At page 719 of the Record, the Speaker ruled as follows:

> ***Honourable members, ever since the ninth parliament, we agreed to use less paper and that is why we bought you ipads. Last week, on Thursday, I directed the clerk to***

upload all these reports on your ipads so this rule does not apply.

It is clear from the above excerpt that members had access to the Committee's Report. No member came up to state that he or she did not receive a copy of the Report. Failure to avail members of the report would have been fatal. In the circumstances, I find that the Committee's Report was duly tabled in accordance with Rule 201(1) of the Rules of Parliament.

(ii) **The debate on the report commencing without three days having passed and alleged failure to second the motion to suspend Rule 201 (2).**

It is not in contention that debate on the report commenced immediately after its tabling and presentation by the Chairperson of the Committee. In my view this was a breach of Rule 201(2). It is also not true that the motion to suspend the rule was moved at Committee stage. It was actually moved during the plenary. However, I do not agree that this was fatal to the bill. My view is premised on two factors.

The first factor is on the rationale of the three days Rule in Rule 201 (2). I agree with the learned Justices of the Constitutional Court that the rationale for the three days rule was to enable members internalize the Report and its contents so that they could debate it from an informed point of view. Indeed some of the members were alive to this reason as well. For example, Hon. Karuhanga, having raised on a point of procedure in regard to Rule 201(2) submitted as follows:

...Therefore, I would like to believe equally that this was intended to allow us, as members, to deal with all the issues and objections, to analyze, study, assess and consult because we represent the people of Uganda so that we come here, we speak for Ugandans and not ourselves.

At page 755 of the Record, the Deputy Attorney General submitted as follows:

> *The rule is intended, as I said, to ensure that members have at least three days to look at the Committee Report, scrutinize it and inform themselves on how they debate.*

Thus by members receiving electronic copies four days in advance and before the Committee Report was presented to them, diligent members who were desirous of perusing the Report had ample time within which to peruse the report so as to acquaint themselves with the contents. It would therefore follow that they could not talk of being ambushed.

The second factor relates to the fact that Rule 201(2) was suspended by the House. The Deputy Attorney General moved a motion that Rule 201(2) be suspended so that debate on the Bill can proceed immediately.

Rule 16 (1) provides for suspension of Rules as follows:

> ***Any Member may, with the consent of the Speaker, move that any rule be suspended in its application to a particular motion before the House and if the motion is carried, the rule in question shall be suspended.***

Subrule (2) of this rule however, provides an exception as follows:

> *This Rule shall not apply in respect to rule 5, 6, 11, 12, 13(1), 16 and 97*

Rule 201(2) is not among those Rules excluded under Rule 201(1). It therefore follows that Rule 201(2) can be suspended. The question that follows is whether the motion was properly passed. Rule 58 provides for **motions which may be moved without notice.** An example of such a motion is *'any motion for the suspension of any Rule of Procedure.'* [See Rule 58(d)] Ordinarily, motions require secondment. This is evident in Rule 59 (1) which provides as follows:

> ***In the House, the question upon a motion or amendment shall not be proposed by the Speaker nor shall the debate on the same commence unless the motion or amendment has been seconded.***

There is evidence on record that the Deputy Attorney General's motion to suspend Rule 201(2) was seconded. At page 761, the Hon. Janepher Egunyu is quoted by the Hansard submitting as follows:

> *'Thank you Madam Speaker, for giving me a chance to speak on this matter. I have stood to support the Attorney-General in suspension of this Rule…Before we waste a lot of time, I would like to support the Attorney General that we suspend the rules and the debate goes on."*

Whereas Rule 59 provides for seconding of motions, it does not define what amounts to seconding. Thus in the absence of clear parameters of what can amount to seconding a motion, it is my view that any form of support for a motion on the floor by any member, other than the mover of the motion, amounts to seconding.

In conclusion on this issue, it is my finding that the majority learned Justices of Appeal did not err when they held that rule 201 was not breached (3 Justices) or that non observance of rule was not fatal.

iv. Alleged Denying Members adequate time to consider and debate the Bill.

Appellants' Submissions

Counsel submitted that there was overwhelming evidence on record to show that Members of Parliament were not accorded sufficient time to debate the report of the Legal and Parliamentary Affairs Committee notwithstanding the fact that this was a matter of great national importance.

Counsel for the Appellants further contended that the actions of the Speaker to close the debate on the Amendment Bill before each and every MP could debate and present their views on the bill was in violation of Rule 133 (3) of the Rules of Procedure of Parliament.

Respondent's Submissions

The Attorney General submitted that Rule 80 (2) of the Rules of Procedure of Parliament provides that if the question of closure is agreed to by a majority, the motion which was being discussed

when the closure motion was moved shall be put forthwith without further discussion. He argued that the requirement is that the majority have to agree to the closure and that this was done. The Attorney General further argued that there was no requirement that each and every Member of Parliament must debate before closure.

He called on this Court to find that the Constitutional Court rightly arrived at the decision they made and prayed that this Court upholds the same.

Constitutional Court holding on the issue of denial of time to Members of Parliament in the course of debate

A review of the Judgments of the Constitutional Court shows that the Justices of the Constitutional Court who considered this issue found that: (i) it was not a mandatory requirement that for any constitutional amendment bill to be enacted into law, deliberations must be received from each and every Member or majority of Members; (ii) Some Members of Parliament interupted the debate by unnecessary disruptions all aimed at frustrating the proceedings; (iii) there is no evidence on record that any Member of Parliament was prevented from further contributing on the debate at the third reading of the bill.

Consideration of the Issue

The appellants' contention that members were denied time to consider and debate the Bill is premised on: (i) Commencement of debate on the Bill immediately after it had been tabled; (ii) the Speaker allocating only three minutes to each member proposing

to debate; and (iii) the Speaker closing the debate on the Bill before each member had debated.

(i) **Commencement of debate on the Bill immediately after it had been tabled**

Most of the appellants' contentions were premised on the contravention of Rule 201. As I have shown in the preceding issue, Rule 201(2) was properly suspended. Furthermore, each member had access to the Committee Report four days prior to the debate since the same had been uploaded on their ipads. In my view, this constituted sufficient time for vigilant members to read and internalize the contents of the Committee's report. It would therefore follow that there was no ambush on them with regard to the issue of preparing for debating.

(ii) **The Speaker allocating only three minutes to each member proposing to debate**;

Considering that it was a full house, giving each member three minutes to express their views on a report they had received in advance was fair in the circumstances. Further review of the record shows that indeed when some of the members stood up to debate, they exceeded the 3 minutes allocated to each member, since the Speaker could in some cases grant an extension of time.

(iii) **The Speaker closing the debate on the Bill before each member had debated.**

Review of the Record [vol 1 Page 855] shows that before the Speaker put the question to close the debate, she pointed out that

124 members had contributed. She immediately put the question to close the debate and it was agreed to.

Rule 80 provides for a motion for closure of debate as follows:

(1) After a question has been proposed in the House…and debated, a member may move 'That the question be now put', and unless it appears to the Speaker that the motion is an abuse of the rules of the House or an infringement of the rights of any Member, the question "That the question be now put' shall be put forthwith and decided without amendment or debate.

(2) If the question of closure is agreed to by a majority, the motion which was being discussed when the closure motion was moved shall be put forthwith without further discussion.

This rule in my view was followed to the letter by the Speaker.

v. <u>Alleged Illegal Suspension of some Members of Parliament.</u>

Appellants' Submissions

Counsel submitted that on the 18th December 2017 when parliament convened to consider the report of the legal and parliamentary affairs committee, three Honorable Members of Parliament raised two pertinent points of law to which the speaker declined to give her ruling and instead arbitrarily suspended some Members of Parliament from parliament in contravention of Articles 1, 28(1), 42, 44 (c) and 94 of the Constitution.

He argued that the Hansard showed that Hon Theodore Sekikuubo brought to the attention of the Speaker the fact that the report of the Committee on Legal and Parliamentary affairs was fatally defective since non Members had signed it. Further that Hon. Ssentamu Robert and Hon. Betty Amongi raised another point of procedure that the matter concerning the Amendment Bill was before the East African Court of Justice and that proceeding with the same would amount to breach of the sub judice rule. Counsel contended that rather than pronouncing herself on these issues raised, the Speaker instead adjourned the proceedings. Furthermore, that before Members could leave the chambers, the Speaker made an arbitrary order suspending some Members of Parliament without assigning any reason whatsoever as required under the Rules nor did she state the offences committed.

Counsel took issue with the finding of the Constitutional Court that the decision of the Speaker to suspend certain Members of the House from participating in the proceedings in the House was due to the fact that the suspended members had defied the Speaker and disrupted the proceedings in the House; thus provoking the wrath of the Speaker.

Counsel submitted that the learned Justices of the Constitutional Court misdirected themselves on matters of law and fact. He argued that the Speaker grossly violated the Rules of Procedure of Parliament and she did not accord the said MPs a fair hearing before suspending them; she did not assign any reason for their said suspension; and she acted ultra vires since she was functus officio at the time she pronounced her arbitrary decision

suspending the said MPs. Counsel submitted further that by virtue of the illegal suspension of the MPs, the Speaker denied them a right to effectively represent their respective Constituencies in the law making process and as such the same vitiated the entire process.

Respondent's Submissions

The Attorney General contended that Rule 7 of the Rules of Procedure of Parliament provided for the general power of the Speaker. He argued that under Rule 7(2), the Speaker had an obligation to preserve order and decorum of the House. Further that Rules 77 and 79(2) give the Speaker powers to order any members whose conduct is grossly disorderly to withdraw from the house. Furthermore that under Rule 80, the Speaker is permitted to name the member who is misbehaving and that under Rule 82 the Speaker has power to suspend the member from the service of the House.

The Attorney General pointed out that the matter of suspension of the Members of Parliament was ably canvassed in the Affidavit of the Clerk to Parliament [at Paragraphs 17- 23, page 612-613 record].

Relying on the Judgments of Musoke, JCC [at page 737]; Owiny Dollo, DCJ [at Page 171-172]; Cheborion, JCC [at page 632] and Kasule, JCC [at pages 263-264], the Attorney General submitted that the Constitutional Court rightly found that the Rules conferred upon the Speaker of Parliament the mandate to order a Member of Parliament whose conduct has become disorderly and

disruptive to withdraw from Parliament and the Speaker properly did so.

The Attorney General further pointed out that once a Member who conducted himself/herself in a disorderly manner was suspended, Rule 89 required that such a member had to immediately withdraw from the precincts of the House until the end of the suspension period. The Attorney General also argued that Rule 88 (4) gives guidance on the period of suspension of a member and that it requires that a Member who is suspended on the first occasion in a session shall be suspended for 3 sittings. The Attorney General placing reliance on Rule 88(4) argued that the 3 sittings for which the member was suspended started running from the next sitting of Parliament.

The Attorney General submitted that the Appellant misconstrued the import of Rule 88 (4) in as far as it applied to the circumstances of this case. He argued that going by the Appellant's arguments, it would be absurd that a Member who was found by the Speaker to have conducted himself/herself in a disorderly manner in the House and is therefore suspended from the services of the House, is then allowed to remain in the House for the day's sitting.

As far as the right to fair hearing was concerned, the Attorney General submitted that Rule 86(2) of the Rules of Procedure of parliament provide that the decision of the Speaker or Chairperson shall not be open to appeal and shall not be reviewed by the House, except upon a substantive motion made after notice which in the instant case was not made by the suspended Members.

Regarding the contention that the Speaker while suspending the Members was out of her chair, the Attorney General submitted that this was not true. In support of his contention, he referred to the Hansard of 18th December 2017 [at page 726 of the record] of appeal where the Speaker said

> *"... I suspend the proceedings up to 2 o 'clock but in the meantime, the following members are suspended..."*

The Attorney General further submitted that the reason for suspension was at page 731 of the record of appeal.

The Attorney General submitted that under Article 257 (a) of the Constitution as well as under Rule 2(1) of the Rules of procedure of Parliament define, 'sitting' is defined to include a period during which Parliament is continuously sitting without adjournment and a period during which it is in Committee. Furthermore, that Rule 20 of the rules of Procedure of Parliament provide that the Speaker may at any time suspend a sitting or adjourn the house.

In light of this, the Attorney General contended that the Speaker only suspended the sitting to 2.00 o'clock and did not adjourn the House, hence there was a continuous sitting and therefore she was not functus officio.

In conclusion on this point, the Attorney General submitted that the Speaker properly acted within her mandate to suspend Members of Parliament for their unparliamentarily conduct. Further that there is no evidence to show that the suspended Members of Parliament moved a substantive motion challenging

their suspension. He prayed that the findings of the Justices of the Constitutional Court be confirmed.

Constitutional Court holding on the suspension of some Members of Parliament

A review of the Judgments of the learned Justices shows that: (i) there was unrebutted evidence that the suspended Members had defied the Speaker and disrupted the proceedings in the House thus provoking the Speaker to suspend them; (ii) In the exercise of her discretion to suspend the Members, the Speaker did not act ultra vires the Rules permitting her to take disciplinary action to maintain the honour of the House; and (iii) whereas each member has a right to participate in the proceedings of Parliament, this participation is premised on good behavior in the House. A member can be suspended by the Speaker for purposes of preserving order and decorum in the House if the member engages in misconduct that disrupts proceedings.

Consideration of the Issue

The appellants contend that the suspension of some members of Parliament was illegal because: (i) it was arbitrarily done since they were never accorded a hearing before the suspension; (ii) the Speaker did not disclose the offence committed by the suspended members and/or reason as required by the rules; (iii) the Speaker acted ultra vires since she was functus officio; (iv) in suspending them, the Speaker denied them an opportunity to represent their constituents.

The Attorney General contends that whatever action the Speaker took was within her powers as provided for in the Rules.

Rule 7 provides for the general powers of the Speaker. Sub-rule 2 mandates the Speaker to *'preserve order and decorum in the House.'* The duty to ensure order in the house is emphasized by Rule 86(2) of the Rules of Parliament.

Rule 82 provides guidelines on how a member of parliament is expected to conduct himself or herself and what he or she is not supposed to do in the course of a sitting. For emphasis, members are also expected to abide by the Code of Conduct prescribed in appendix F of the Rules. Rule 87 provides for order in the House. Sub-rule 2 provides in the relevant terms as follows:

> ***The Speaker...shall order any member whose conduct is grossly disorderly to withdraw immediately from the House...for the remainder of that day's sitting...***

Rule 88 provides for naming and suspending of members as follows:

> *(1)* ***If the Speaker...considers that the conduct of a member cannot be adequately dealt with under sub rule (2) of rule 87, he or she may name the member.***
>
> ***(2) Where a member has been named, then-***
>
> ***(a) In the case of the House, the Speaker shall suspend the member named from the service of the House;***

Lastly, under Rule 89, a member who has been suspended from the service of the House by virtue of sub rule (2) or (3) of rule 88 is required to immediately withdrawal from the precincts of the House until the end of the suspension.

A review of the Record [at Vol 1page 726] shows that on 18 December 2017, at around 11 o'clock, the Speaker suspended 6 members. These members were: (i) Hon. Ibrahim Ssemujju; (ii) Hon Allan Ssewanyana; (iii) Hon. Gerald Karuhanga; (iv) Hon. Hon. Jonathan Odur; (v) Hon. Mubarak Munyagwa; and (vi) Hon. Anthony Akol.

It suffices to note that immediately when the Speaker commenced the proceedings of the day, she observed as follows:

> ***"...I would like to appeal to the honourable members to exercise tolerance and a spirit of accommodation...I also would like to remind the members who were suspended last time that if they do misconduct themselves again, they will be suspended again, this time for seven sittings...therefore do not endanger your right to speak and vote. I am just asking you honourable members, that we tolerate and listen to one another..."***

Some of the members did not take heed to the Speaker's advice. Indeed a review of the Hansard from the moment the Speaker said the above words to the suspension of the members shows that: (i) Many times the Speaker pleaded with members to be orderly and to take their seats. In one instance she shouted *'Order!'* followed by *'Honourable Members, I would like to remind you about rule 88 of the Rules of Procedure of Parliament: your conduct in the House'*; and (ii) the Speaker called on the leader of opposition to manage her side. Indeed in one instance the Speaker asked, *'Are you members assaulting the leader of opposition. Give her space.'* Clearly, what can be inferred from all this is that there were

members who in the eyes of the Speaker were behaving contrary to the Rules which required them to behave with decorum and curtsy. It is therefore not surprising that the Speaker, in order to bring order in the House, suspended some of those members.

Members of Parliament are expected to behave in a way that brings honor to the House. See **Severino Twinobusingye vs AG, Constitutional Petition No. 47 of 2011.**

I would therefore find no fault with the decision of the Speaker to suspend members who conducted themselves in a disorderly way. She acted within her powers as provided for in the Rules highlighted above. If any of the suspended members felt that they were unjustly treated by the Speaker, nothing prevented them from moving a substantive motion in Parliament to challenge her action.

On the issue of fair hearing, I find the appellants' assertion that the Speaker should have given members who were suspended a hearing before suspending them untenable. The members misbehaved before the Speaker who called them to order many times. They were aware of their conduct as well. I concur with the analogy of contempt of Court made by Kasule, JCC, in his Judgment that:

> ***It is asserted by the petitioners that the Speaker ought to have afforded a hearing and also have provided reasons for suspending the six Honourable Members of Parliament under Articles 28(1) and 44(c). It is however unexplained by the petitioners what fair hearing the***

Speaker should have given to the suspended members. Like in contempt of Court proceedings the members affected misconducted themselves in the very eyes and hearing of the Speaker, including disobeying her very orders to them to be orderly and the very members were exchanging defiant words and physical gestures to the chair.

The appellant's also argue that the Speaker acted ultra vires since she was functus officio by the time she suspended the members. A review of the record shows that in the course of the proceedings, it was brought to the attention of the Speaker that the report of the Committee on Legal and Parliamentary affairs was allegedly signed by non members. In the ensuing debate, she observed that she needed to assure herself as to the membership of the Committee. She observed as follows:

"...I will ascertain the issue which has been raised about membership on that Committee, particularly the number of members. I also would like to check the Daily Hansard because I was not here when the transfers were made. Therefore, I will suspend the proceedings for today up to 2 o'clock. I suspend the proceedings up to 2 o'clock but in the meantime, the following Members are suspended...They should not come back in the afternoon.

A question that needs to be answered is whether the Speaker was functus officio at the time of suspending the members.

Black's Law Dictionary defines the term functus officio as follows:

"**Without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."**

In my view, the Speaker had legal competence to act the way she did. She could have acted functus officio if she had suspended the members after adjourning the House and not merely suspending it. Accordingly in my view the Speaker was not functus officio when she suspended the members.

Lastly, the appellants argue that in suspending the members, the Speaker denied them an opportunity to represent their constituents. Whereas this might be so, I have already found that the Speaker duly exercised her powers to suspend the members. Since the Speaker's actions were lawful, it follows that suspension was proper.

In conclusion on this issue, I hold that members were properly suspended by the Speaker since she did it in accordance with the Rules.

vi. <u>Denying Members of the Public access to Parliament in the course of debating the Bill.</u>

Appellants' Submissions

Mr. Mabirizi submitted that proceedings of Parliament during the debating and passing of the Bill were not public since members of the public were denied access. He faulted the learned Justices of the Constitutional Court for holding that there was no evidence that the appellant or any other member of the public was chased away or denied access. Appellant argued that his contention of

being denied access to Parliament required no proof since the Attorney General admitted it by not controverting his evidence.

The appellant also argued that the applicable Rule was Rule 23 and not Rule 230 as argued by some of the Justices. In his view Rule 230 applies where the House is proceeding in public and not in isolation as it was done. He further argued that no Rules were exhibited on record as having been made by the Speaker under which the appellant was denied access. Furthermore that there was no evidence on record to show that he did not meet the standard set up by the rule to be in the gallery.

Respondent's Submissions

The Attorney General reiterated his submissions in the Constitutional Court [at pages 2154-2159 Vol K, of the record]. He added that Rule 230 of the Rules of Procedure of Parliament vests in the Speaker power to control the admission of the public to Parliament premises so as to ensure law and order as well as the decorum and dignity of Parliament.

The Attorney General also refuted the appellant's contention that the proceedings of Parliament were not public and that the court misapplied Rule 230 of the Rules of Procedure of Parliament. The Attorney General submitted that the Constitutional Court, after reviewing the evidence on record, the powers of the Speaker as provided in the Rules and the effect of the Appellant's non admission, properly found that the Speaker and the parliamentary staff and security acted properly and within the Constitution in making the orders they made as regards admission of the public to the parliamentary gallery.

Constitutional Court holding on the issue of Denying Members of the Public access to the House in the course of debating the Bill

Review of the Judgments of The Justices of the Constitutional Court shows that: (i) Whereas Rules 23 and 230 require sitting of Parliament and its Committees to be public, the Speaker has discretion on whom to admit to Parliament in order to ensure order as well as decorum and the dignity in Parliament; (ii) No evidence was adduced to their satisfaction that there was denial of public access to the gallery of Parliament; and (iii) There was tension and some chaos, some of which was originated by Members of Parliament themselves and from and within the Parliamentary Chamber itself. This caused extra-ordinary measures to be taken around all the premises of Parliament, including accessing the Parliamentary gallery.

Consideration of the Issue

The contention under this issue is that members of the public were denied access to Parliament in the course of debating the Bill introduced by the Hon. Magyezi.

It is not debatable that members of Parliament legislate for the people they represent. It would therefore follow that the people on whose behalf the members exercise the power to legislate should know how this power is being exercised and on what issues it is being exercised. Indeed in **Doctors for Life International v. the Speaker of the National Assembly and 11 ors, Case CCT 12 of**

2005, the Constitutional Court of South Africa emphasized the importance of the public accessing Parliament as follows:

> ***Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarise themselves with the lawmaking process and thus be able to participate in the future...All this is part of facilitating public participation in the law-making process.***

Rule 23 (1) recognizes the House being public as follows:

> ***Subject to these Rules, the sittings of the House or its Committees shall be public.***

The above provision notwithstanding, sub rule (2) provides an exception where the public might be shut out as follows:

> ***The Speaker may, with the approval of the House and having regard to national security, order the House to move into closed sitting.***

Sub rule (3) further provides as follows:

> ***When the House is in closed sitting no stranger shall be permitted to be present in the chamber, side lobbies or galleries.***

Lastly Rule 230(1) provides for admission of the public into the House as follows:

Members of the public...may be admitted to debates in the House under Rules that the Speaker may make from time to time.

Thus, whereas members of the public can be allowed access to the House, in certain instances, they can be denied access as highlighted in the Rules above. It would therefore follow that if justification for such denial exists for a member or members of the public, then the Speaker cannot be faulted for denying such members of the public access to the House.

There is also no doubt that unnecessary tension had been caused inside and outside the House from both sides of the political divide. It was therefore not surprising that extra caution was taken by the Speaker to ensure that order prevailed. Such caution, in my view, may have induced the Speaker to restrict access to Members of the public to the Gallery to avoid further disturbances. I cannot therefore fault the Constitutional Court for the decision it reached in this regard.

vii. <u>Signing of the Committee Report by Members who never participated in the Committee's Proceedings.</u>

Appellants' Submissions

The appellants submitted that there was ample evidence that members who did not participate in committee proceedings signed the report. The appellants faulted the majority Justices of the Constitutional Court for misconstruing the law, and as a result failing to nullify the report signed by members who never participated in the proceedings of the committee.

The appellants contended that Rule 187(2) of the Rules of Procedure relied on by Barishaki JCC to find that the committee had quorum does not apply because the Legal and Parliamentary Affairs Committee is not a select committee. He argued that Select committees are set up under Rule186 and are temporary Committees. Further the legal and parliamentary Affairs Committee is a sectoral Committee established under Rule 183(1) and 2(g). Furthermore, contrary to the Justices' stated 5 members' minimum, under Rule 184(1), the minimum number for a sectoral committee was 15. In counsel's view, had the Justices keenly looked at Article 90(2) & (3) of the Constitution, they would not have treated the matter the way they did.

The appellants also submitted that the majority Justices erred in relying on Article 94(3) which does not apply to committees of parliament. He argued that Article 94(3) deals with the entire Parliament and not Committees which are provided for under Article 90.

The appellants argued that the complaint before court was whether it was in line with the Constitution for members who never participated in the proceedings of the committee to sign a report. He contended that the learned Justices of the Constitutional Court veered off the rail when they started going into issues of vacancy and participation of non-members which were not in issue.

The appellants also submitted that the majority justices defied the Supreme Court decision of **Hamid V. Roko Construction Ltd, SCCA No.1/13** which if followed would nullify the report signed by strangers. Counsel pointed out that in **Hamid** (supra) this Court

held inter alia that the validity was not on numbers. Counsel further argued that Musoke, JCC'S finding that strangers had been briefed about the committee proceedings was without evidence and bad in law for promoting hearsay and legislators' reckless signing of legal documents.

Respondent's Submissions

The Attorney General submitted that the Committees of Parliament are provided for under Article 90 of the Constitution and Rule 183(1) of the Rules of Procedure of Parliament. Further, Article 94(3) of the Constitution provides that the presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not by itself invalidate those proceedings. Furthermore, Rule 184 (1) of the Rules of Procedure of Parliament provides that each Sectoral Committee of Parliament shall consist of not less than fifteen Members and not more than thirty Members selected from among Members of Parliament.

The Attorney General further placed reliance on Rule 201 (1) of the Rules of Procedure of Parliament which provides that a report of the Committee shall be signed and initialed by at least one third of all the Members of the Committee. The Attorney General argued that the Members who constituted the Legal and Parliamentary Affairs Committee were listed in the report of the Legal and Parliamentary Affairs Committee and were 26 members.

In light of his submissions above, he contended that the requirement of the law in regard to quorum and non-validation of the report were considered and correctly adjudicated by the Constitutional Court and prayed that this Court upholds the same.

Constitutional Court holding on the Signing of the Committee Report by members who did not participate

Review of the Judgments of the majority Justices on this issue shows that the learned Justices held that: (i) the fact that people who were not known to be members of the Committee signed the report was not fatal to the process, though irregular. (ii) Even if the signatures of those members were deleted from the report, there would still be sufficient numbers of members who attended the Committee proceedings and signed the report.

Consideration of the Issue

The major contention under this issue is that members who were not known to be Members of the Legal and Parliamentary Affairs Committee and did not participate in the Committee's Proceedings signed the Committee Report. The appellants' contend that this was fatal since these actions made the Report a nullity.

A review of the Hansard of the House of 18th December 2017 shows that Hon Theodore Sekikuubo brought to the attention of the Speaker the fact that the report of the Committee on Legal and Parliamentary affairs had been signed by non Members to wit; Hon. Akampurira Prossy Mbabazi and Hon. Lilly Akello, who both sat on the committee of Defence and Internal Affairs.

Further review shows that after the matter became contentious as is evident from the Hansard, the Speaker suspended the House for a few hours to review the Hansard in order to satisfy herself about the membership of the Committee. Her findings, which she communicated to the House, showed that the concerned members had been transferred to the Legal and Parliamentary Affairs

Committee by the responsible party whip. It is indeed true that these members were transferred when the Committee had already started its work.

The question to be resolved is whether the Committee was properly constituted at the time when it started its work and at the time when it completed its work and presented it before the House.

Rule 184(1) provides for the composition of Sectoral Committees as follows:

> ***Each Sectoral Committee shall consist of not less than 15 members not more than thirty members selected from among members of Parliament.***

Rule 193 (1) provides for the quorum of the Committees as follows:

> ***Unless the House otherwise directs or these Rules otherwise provide, the quorum of a Committee of the House shall be one third of its members and shall only be required for purposes of voting.***

Lastly, Rule 201 makes it a requirement for a Committee Report to be signed as follows:

> ***A report of a Committee shall be signed and initialed by at least one third of all the Members of the Committee...***

The Committee Report in the present case, contains the list of the members that participated in the hearings of the Committee. Further review of the record shows that as at the time of the Committee receiving directions from the Speaker after the first reading of the Bill, the Committee was properly constituted.

Furthermore, at the time of signing it the requisite quorum as provided under the Rules was met since more than 15 members signed and initialed it. It would therefore follow that the Report as presented before the House was proper.

The above notwithstanding, I am of the view that members who had not participated in the proceedings of the Committee or those who came in later as a result of redeployment by the parties' chief whips ought to have refrained from signing the Committee Report. Their signatures did not however delegitimize the Committee's Report. My view is supported by the provisions of Article 94(3) which provides as follows:

> ***The presence or the participation of a person not entitled to be present or to participate in the proceedings of Parliament shall not, by itself, invalidate those proceedings***.

I note that some of the appellants argue that the above constitutional provision only applies in respect of the whole House. I respectively disagree with this contention. Proceedings of Parliament, in my view, are not only those which take place in the whole House. They include proceedings which take place in Committees as well.

In conclusion on this issue, it is my finding that the signing of the report by members that did not participate in the proceedings or came in later did not vitiate the Committee's Report.

viii. <u>Proceeding on the debate in the absence of the Leader of Opposition and other Opposition Members of Parliament.</u>

Appellants' Submissions

The appellants contended that the absence of the Leader of the Opposition, opposition chief whip and other opposition members rendered the proceedings invalid. They argued that Parliament was not properly constituted in the absence of the leader in opposition.

It was also the appellants' contention that the reasons given by the Constitutional Court for justification of proceeding without members of the opposition did not have a constitutional basis since the fear that Parliament may be taken at ransom by opposition when a decision is made that it is not properly constituted is without any legal basis. In counsel's view, this goes against the very purpose of multi-party democracy which is to promote tolerance of divergent minority views as opposed to a single party system which is prohibited in the Constitution.

Respondent's Submissions

The Attorney General reiterated his submissions in the lower court at page 2165-2166 Vol K of the record of appeal and prayed that this court adopts the same. He however pointed out that Rule 24 of the rules of Parliament enacted pursuant to Article 88 of the Constitution provides that the quorum for the business of Parliament shall be one third of all Members of Parliament entitled to vote. In his view, it followed that the business of parliament can go on in the absence of the Leader of Opposition and opposition

Members of Parliament as long as there is the requisite quorum in Parliament and under Article 94 of the Constitution, Parliament may act notwithstanding a vacancy in its membership.

Constitutional Court holding on the Absence of Opposition Members of Parliament during the debate

All majority Justices agreed that absence of the Leader of Opposition and her fellow members of the opposition did not result in Parliamentary proceedings becoming invalid. They particularly noted that: (i) the members of the opposition walked out of the Chamber on their own volition. They noted the absurdity that would result by the Speaker suspending proceedings anytime a member of the opposition walked out; (ii) Despite the walk out by some members, there was still requisite Coram for Parliament to continue proceedings as provided for in the Rules; (iii) Article 94 was clear that Parliament may act notwithstanding vacancy in its membership; (iv) Later in the course of proceedings the Leader of Opposition and her entourage returned and participated in the proceedings.

Consideration of the Issue

The question that needs to be determined under this sub issue is whether the absence of the Leader of Opposition and other Opposition members led to proceedings in Parliament being a nullity, so that it can be argued that whatever was debated in their absence was null and void.

Article 78 (1) provides for the composition of Parliament. It suffices to note that under this provision, there is no category for 'Members

of the Ruling party, Members of the opposition, and independents (if any). Be that as it may, when it comes to the business of Parliament, my view is that for Parliament to properly be constituted in order to carry on business, the most important factor to consider is whether there is enough number of members to constitute the requisite quorum. Indeed, a review of the legal regime, whether constitutional, statutory or under subsidiary legislation, governing transacting of business in the House, shows that there must be quorum, depending on the subject matter in issue. The provisions do not say that the House must be composed of Members of the Ruling party and Members of the opposition. A review of some of these provisions would suffice.

Article 88 provides for quorum of Parliament as follows:

> ***(1)The quorum of Parliament shall be prescribed by the Rules of Procedure of Parliament made under Article 94 of this Constitution.***
>
> ***(2) For the avoidance of doubt, the rules of procedure of Parliament may prescribe different quorums for different purposes.***

Under Rule 24(1) it is provided as follows:

> ***The quorum of Parliament shall be one third of all Members of Parliament entitled to vote.***

It also suffices to note that even under Article 260 and 262 quorum is in respect of members regardless of their category.

It therefore follows that if the requisite number sufficient to constitute quorum is present, the business of the House will proceed. This implies that even in the absence of the Leader of Opposition and other members of the opposition, Parliament can still transact its business provided the remaining members constitute a quorum.

It was not argued anywhere that because of the absence of the members of the opposition, Parliament lacked quorum and that therefore its proceedings were in breach of the provisions relating to quorum under both the Constitution and its Rules of Procedure. This notwithstanding, I note that at the time of voting, when the quorum is more crucial as it is provided under the Constitution and the Rules, there was sufficient quorum.

I therefore find no merit in the appellants' contention.

ix. 'Crossing' of the Floor by Ruling Party Members to the opposition side in the course of debating the Bill.

Appellants' Submissions

The appellants argued that the Speaker was estopped from allowing members to cross the floor yet she had earlier punished others for doing the same. Counsel contended that the powers of the Speaker do not involve violating the Administration of Parliament Act and the Rules that prohibit crossing the floor.

Counsel faulted the learned Justices of the Constitutional Court for holding that the fact of crossing the floor was not in issue and that members did not cross for purposes of voting.

Counsel further submitted that the Speaker cannot exercise her general power in the face of clear provisions. He pointed out that Rule 9 prescribes sitting arrangements in the House and that Rule 82(1)(b) specifically prohibited members from crossing the floor of the House or moving around unnecessarily during a sitting.

Counsel contended that the finding that no evidence was adduced that the crossing prejudiced any members was unexpected of a constitutional court in light of the above stated constitutional provisions and Rules of Parliament which call for Members of Parliament to be accountable to the electorate. He argued that if there is no prejudice in casual crossing of the floor, why is it prohibited and punishable?

He reiterated his earlier assertion that it was wrong for the learned Justices of the Constitutional Court to assume that the point in issue before them was actual switching of political sides yet it was a breach of Rules of Procedure.

Respondent's Submissions

The Attorney General submitted that Rule 9 (1) of the Rules of Procedure of Parliament obligated the Speaker to as far as possible reserve a seat for each Member of Parliament. On the other hand, Rule 9(4) obligates that Speaker to ensure that each Member has a comfortable seat in Parliament.

The Attorney General submitted that since the members of the opposition walked out leaving empty seats, the Speaker was justified in the circumstances to permit Members of Parliament to sit on the available seats in the chambers of Parliament. The

Attorney General further argued that members taking up available seats as had been directed by the Speaker did not amount to their joining the opposition and did not contravene any rules of procedure of Parliament and therefore the Justices of the Constitutional Court rightly found so.

Constitutional Court holding on the issue of 'Crossing'

All the learned Justices of the Constitutional Court agreed that there was no crossing of the floor by the Ruling party members to the opposition. They particularly noted that: (i) 'Crossing the floor' is interpreted in the legal sense rather than mere physical movement for purposes of occupying available space; (ii) Crossing must be with the intention of joining the opposition or otherwise as envisaged under Article 83 of the Constitution; and (iii) It was not proved that by inviting Members of Parliament to sit on the seats left vacant by opposition Members, the Speaker had in essence allowed members to cross to the opposition.

Consideration of the Issue

The appellants allege that the members of the Ruling Party 'crossed the floor' and joined the opposition side when at the behest of the Speaker, they sat in the chairs reserved for the opposition who had walked out of Parliament.

The concept of 'crossing the floor' was restated by this Court in **Theodore Ssekikubo & Ors v. Attorney General, Constitutional Appeal No. o1 of 2015** where this Court pointed out that the term meant a member of Parliament abandoning one's party on whose ticket he or she had been elected and joining another or becoming

independent. It therefore follows that the term does not mean physical crossing the floor of the House and sitting where the party or parties on whose ticket one was not elected on sit or where independents sit.

Review of the Hansard shows that during one of the debates involving the Amendment Bill, members of the Opposition voluntarily walked out of the House. The Ruling party members remained in the House and continued debating. Seeing the empty seats and realizing that some of the Ruling party members were squeezed in their seats, the Speaker invited them to occupy the seats abandoned by the members of the opposition so that they could sit more comfortably. Debate proceeded normally, with the Ruling party members who sat on the side of the opposition continuing to support the position taken by the Ruling party on the matter.

Rule 82(1)(b) relied on by the appellants is not applicable in this case, since the members did not cross the floor in the legal sense, that is, leaving the party on whose ticket they were elected and/or joining another party or becoming independents.

I also note that Rule 9 provides for the sitting arrangement in the House. It is not disputed that seats on the right hand side of the Speaker are reserved for members of the party in Government and those on the left are reserved for members of the opposition parties in the House. It is not that the members of the party in Government came and occupied the seats reserved for the opposition. They occupied these seats after the members of the

opposition had abandoned the debate and walked out of the Chamber.

It also suffices to note that the same Rule mandates the Speaker to ensure that each member has a comfortable seat. It would therefore follow that the actions of the Speaker in inviting members of the governing party in Government to take seats vacated by the members of the opposition was to ensure that members were comfortable.

I therefore agree with the findings of the learned Justices of the Constitutional Court that there was no crossing of the floor in the legal sense of the term. I also hold that in allocating empty seats ordinarily occupied by members of the opposition the Speaker did not violate the Rules of Procedure.

x. Non-observance of the 14 Days Rule between the 2nd and 3rd Reading of the Bill.

Appellants' Submissions

Counsel for the appellants faulted the majority learned Justices of the Constitutional Court for finding that whereas the passing of the Amendment Act without observing the 14 days between the 2nd and 3rd reading contravened the Constitution, the contravention was not fatal. Counsel argued that this was not a correct approach. He contended that when the clauses in the Bill requiring 14 days separation were passed at the third reading they became part of the Amendment Act. Counsel further argued that Article 260(1) was quite categorical that such Bill shall not be

taken as passed unless the votes at the second and third reading are separated by fourteen days.

Counsel further submitted that in the ordinary meaning of the words 'a bill shall not be taken as passed', means that the Bill will not make it to 3rd reading where the House does not comply with the 14 days. Counsel also argued that having amended Article 1 of the Constitution by infection, the proper course was to separate the two votes at second and third reading by 14 days. Thereafter it would be referred to a referendum. Counsel contended that it was irrelevant that one year later the court declared some of the provisions unconstitutional. He argued that each of the two arms of government namely the Judiciary and the Legislature had its own functions and responsibilities noting that the one for the legislature was to ensure that there is a 14 days separation of the two votes. In his view, the legislature could not sit back and say, "These provisions will be struck down by the Constitutional Court; there is therefore no need for us to separate the two sittings with 14 days". He argued that the constitutional provisions must be complied with and that it could not be left to speculation what would happen in future.

Counsel reiterated his assertion that Article 263(1) was clear that *a bill [not some provisions of a bill] "shall not be taken as passed unless…..the votes on the second and third reading……separated by at least fourteen days…."* Thus, the motions of passing it at the third reading and sending it to the President for assent was all in vain. In his view, the bill remained and remains what it was- a Bill. He submitted that this Court gives effect to the words *"shall*

not be taken as passed" and holds that the failure to separate the two sittings was fatal to the Act. He argued that the Act cannot be validated and given constitutional cover when it never passed. In his view, this could mean validating a constitutional illegality.

Respondent's Submissions

The Attorney General refuted the appellant's contention that the Constitutional Court erred in holding that the failure to separate the second and third seating by 14 days was not fatal. He further refuted the appellant's submissions that the failure to submit a Certificate of the Electoral Commission envisaged in Article 263 (2) (b) invalidated the whole Act.

The Attorney General submitted that the issues of observance of the 14 days sitting between the second and third reading as well as the failure to submit a certificate of the Electoral Commission were ably determined by the Constitutional Court. In support of his contention he relied on the Judgments of Cheborion, JCC [at pages 2773 to 2774], and Owiny-Dollo, DCJ [at pages 2426-2427.]

He submitted that the majority learned Justices came to the right conclusion in holding that the non-observance of the 14 days sitting was not fatal. The Attorney General reiterated his submissions on this issue as contained in Volume 2 of the record of proceedings, from page 538 to 559.

He further argued that the contents of the original Bill that was presented to Parliament did not contain any provision that required the separation of the second and third sittings of Parliament by 14 days. Further that in the same vein, the Bill did

not contain any provision the amendment of which required its ratification by the people of Uganda through a referendum, thereby necessitating the issuance of a certificate of the Electoral Commission.

He pointed out that his submission above was supported by the findings of the Learned Justices of the Constitutional Court at pages 2385 and 2773. He further pointed out that as the learned Justices found, it is only the amendments that were proposed during the Committee stage that had an infectious effect on Articles 1, 8A and 260 of the Constitution. Thus, having found that the amendments that were proposed during the Committee stage had an infectious effect on Articles 1, 8A and 260 of the Constitution and therefore null and void, the learned Justices were right to apply the severance principle and severed those Articles that offended the Constitution from those whose enactment would not require the separation of the second and third reading by 14 days as well as those ratification of such a decision through a referendum.

He invited Court to reject the assertion by the Appellants and uphold the findings of the majority Justices.

Constitutional Court holding on the issue of non observance with 14 days between the 2nd and 3rd Reading of the Bill

The learned Justices of the Constitutional Court found that some of the provisions of the Amendment Act amended by infection other provisions of the Constitution that required separation of 14 days between the 2nd and 3rd reading before they could be passed, for instance Article 1, 2 and 260. They observed that failure to observe

the 14 days Rule was a breach, and therefore those provisions of the Amendment Act could not stand. The majority Justices however held that the rest of the provisions that did not require the observance of the 14 days Rule could be upheld.

Consideration of the Issue

The bone of contention in this issue is failure by Parliament to observe the 14 days rule between the 2nd and 3rd reading of the Bill since it contained provisions which required a separation of these two readings by at least 14 days. This 14 days rule is provided under Article 263 (1) as follows:

> ***The votes on the second and third readings referred to in articles 260 and 261 of this Constitution shall be separated by at least fourteen sitting days of Parliament.***

A review of the Amendment Act and how it was passed shows that the Amendment Act itself and the provisions therein amended by infection Articles 1, 2 and 260 of the Constitution. These three articles are listed among those articles under Article 261 and whose amendment, in line with Article 263(1), would require that the second and third reading of the Bill is separated by at least 14 sitting days of Parliament. It would therefore follow that the failure to comply with the requirement of the 14 days rule amounted to a failure to comply with Article 263(1) the Constitution. This in my view was fatal.

I however note that the Bill as introduced by the Hon. Magyezi before the House did not contain any provisions which would have required a separation of 14 days between the second and third

reading. The provisions which required a separation of 14 days were introduced at a later stage.

Counsel for the appellants falsely imported words into Article 263(1) that "the bill shall not be taken as passed". These words are in clause 2 of Article 263 and not in close 1. Even so, the provisions which were irregularly added to Hon. Magyezi's bill at Committee Stage necessitated separating the votes on the second reading and third reading by 14 days. Parliament's failure to do so therefore caused a breach of the constitutional provision.

However, the bill was passed and assented to by the President, and became an Act of Parliament. The issue that faced the Constitutional Court was whether the whole Amendment Act should be struck down or the provisions which were irregularly added to the bill struck out. The court used the doctrine of severance to strike out the provisions in the Amendment Act which were irregularly added to the bill and saved those provisions which had no irregularity in their passage.

I considered the doctrine of severance earlier in my consideration of the application of Article 93 to the bill and found that the Constitutional Court did not err in applying the doctrine. The same considerations and conclusion I made equally apply to this issue.

xi. <u>Failure to comply with the 45 days Rule by the Legal & Parliamentary Affairs Committee to present the Report.</u>

Appellants' Submissions

Mr. Mabirizi argued that the 45 days within which the Committee was supposed to produce its report started to run after 3rd October and expired on 17th November 2017. He argued that by presenting the Report outside the 45 days, the Report was a nullity. Appellant further pointed out that the Committee did not seek extension of time within which to complete the work or validate the late presentation of the Report.

The appellant argued that had the learned Justices of Appeal determined this contention in line with Rules 128 (2), 140 and 215, they would have found that there was no valid report to rely on.

Respondent's Submissions

The Attorney General submitted that in his affidavit in rejoinder to the affidavit of Jane Kibirige, the Clerk to Parliament, Mr. Mabirizi submitted that the report of Legal and Parliamentary Affairs Committee was not valid since it had delayed in the Committee beyond 45 days contrary to Rule 128 (2) and 140 of the Rules of Procedure of Parliament.

The Attorney General submitted that it was crucial to note from the outset that the appellant did not specifically plead this issue in his petition but only brought it up in an affidavit in rejoinder. According to the Attorney General, this explains why he could not respond to it.

The Attorney General further argued that this also constituted a departure from pleadings and should be disregarded.

Without prejudice to his submission above, the Attorney General submitted that Rule 128 of the Rules of Procedure of Parliament

provides that whenever a Bill is read first time in the House, it is referred to the appropriate Committee for consideration, and the Committee must report to the house within 45 days.

He further pointed out that Rule 140 (1) provides that no Bill shall be in the Committee for more than 45 days. Further that Rule 140 (2) provides that if a committee finds itself unable to complete consideration of any Bill referred to it, the Committee may seek extra time from the Speaker

The Attorney General submitted that the basis of the appellant's argument was that the Bill was referred to the Committee on the 3rd of October, 2017 and the 45 days run out on 17th November 2017 yet the committee reported to the House on 14th December, 2017 after expiry of 45 days.

The Attorney General submitted that had this matter been raised in time, he would have led evidence to prove that the committee acted well within the provisions of Rules 128 and 140 of the Rules of procedure of Parliament in that whereas the Bill was referred to the committee on 3rd October 2017, the house was sent on recess on 4th October 2017. Further that during recess, no parliamentary business is transacted without leave of the Speaker, therefore, the days could not start running until the leave was obtained.

The Attorney General further pointed out that by a letter dated 29th October 2017 the Chairperson duly applied for leave, which leave was granted by the Speaker on the 3rd November 2017. That both letters are annexed. Further that the 45 days started running from the 3rd November 2017. In the Attorney General's view, this meant that the days would expire on 16th December 2017. Thus,

the Committee reported on the 14th December 2017 two days before the expiry of the 45 days period.

He added further that in any event noncompliance with the 45 days rule does not vitiate proceedings on a Bill. He placed reliance on Rule 140 which provides that where extra time is granted, or upon expiry of the extra time granted under sub rule 2, the House shall proceed with the Bill without any further delay.

The Attorney General submitted that the report of the committee was duly presented to the whole House within the period stipulated under Rules 128 and 140 and alternatively, if it delayed, which is denied, the delay did not vitiate or invalidate the enactment of the constitutional amendment Act No.2 of 2018.

Constitutional Court holding on the non observance of 14 days

Issue was not canvassed by the parties at the Constitutional Court. The Court in turn did not canvass it.

Consideration of the Issue

Review of the parties' pleadings shows that this issue only appears in Mabirizi's Affidavit in rejoinder. The Judgments of the learned Justices of the Constitutional Court show that they did not canvass this issue as well. The learned Justices cannot be faulted for failing to consider this issue. In **Kananura Andrew Kansiime v. Richard Henry Kaijuka, Civil Reference No. 15 of 2016**, this Court was faced with a similar issue of a party raising a new issue in rejoinder. In this case, a party had in his affidavit in rejoinder raised a new issue regarding certain alleged illegalities. In finding

no fault with the single Justice's failure to consider this issue, this Court held as follows:

> ***We have further noted that it was improper for Kananura to raise the issue of illegality in rejoinder, because he was only supposed to respond to matters that had been raised in the reply and not to raise new matters. As a result, Kaijuka was not able to respond to the new issues raised. In the circumstances, we cannot fault the single Justice for having failed to consider whether the intended appeal raised the issue of illegality and novel points of law.***

In the circumstances, I have found no basis for considering this issue.

xii. <u>Failure to close the Doors to the Chamber at the time of Voting.</u>

Appellants' Submissions

Counsel for the appellants submitted that failure by the Speaker of Parliament to close all doors to the Chambers to Parliament before voting on the 2nd reading of the Bill and during voting was inconsistent with and in contravention of Articles 1, 2, 8A, 44 (c), 79, and 94 of the Constitution and rule 98(4) of the Rules of Parliament. Counsel further submitted that the fact of failure to close the doors during voting was also admitted by the clerk to Parliament in her affidavit.

It was counsel's submission that the rationale of Rule 98 (4) was to bar Members who had not participated in the debate from entering parliament and/or participating in decision making by

way of voting. Counsel contended that rather than the Speaker complying with the Rules of Parliament by closing the doors, she not only left the doors wide open but also called for members who were outside the chambers during the time of debate to enter and vote.

Counsel therefore submitted that the Constitutional Court erred in law in holding that no evidence was availed as to how failing to close all the doors during voting made the enactment of the Act to be unconstitutional and that the rules of procedure were not made in vain. In counsel's view, they must at all material times be obeyed and respected save where they have been duly suspended and that noncompliance renders the entire process and the outcome thereof illegal.

Respondent's Submissions

The Attorney General submitted that Rule 98(4) of the Rules of Procedure of Parliament provide that the Speaker shall direct the doors to be locked and the bar drawn until after the roll call vote has taken place. Further that the Speaker disclosed the reason why she could not do it.

According to the Attorney General, this action by the Speaker was validated by Rule 8(1) where the Speaker can make a decision on any matter *"having regard to the practices of the House..."*

The Attorney General further pointed out that under Rule 8 (2) of the Rules of Procedure of Parliament the Speaker's ruling under sub rule (1) becomes part of the Rules of Procedure of Parliament until such a time when a substantive amendment to these rules is

made in respect to the ruling. The Attorney General contended that the action taken by the Speaker not to close the doors of the House during voting was within the ambit of these powers. The Respondent therefore submits that the court properly arrived at the decision they made.

Constitutional Court holding on the Speaker's failure to order the doors of the Chamber to be shut at the start of and during voting

The learned Justices of the Constitutional Court stated that Rule 98 (4) required the Speaker to direct that doors to the Chamber to be locked prior to voting. They further observed that: (i) it was not disputed that the Speaker did not order for the closure of the doors to the Chamber; (ii) Voting when the doors were opened offended the above Rule. However, their Lordships held that this did not violate the Constitution and/or vitiate the enactment of the impugned Act since: (i) the Speaker explained why the Rule could not be complied with; and (ii) All Members who were present and wanted to vote, voted and that there was no evidence to the contrary.

Consideration of the Issue

It is not in dispute that Rule 98(4) requires the Speaker to shut the doors during voting. This Rule provides as follows:

> ***The Speaker shall then direct the doors o be locked and the bar drawn and no Member shall thereafter enter or leave the House until after the roll call vote has been taken.***

Review of the Record shows that on Wednesday 20th December 2017 when the voting commenced and indeed during voting, the doors to the Chamber were open. It would therefore follow that there was breach in respect of the above provision. This notwithstanding, the Speaker before ordering the commencement of voting observed as follows:

> ***"...ideally I was supposed to have closed the doors under Rule 98(4). However that exists in a situation where all members have got seats. Therefore it is not possible to lock them out and that is why I did not lock the doors....."***

Clearly, the Speaker was aware of this Rule but advanced a reason, which in my view was sufficient, as to why she could not close the doors of the Chamber. Thus her failure to shut the doors was fully understandable and could not in any way lead to the conclusion that the enactment of the Bill was unconstitutional.

I therefore find no merit in the appellants' complaint.

xiii **<u>Discrepancies in the Speaker's Certificate vis-à-vis the Bill as Passed.</u>**

Appellants' Submissions

Counsel contended that the Learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire Amendment Act was not fatally affected by the discrepancies and variances between the Speaker's Certificate of compliance and the Bill at the time of Presidential assent to the Bill. Counsel submitted that the Speaker's certificate of compliance was

materially defective, ineffectual and thus rendered the presidential assent a nullity.

Counsel argued that the requirement of a valid Certificate of Compliance under Article 263 (2) of the Constitution was couched in mandatory terms. He pointed out that the speaker's certificate of compliance which accompanied the Amendment Bill was but full of glaring inconsistencies and discrepancies. He further pointed out that whereas the certificate clearly indicated that the Amendment Bill only amended Articles 61, 102, 104 and 183 of the Constitution, the bill itself indicated that parliament had amended in addition to the said provisions Articles 105, 181, 289, 291 and in fact created another provision to wit, 289A.

Counsel vehemently averred that the discrepancies and variations which appeared between the Speaker's certificate of compliance and the Constitution (Amendment) Bill were gross both in content and form and thus contravened Article 263 (2) of the Constitution and S.16 of the Acts of Parliament Act. In counsel's view, this rendered not only the presidential assent to the bill a nullity but even the resultant Act.

Counsel also argued that the Constitutional Court wrongly concluded that the discrepancies only affected those provisions forming part of the Constitution (Amendment) (No. 2) Bill, 2017 amending Articles 77, 105, 181, 289, 289A, and 291 of the Constitution which were not included in the Speaker's certificate; and not the entire Act.

Counsel submitted that the Constitutional Court misdirected itself on the legality of the Speaker's certificate of compliance in light of the Supreme Court authority of **Ssemwogerere & Anor vs. Attorney General; Supreme Court Constitutional Appeal No. 1 of 2002** where court held that:

"In the case of amendment and repeal of the constitution, the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent to the provision is and remains, even though it receives the Royal (sic) Assent, invalid and ultra vires."

While citing the foregoing position in the instant matter, Owiny – Dollo, DCJ, held that:

"This requirement, in my view, is not only about the issuance of a certificate of compliance; but is equally about its content, as is provided for in the Format for such certificate in the Schedule to the Acts of Parliament Act"

Counsel averred that the highlighted inconsistencies were deliberate and intended to subvert and fraudulently circumvent constitutional provisions which required a referendum for the amendment to be valid under Article 263 (1) of the constitution.

Respondent's Submissions

The Attorney General refuted the appellant's contention that the learned Justices of the Constitutional Court erred in law and fact in holding that the validity of the entire Amendment Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent. He further refuted the Appellant's contention that the Speaker's Certificate of compliance was materially defective, ineffectual and that this rendered the presidential assent a nullity.

The Attorney General submitted further that the Constitutional Court came to the right finding in holding that the validity of the

entire Amendment Act was not fatally affected by the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent.

The Attorney General submitted that the learned Justices of the Constitutional Court individually dealt with the discrepancy and variances between the Speaker's certificate of compliance and found that the discrepancies were not fatal. In the Attorney General's view, majority Justices came to the right conclusion in holding that the discrepancy in the Speaker's certificate of compliance and the Bill was not fatal.

The Attorney General further contended that it was not in dispute that the Bill that was sent to the President for assent was accompanied by a certificate of compliance as required in Article 263 (2) (a) of the Constitution. He further argued that The Certificate however indicated that four (4) Articles of the Constitution were being amended and yet ten (10) Articles of the Constitution were amended. He noted that the Articles that were indicated in the Certificate were Articles 61, 102, 104 and 183 while the Articles that had been amended but excluded were Articles 77,105,181,289 and 291.

The Attorney General submitted that the decision of the majority Justices in upholding the validity of the certificate of the Speaker was a recognition that the certificate complied with the form prescribed in section 16 (2) and Part VI of the second schedule of the Acts of Parliament Act Cap 2 since the Articles that were being amended were enumerated thereunder.

The Attorney General further submitted that in holding that the other Articles that had been amended but not included in the Speaker's Certificate were unconstitutional, the Constitutional Court rightly relied on the severance principle as espoused in Article 2(2) of the Constitution.

The Attorney General invited Court to reject the assertion by the Appellants and uphold the findings of the majority that the discrepancy and variances between the Speaker's certificate of compliance and the Bill at the time of Presidential Assent was not fatal to the Bill.

Constitutional Court holding on the inconsistencies between the Speaker's Certificate and the provisions of the Bill as passed

The learned Justices of Appeal indeed acknowledged that there were discrepancies between the Speaker's Certificate and the provisions of the Bill as passed by Parliament. The majority Justices however held that this did not render the Speaker's Certificate invalid since: (i) it was issued in conformity with the format specified in Part VI of the 2nd Schedule to the Acts of Parliament Act; and (ii) it was duly signed by the Speaker. The Justices of the Constitutional Court noted that the Certificate only applied to the Articles stated therein [61, 102, 104 and 183]. Further, that the excluded Articles [77, 105, 181, 289, and 291] could not be held to have been properly amended because to constitute a valid enactment, they ought to have been included in the Speaker's Certificate.

Consideration of the Issue

The appellants contend that because there was discrepancy between the Speaker's Certificate and the Bill as passed in regard to the constitutional provisions that had been amended, the Amendment Act could not be held to have been correctly passed. The appellants further argued that because the Certificate listed only a few articles as having been amended, it was fatally defective and thus could not pass as a certificate envisaged under Article 263.

Article 263 (2) provides as follows:

A bill for the amendment of this Constitution which has been passed in accordance with this Chapter shall be assented to by the President only if-

(a) It is accompanied by a Certificate of the Speaker that the provisions of this Chapter have been complied with in relation to it;

It is not in dispute that the Amendment Act was accompanied by the Certificate of the Speaker at the time the President assented to it. It is also not in dispute that the Certificate accompanying the Amendment Act complied with the format laid out in the Acts of Parliament Act. What is in dispute is that the Certificate excluded other provisions as contained in the Amendment Act.

I agree with the findings of the Constitutional Court that the Speaker's certificate was defective. While it complied with the format, it did not comply with the content. The Speaker's certificate, according to Article 263(2), is required to certify, for purposes of presidential assent, that the bill in question has been passed in accordance with Chapter 18 of the Constitution. The Speaker knew, or should have known, that the amendment of the Articles she excluded from the certificate, that is Articles 77, 105, 181, 289 and 291, were not passed in accordance with Chapter 18.

However, this case must be distinguished from the case of **Ssemwogerere & Another vs. Attorney General** (supra). In the **Ssemwogerere** case there was no Speaker's certificate at all. In the instant case, however, there was a certificate which complied with the format. Secondly the Articles which the Speaker indicated in the certificate as having been passed in accordance with Chapter 18 of the Constitution were indeed passed in accordance with that Chapter. The omitted Articles were the ones which violated the Constitution in their passing.

Therefore, the Speaker's certificate which was clearly defective had some saving features in it. I do not, therefore, agree with the appellants' contention that because of its defect, the entire Amendment Act should be declared a nullity. The Articles which were excluded from the certificate were rightly declared unconstitutional by the Constitutional Court through the court's application of the doctrine of severance.

I find that the doctrine of severance which I discussed earlier under sub-issue (i) equally applies to the Speaker's certificate. In my view, defects in the certificate were not so grave as to render the whole Amendment Act a nullity. The amendment provisions which were not included in the Speaker's certificate were rightly declared by the Constitutional Court to be unconstitutional.

xiv **Alleged illegal assent to the Bill by the President [President signing the Bill without scrutinizing the contents of the accompanying Certificate vis-à-vis the contents of the Bill].**

Appellants' Submissions

On the alleged illegal assent to the bill by the President, counsel submitted that the act of the President assenting to the bill without scrutinizing the same to ascertain its propriety was in contravention of Articles 91(1) (2) and (3), and 263 of the Constitution and Section 9 of the Acts of Parliament Act. He also relied on the decision of the Supreme Court in the **Ssemwogerere case (supra)** where court held that;

> *"The presidential assent is an integral part of law making process. Under Article 262(2), the Constitution commands the President, to assent only if the specified conditions are satisfied. The command is mandatory, not discretionary. It*

does not allow for discretion in the President to assent without the Speaker's certificate of compliance."

He therefore submitted that the constitutional duty imposed on the President requires him to scrutinize the certificate of compliance and the accompanying Bill as to their regularity before appending his signature.

Constitutional Court holding on the illegal assent of the Amendment Act by the President

The learned Justices of the Constitutional Court who considered the issue of the Presidential assent and held that the Presidential assent in respect of the amendments excluded from the Speaker's Certificate of Compliance and the absence of the Certificate from the Electoral Commission in respect of the amendments that required a referendum, rendered those excluded amendments unconstitutional.

Consideration of the Issue

The appellants contend that the Presidential assent was illegal since the President acted on a defective Certificate. I have found that the Certificate was defective and that it should only apply to those provisions of the Amendment Act that amended the provisions listed in the Certificate. However, the provisions of Article 263 (2) are clear that the Certificates issued therein are to assure the President that amendments were carried out in accordance with the relevant provisions of the Constitution. The Speaker's certificate is what the President relies on to sign the bill, otherwise what other purpose would the certificate be intended to serve? In my view, it is not a constitutional requirement that the President should go behind the Speaker's certificate to assure

himself or herself that the bill was passed in compliance with the Constitution.

Issue 3

This issue was framed as follows:

> ***"Whether the learned Justices of the Constitutional Court erred in law and fact when they held that the violence/scuffle inside and outside Parliament during the enactment of the Constitution (Amendment) Act No. 1 of 2018 did not in any respect contravene nor was it inconsistent with the 1995 Constitution of the Republic of Uganda."***

Appellants' Submissions

Counsel for the appellants submitted that the Bill from which the Amendment Act emerged was passed amidst violence, orchestrated by the UPDF, UPF and other militias both within and outside Parliament. Counsel further submitted that this violence was not restricted to just inside and outside Parliament but was extended across the whole Country during public consultations. In counsel's view, this vitiated the entire process, and thus made the Amendment Act unconstitutional.

Counsel contended that the learned Justices of the Constitutional Court rightly established that the UPDF, the Uganda Police force and other militia wrongfully intervened in the entire process that led to the enactment of the Amendment Act. He however faulted them for holding that this interference [in the form of violence]

neither contravened nor was it inconsistent with the Constitution since it was not prevalent.

Relying on Article 3(2) of the Constitution, counsel for the appellants submitted that the unlawful invasion and/or heavy deployment at Parliament by combined forces of the UPDF, UPF and other militia before and on the day the Amendment bill was tabled before Parliament amounted to amendment of the Constitution by violent means. He further contended that this invasion also undermined Parliamentary independence and as such was inconsistent with and in contravention of the Constitution. He argued that all these actions were prohibited by Article 3(2) of the Constitution.

Counsel also submitted that letting this stand would be akin to validating the overthrow of the Constitution as was done in the case of **Uganda v. Commissioner of Prisons, ex parte Michael Matovu [1966] 1 EA** where Court applied the Hans Kelsen General theory of law, itself prohibited under Article 3(2) of the 1995 Constitution in validating the overthrow.

Regarding the alleged violence committed by the Security Forces against some MPs and other citizenry as a result of the enforcement of the Directive issued by the Police Director of Operations, counsel submitted that these actions of the Security Forces violated Article 1 of our Constitution since the people who are supreme were denied an opportunity to participate in the amendment process and/or were prevented from defending their Constitution. Relying on **Doctors for life** (supra), counsel

submitted that public participation in enactment of laws was very paramount.

Counsel also faulted the learned Justices of the Constitutional Court for failing to appreciate the chilling effect this violence had on other MPs that would have wished to oppose the amendment and/or other members of the public who wished to participate in the amendment process. Indeed counsel pointed out that the heavy deployment and unprecedented violence meted out against Members of Parliament within the precincts and chambers of the August House prompted the Speaker to write a letter addressed to the President of Uganda inquiring into the existence of armed personnel in the perimeters of Parliament.

It was also argued by the appellants that the violence inside Parliament which included the arrest, assault, and detention of members of Parliament and their forceful exclusion from representing their constituents was also inconsistent with Articles 23, 24, and 29 of the Constitution. Further that it was not the conduct of the person whose rights are limited that was examinable by the Court. Rather that it was the conduct of the person limiting the rights that was put to scrutiny by the Court. Counsel thus faulted the learned Justices of the Constitutional Court for rationalizing the deprivation of the MPs' rights under Articles 23, 24 and 29 instead of determining whether the limitation to members' rights was justifiable in a free and democratic state - a test the Justices themselves set.

Counsel concluded his submissions by inviting this Court to find that the violence meted out by the Security Forces inside and

outside Parliament in the course of passing the Amendment Act contravened the Constitution and therefore the Constitution ought to be nullified.

Respondent's Submissions

The Attorney General refuted the appellants' contentions and submitted that the learned Justices of the Constitutional Court rightly found that the violence/scuffle inside and outside Parliament during the enactment of the Amendment Act did not amount to a breach of the 1995 Constitution to warrant the declaration of the whole process as unconstitutional. He invited this Court to uphold the decision of the Constitutional Court on this matter.

The Attorney General was emphatic that it was factually incorrect for the Appellants to allege that the learned Justices of the Constitutional Court found that the UPDF, UPF and other militia wrongfully intervened in the entire process leading to the enactment of the impugned Act. The Attorney General argued that it was the unanimous decision of the learned Justices of the Court that the intervention of the UPF was lawful and that there was never any reference to militias as alleged by the Appellants. He invited the appellants to always make factual references to the Judgments of the Court.

On the scuffle inside Parliament, the Attorney General referred to the evidence of the Clerk to Parliament and the Sergeant at Arms and submitted that the proceedings of Parliament on the 21st, 26th and 27th September 2017 were characterized by unprecedented

chaos, disorder and misconduct of some Members of Parliament that eventually led to the Speaker issuing an order for their immediate suspension from the House on 27/09/2017. He further submitted that the suspended MPs chose not to heed the Speaker's orders to leave the House and this led to their eviction by members of the security forces under the command of the Sergeant-at-Arms.

Relying on Article 79(1) of the Constitution, the Attorney General submitted that Parliament had power to make laws on any matter for the peace, order and development and good governance of Uganda. Secondly, that under Article 94(1), Parliament had power to make rules regulating its own procedure, including the procedure of its committees.

On the alleged violence throughout the Country, the Attorney General submitted that an overwhelming number of Members of Parliament carried out their consultations with the people in an uninterrupted manner and indeed came and presented their findings to Parliament. He further submitted that the Directive issued by the Director Operations, UPF was not implemented across the whole country.

Regarding the argument that the MPs rights guaranteed under the Constitution were violated, the Attorney General relied on Article 43(1) of the Constitution and submitted that it was in public interest that the debate on the Bill needed to proceed and be conducted in a manner that promoted debate by members across the political spectrum as the matters therein were clearly of high national importance. He argued that the events that transpired on 26th and 27th September 2017 that led to the scuffle with security

agencies were contrary to the public interest and necessitated the limitations to the enjoyment of the rights of the MPs and their eventual arrest and detention by the Security forces. He further argued that such use of force would have been unnecessary had the orders of the Speaker aimed at maintaining order in the House been adhered to by the offending Members of Parliament.

Regarding the appellants' argument that violence both inside and outside Parliament had a chilling effect on other members of the public that wished to participate and other Members of Parliament that would have wished to oppose the amendment, the Attorney General submitted that an overwhelming number of Members of Parliament carried out their consultations with the people in an uninterrupted manner and indeed were able to come and vote on the Constitution Amendment Bill (No. 2) of 2017.

Regarding the appellants' argument that because of the violence meted out against the MPs, force was used to amend the Constitution and thus there was breach of Article 3(2) of the Constitution, the Respondent contended that this was a new argument by the appellants raised on appeal. In the Attorney General's view, they were precluded from raising it before this Court since the grounds of objection must arise from the decision that is being appealed against which is not the case in this matter. In support of this proposition, the Attorney General relied on Rule 82 (1) of the **Judicature (Supreme Court Rules) Directions.**

Be that as it may, the Attorney General submitted that the amendment was done with the full participation of Members of Parliament and thus the appellants' contention that force was used

to amend the Constitution was untenable. The Attorney General further submitted that the appellants' contention that the forceful removal of the MPs on the 27th September 2017 amounted to a treasonous act under Article 3(2) was also untenable since the act of their removal was done in accordance with the Constitution by virtue of the powers vested in the Speaker under the Rules of Procedure of the Parliament of Uganda.

He prayed that this Court finds that the Appellants misconstrued the application of Article 3 (2) of the Constitution as the expulsion of the Members of Parliament was not a singular event but was a result of their consistent misconduct during the debate of the Bill which resulted in the Amendment Act.

Constitutional Court Holding

Review of the Judgments of the Constitutional Court shows that the learned Justices agreed and found that: (i) there was a scuffle inside the Parliamentary Chambers on 27/09/2017; (ii) the scuffle arose as a result of the suspended MPs' failure to exit the Chamber after being ordered to do so by the Speaker; (iii) in order to enforce compliance with the Speaker's order, the Parliamentary Sergeant-at-Arms with the help of the Security Forces used force to eject the suspended Members from the Chamber. In light of this, the learned Justices agreed that the forceful ejection though regrettable was necessary. They however, deprecated the use of the Army to eject the MPs noting that the Police could have handled the situation without UPDF getting involved.

Regarding the violence outside Parliament, the majority learned Justices observed that whereas it happened in certain instances it did not stop the MPs from gathering views and presenting them before Parliament and voting on the Bill.

In light of these findings, the majority came to the conclusion that the violence inside Parliament and outside Parliament did not contravene the Constitution.

Consideration of Issue 3

The appellants' main contention under this issue is that the violence both inside and outside Parliament violated various provisions of the Constitution. The provisions that were allegedly violated were Articles 1, 3(2), 23, 24 and 29. The appellants allege that Article 1 was violated in as far as the people of Uganda were prohibited from participating in the enactment process by stifling their right to give their views on the Bill. According to the appellants this amounted to denying them the right to participate in their governance.

Regarding Article 3(2), the appellants contend that the violence meted out inside Parliament in the course of enacting the Amendment Act amounted to violent amendment of the Constitution. With regard to Article 23, the appellants allege that the MPs right to liberty was violated when they were ejected from Parliament and arrested. Regarding Article 29, the appellants alleged that the manner in which the MPs were ejected from Parliament amounted to inhuman treatment which took away their human dignity. Lastly, with regard to Article 29, the appellants

allege that the MPs right of expression was taken away by their ejection from Parliament.

A review of the judgments of the learned Justices of the Constitutional Court shows that they comprehensively dealt with the issue of violence inside Parliament and the consequences thereof in as far as the Amendment Act was concerned. Further review of the judgments shows that the Justices provided a genesis of the events of 27/09/2017 that eventually resulted into the forceful removal of some MPs from the House by security operatives.

The above notwithstanding, a brief review would suffice in order to appreciate whether the actions of 27/09/2017 that resulted in the alleged violations as claimed by the appellants were warranted or not.

According to the copy of the Hansard of the Parliament of Uganda of 27/09/2017, the Speaker addressed the House on the issue of misconduct of some members. For emphasis, I have deemed it proper to cite the Hansard verbatim. She said:

> ***... Hon. Members, you may recall that this House has not been able to conduct business properly since the 21st of September. This is when Members were not willing to listen to their colleagues who had different opinions and the Deputy Speaker was forced to adjourn the House without conducting any serious business.***
>
> ***...***

At the sitting of yesterday, the unruly conduct of last week was repeated. The Speaker could not be heard in silence. Members were standing, climbing on chairs and tables, and they were dressed in a manner that violates Rule 73 of our Rules of Procedure. I made several calls to the Members to sit down and be orderly, but this was not adhered to. Some members crossed from one side to the other in a menacing manner, contrary to rule 74 of our Rules of Procedure. The Speaker could not address the House in silence as many Members were menacingly standing near the Speaker's Chair.

As I told you yesterday, this Parliament is a place to speak and exchange views, including listening to those you do not agree with. We cannot all have the same views; that is why one of the cardinal tenets of parliamentary etiquette, and indeed as provided for in our Rules of Procedure, is that we should always listen to each other. The actions by many of you, whom I am going to name I noted them yesterday and I should have named them yesterday but due to the noise, I could not. However, today I will name you.

The Speaker then proceeded to state her responsibility while referring to the Rules of Procedure. She cited among other rules Rule 7(2) which mandates the Speaker to preserve order and decorum in the House; Rules 77 and 79(2) that gives the Speaker power to order any member whose conduct is grossly disorderly to withdraw from the House; Rule 80 which permits the Speaker to

name a Member who is misbehaving; and suspending such a member from the service of the House.

The Speaker further cited Rule 8 which gives the Speaker authority to decide on the issues not expressly provided for. Thus, she observed that she ought to have done this on the 26/09/2017 but acknowledged that it was not possible because of the conduct of some members. She further observed that she noted down the names of the members that were shouting.

The Speaker then cited Rule 80(1) and proceeded to name and suspend the listed members from Parliament from the service of the House for the next three sittings. She further noted that the effect of the suspension was that a suspended member immediately had to withdraw from the Chamber and that such a member could neither attend Committees nor enter the precincts of Parliament.

Having read the names of the suspended members, they [suspended members] refused to exit the Chamber. She ordered them to exit the Chamber the second time but still they declined to exit the Chamber. To enforce her order, the Speaker ordered the Sergeant at Arms to remove the members that she had named. She called upon them to exit the third time. The suspended members still refused. She then suspended the House for 30 minutes and ordered that on her return, the suspended members should have left the House.

Further review of the evidence on record shows that when the Sergeant-at-Arms and his staff tried to eject the Members from the

House, the members became unruly and indeed some of them attacked the Sergeant-at-Arms and his team with among other things furniture and microphone sticks. This necessitated the Sergeant-at-Arms to call for back up in order to ensure compliance with the Speaker's order. Reinforcements in form of Security Forces came in and forcefully ejected the suspended members.

This scuffle continued outside Parliament where the suspended MPs that had been forcefully removed from Parliament were bundled and dumped in Police Patrol Cars and whisked away.

It suffices to note that all this action elaborated above happened before the motion seeking leave to introduce the private member's Bill for the Amendment Bill had been tabled or read. Thus, there was no Bill before Parliament to talk about. It would therefore follow that since the violence inside Parliament happened before the Bill was tabled, it would not be accurate to state that the amendments to the Constitution as contained in the Amendment Act were enacted under violence or amounted to a violent amendment of the Constitution.

Therefore, the appellants' argument that there was a violent amendment of the Constitution, which is prohibited under Article 3 (2), is untenable because there was no Bill pending before Parliament when violence in the House occurred. The appellants' argument could have made sense if after the introduction of the Bill members were coerced through violence to support it, or if the appellants adduced evidence showing that the members who voted one way or the other were coerced to do so. The appellants did neither of this.

I wish to note from the onset that in suspending and ordering the suspended members to exit the Chamber, the Speaker of Parliament was acting within her powers as provided by the 2012 Rules of Procedure of Parliament then in force. Indeed in her address to Parliament cited above, she referred to the Rules and gave a basis for invoking them to bring decorum in the House so that the business of the House could continue in a civil manner.

It is evident that there was deliberate effort to disrupt the proceedings of the House as evidenced from the Hansard.

> **Speaker:** ***Honourable members, take your seats. Hon Ssemujju, take your seat. Honourable members, the word 'Parliament' comes from the French word 'parle', which means a place where you speak. Therefore let us speak with our mouths, not fists. Please it is part of Parliamentary etiquette to listen to each other and I had invited the Minister to speak.***

Rule 85 thereof provides that:

> ***"When the Speaker addresses the House, any Member then standing shall immediately resume his or her seat and the Speaker shall be heard in silence"***

Rule 88 (6)

> "***Where a Member who has been suspended under this rule from the service of the House refuses to obey the direction of the Speaker when summoned under the***

Speaker's orders by the Sergeant-at-Arms to obey such direction, the Speaker shall call the attention of the House to the fact that recourse to force is necessary in order to compel obedience to his or her direction, and the Sergeant At Arms shall be called upon to eject the Member from the House."

The Speaker was therefore acting within her powers to call upon the Sergeant-at-Arms to eject members of Parliament who had made deliberations in the House impossible.

This court was invited to determine the constitutionality of the actions of the Sergeant-at-Arms together with the back-up security of the Uganda Police Force and Uganda People's Defence Forces in evicting the said Members of Parliament in light of Articles 1, 2, 3(2), 8A, 97, 208(2), and 211(3) of the 1995 Constitution.

The issue to be determined is whether the measures taken by the Sergeant-at-Arms and the security forces in implementing the order of the Speaker were 'acceptable and demonstrably justifiable' under Article 43(2) of the 1995 Constitution. In **Charles Onyango Obbo and Andrew Mujuni Mwenda vs. The Attorney General, Constitutional Petition No. 19/1997**, it was held:-

"To establish that a limit to rights and freedoms is reasonable and demonstrably justifiable in a free and democratic society, two criteria must be satisfied. First the objective that the measures responsible for the limit on a charter right or freedom are designed to serve must

be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

Secondly, once a sufficiently significant objective is recognized, then the party invoking it must show that the means chosen are reasonably and demonstrably justified. This involves a form of proportionality test... Although the nature of the proportionality test will vary depending on the circumstances, in each case the Court will be required to balance the interest of society with those of individuals and groups."

In **Charles Onyango Obbo & Anor v. Attorney General, Constitutional Appeal No. 2 of 2002**, Mulenga, JSC further elaborated on the provisions of Article 43 as follows:

The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudice" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right

in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution.

However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibit the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.

The term "free and democratic" as envisaged in Article 43 (2) (c) of the Constitution was expounded in **Constitutional Petition No. 22/2006, Paul Kafeero & Anor vs. the Electoral Commission and Attorney General**. Kitumba JCC (as she then was) cited with approval a Canadian case at page 12 para 4, in **The Queen Oakes [1987] (Const) 477 at 498-9** where it is stated:

"The court must be guided by the values and principles essential to a free and democratic society which I believe

embody to name but a few, respect for inherent dignity of human beings, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individual and groups in society. The underlying value and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect to be reasonable and democratically justified".

The evidence led by the Sergeant-at-Arms and the Clerk to Parliament was that on the 21st, 26th and 27th September 2017 the House experienced unprecedented disorder and misconduct from the MPs that eventually led to the Speaker issuing an order of suspension that was not adhered to by the members of Parliament.

The Justices of the Constitutional Court rightly found that the Speaker was empowered to maintain order, discipline and decorum in the House. Such powers obviously should include the power to exclude any member from Parliament for temporary periods, where the conduct of such a member is inconsistent with good order and discipline in the House.

The Attorney General correctly cited the case of **Twinobusingye Severino vs. Attorney General** Constitutional Petition No. 47/2011 where the Court stated:

"We hasten to observe in this regard, that although members of Parliament are independent and have the freedom to say anything on the floor of the House, they are however, obliged to exercise and enjoy their Powers and Privileges with restraint and decorum and in a manner that gives honour and admiration not only to the institution of Parliament but also to those who, inter-alia elected them, those who listen to and watch them debating in the public gallery and on television and read about them in the print media. As the National legislature, Parliament is the fountain of Constitutionalism and therefore the Honourable members of Parliament are enjoined by virtue of their office to observe and adhere to the basic tenets of the Constitution in their deliberations and actions."

Bearing in mind the provisions of Article 43 and the dictum of Mulenga, JSC above, the question that I need to answer is whether the limitations placed on the rights of the MPs were justifiable in the circumstances.

My first port of call is in the excerpt of the Speaker's communication to the House on 27/09/2017 I set out earlier. From the Speaker's communication, it is evident that prior to events of 27/09/2017 there had been unnecessary tension both inside and outside Parliament. Indeed on 21/07/2017 the Deputy Speaker is quoted by the Hansard saying ***'Hon. Members, from Saturday to Wednesday, there have been calls on the Media; on Television; Radio and even in print media, that there is***

going to be war in Parliament today afternoon.' He then proceeded to invite the Prime Minister to Speak. A few minutes into his speech, there was interruption by several members of the opposition who rose and sang the National Anthem. The Deputy Speaker pleaded with them in vain to take their seats. He then took time to counsel them on the etiquette expected of a Member of Parliament (despite interjections from members). Indeed in appreciation of the Deputy Speaker's counsel, Hon. Odonga-Otto rose up and stated as follows:

> ***Thank you very much, Mr. Speaker and thank you for the manner in which you are calling for calm in this House. Of course, we came charged and we are still monitoring what is going on.***

The same interruptions were repeated on 26/09/2017 this time before the Speaker herself. A review of the Hansard of 26/09/2017 shows the Speaker pleading with members to take their seats. Indeed in her communication she alluded to this conduct of the previous day, that is, 21/09/2017.

It is this conduct and the need to restore order in the House that prompted the Speaker to suspend the members who then refused to vacate the House. The consequence of this failure to comply with the order of the Speaker was the forceful removal of the suspended members. The actions of the suspended members prior to their suspension had stalled the business of the House. The Speaker could not be heard in silence. It would therefore follow that the rights of these members as provided in the above

provisions of the Constitution could be curtailed for purposes of enabling business of Parliament to proceed without interruption.

I also note that the appellants allege that this violence interfered with Parliamentary independence. I respectfully disagree with this assertion. First, the security forces entered the Chamber for purposes of evicting the suspended members from the House. Secondly, having evicted them, the security forces departed the Chamber. Indeed the business of the House was able to resume immediately in a calm atmosphere save for the members of the opposition who walked out voluntarily.

I, therefore, agree with the Justices of the Constitutional Court that the Sergeant-at-Arms and the security forces were justified in ejecting members of Parliament from the House for having refused to heed the call of the Speaker to leave the House and for making the conduct of the business of the House impossible. The Sergeant-at-Arms was in any case rightly acting on the orders of the Speaker.

While the behavior of the suspended members of Parliament was obviously unacceptable, the manner in which the security forces treated them after the MPs were removed from the House for misbehavior, according to affidavit evidence on record, was not justifiable if we follow the principle laid down by this court in **Charles Onyango and Another vs. Attorney General** (supra).

The MPs were not armed and there was no fear that they were going to storm back into the House by force. After their ejection they posed no problem to anybody. In spite of this, they were

arrested, bundled, dumped on security vehicles and taken to detention centres where they were kept. In the process some got seriously injured. All this, in my view, was neither necessary nor acceptable. It is, therefore, my finding that their constitutional rights under Article 24 were violated.

It is my view, however, that their remedy for this violation lies in bringing action under Article 50 of the Constitution for redress and not in nullifying the enactment of the whole Amendment Act on account of what happened to them. As I showed earlier, it is their conduct which led to their being removed from the House and what happened to them when they were outside the House must be separated from the proceedings of Parliament which they had thrown in total disorder and which resumed in an orderly manner after the scuffle inside the House had ended.

Consideration of alleged violence in the country during consultation.

The appellants' major argument under this issue was that violence had the effect of frustrating their consultation. I have already addressed this issue of consultation under issue 2. Evidence on record shows that indeed in certain cases consultation rallies by some members of the opposition were dispersed by Police. Clearly, this was a violation of the member's Constitutional right to assemble and move freely throughout Uganda as guaranteed by Article 29 of the Constitution. However, it is my view that considering that consultations took place uninterrupted in the whole country save for the limited cases where rallies were dispersed by the police as evidenced by members' reports on the

floor of Parliament and considering further that members debate proceeded freely and voted on the bill, it is my view that the violence that took place had little impact on the passing of the Amendment Bill.

The appellants also argued that the violence had a chilling effect on members and other citizens who wished to participate in the debating of the Bill. I also find this argument untenable. The evidence on record shows that members traversed their constituencies (save for a few), consulted their constituents and indeed freely expressed their views and voted in Parliament. This was regardless of whether they were pro or anti the Bill. Clearly, this was not evidence of a 'chilling effect' as alleged by the appellants.

The appellants' argument that Article 1 was violated is also untenable. Article 1 brings out the sovereign power of people to participate in their governance. This power can be exercised either directly or through their elected representatives. From the record, Members of Parliament who stood up to debate and vote on the Bill stated that they consulted their electorates. Further, there is evidence on record that people were consulted on the Bill whether by the Legal and Parliamentary Affairs Committee or the members themselves. I therefore find that Article 1 was not violated.

Lastly, I note that the appellants argued that the violence exhibited inside and outside Parliament amounted to amending the Constitution violently and thus contrary to Article 3(2) of the Constitution. The Attorney General argued that this was a new issue which this Court should not canvass.

Indeed a review of the pleadings on record shows that this issue was never canvassed. I am aware that this Court has in various instances held that a new matter can be considered at an appellate level. However, in the present circumstances, I have not found it necessary to consider it. Even if I had, considering all the circumstances leading to the suspension and the forceful eviction of the concerned members from the House, due to their misbehavior, this could not amount to the violent amendment of the Constitution.

In conclusion on this issue, it is my finding that: (i) the violence inside and outside Parliament did not amount to a violent amendment of the Constitution; and (ii) the forceful eviction of the affected members from the House was justifiable; (iii) During the process of removing affected members from the House and arresting them the security forces used excessive force and violated their human rights under Article 24. The dispersal of their consultation rallies also violated Article 29 of the Constitution. However, these violations were in limited areas of the country and did not affect the passing of the Amendment Bill by Parliament.

Issue 4

Issue 4 was framed as follows:

> ***"Whether the learned Justices of the Constitutional Court erred in law when they applied the substantiality test in determining the petition?"***

Appellants' Submissions

The appellants argued that under article 137 of the constitution, the Constitutional Court has no jurisdiction to apply the

substantiality test. According to the appellants, the work of the Constitutional Court was to determine whether the actions complained against were inconsistent with and/or in contravention of the Constitution and where it found so, then to declare so, give redress or refer the matter for investigation.

The appellants also argued that since this role was limited to only determining whether there was contravention of the Constitution and not the degree of contravention, there is no way the Constitutional Court could go ahead to investigate whether the contravention of the Constitution affected the enacted law in a substantial manner.

The appellants further contended that the illegalities and transgressions in issues 1, 2 and 3 were sufficient to lead to the nullification of the Amendment Act. In the appellants' view, the learned Justices of the Constitutional Court also erred in law by applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with and/or violated the Rules of procedure of Parliament as well as the invasion of Parliament.

The appellants submitted that whereas its applicability is expressly provided for in electoral laws, in constitutional matters the test was totally different. The appellants argued that the Constitution being the supreme law of the land provided for no room of any scintilla of violation. They argued that it was an absurdity and indeed a paradox that the Constitutional Court, whose primary mandate and duty was to jealously guard and defend the sanctity of the Constitution was suggesting that there can be room for certain individuals and agencies of Government to violate the Constitution with impunity, more so the Parliament of

Uganda which was charged with the duty of protecting it and promoting democratic governance in Uganda under Article 79 (3).

The appellants also argued that the Constitutional Court misunderstood the substantiality test as laid down by the Supreme Court and therefore misapplied it to the facts of the Constitutional Petition. In the appellants' view, the result was a wrong decision. Appellants reiterated their contention that the test of substantiality as applied by the Supreme Court in Presidential Election Petitions was not applicable to constitutional matters.

Lastly, the appellants argued that even if the 'substantiality' test was to apply, which was not the case, there was no legal and factual basis for not nullifying entire process amidst several unanswered questions.

Attorney General's submissions

The Attorney General refuted the appellants' contentions. He argued that the learned Justices of the Constitutional Court correctly applied the substantiality test and in so doing reached a proper conclusion.

Relying on inter alia **Black's Law Dictionary**, the **Merriam-Webster Law dictionar**y and the decision of this Court in **Kizza Besigye v Yoweri Museveni Kaguta, Election Petition No.1 of 2001**, the Attorney General submitted that the substantiality test was a tool of evaluation of evidence. He argued that to fault Court for applying the substantiality test for evaluation of evidence while determining a constitutional petition was tantamount to saying that a court interpreting the Constitution should not apply a tool of evaluation in determination of the matter before it. In the Attorney General's view, such proposition was absurd.

The Attorney General further argued that the test could either be derived directly from the law or could be adopted by a Judge while evaluating the evidence before him or her. Thus, the Attorney General argued that whether it is the Constitutional Court, or an ordinary suit, it was trite that the matter or matters in controversy should be determined after a proper evaluation of evidence.

Relying on the case of **Nanjibhai Prabhudas & Co. Ltd versus Standard Bank Ltd [1968] E.A 670**, the Attorney General argued that the substantiality test was applied by Court in holding that Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature.

Turning to the present case, the Attorney General submitted that the learned Justices applied the substantiality test and found that the non-compliance in the form of procedural irregularities were not of a fundamental nature, as to render a law null and void.

The Attorney General further submitted that it was important to note that what the court addressed was the lack of evidence to prove that the scuffles and interferences affected the entire process in passing the Bill into law. In his view, the Court's evaluation of evidence and resulting decision was not exclusively based on the quantitative test. Rather, he argued that the Court considered the nature of the alleged non-compliance and rightly reached a conclusion that the quantum and quality of evidence presented to prove the violation were not sufficient to satisfy nullifying the entire process.

The Attorney General also posed a question to the effect that *'what then is the standard of proof in dealing with Constitutional matters, most especially where the matters touch on amendment and*

breaches of the Constitution? Is the standard of proof different from the usual proof on the balance of probabilities?'

In trying to answer this self made question, he contended that it was not in dispute that the common law concept of burden of proof that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. In this case, he argued, it was common ground that it is the Appellants who bear the burden of proving to the required standard that, there were such irregularities/violence that affected the result of the entire passing of the Bill into law and should be nullified.

He argued that the form of evidence presented during the hearing of the Petition was both affidavit and oral evidence. A scrutiny and evaluation of the above evidence, according to the Attorney General, did not support the Petitioners' assertion of such widespread/massive irregularities and violence that would have led Court to nullify the entire resultant Act.

He supported the conclusion of the Court that the evidence neither disclosed any profound irregularity in the management of the legislative process for the enactment of the Amendment Act nor proved that the participation of some Members of Parliament was gravely affected. In his view, the parts that were so affected were rightly severed by the Court.

In this particular case, the Attorney General argued that the Constitutional Court was right to inquire into the extent of the alleged massive irregularities and in so applying the qualitative and quantitative test, it considered whether the errors, and irregularities identified sufficiently challenged the entire legislative process and could therefore lead to a legal conclusion that the Bill

was not passed in compliance with the requirements of the Constitution.

In conclusion, the Attorney General invited this Court to uphold the finding of the Constitutional Court that certain irregularities/errors were mere technicalities and were not fatal to sufficiently invalidate the entire process of enactment of the Amendment Act.

Constitutional Court holding on the issue

A review of the Judgments of the majority learned Justices at the Constitutional Court shows that they applied the substantiality test majorly in determining the effect of the alleged violence orchestrated by the Police in the process of consultation and the effect of a directive issued by the Police Director of Operations prohibiting Members of Parliament from consulting outside their constituencies. They found that in certain instances, there was interference with the consultation process by the police and the army and that the Police Directive was also enforced in certain places. They however found that this interference and enforcement was in isolated places and did not affect the consultation process substantially. They also applied the substantiality test in determining that the failure to comply with some of the Rules of Procedure of Parliament though irregular was not fatal to the process of enacting the Amendment Act. A classic example of this was in their holding on the failure of the Speaker to order for the doors to the Parliamentary Chamber to be closed during voting. Another instance of application of the substantiality test was in the Court's finding that the signing of the Committee's Report by members of the Committee that did not participate in the Committee's proceedings though irregular was not fatal.

Consideration of the issue

The question that I need to answer under this issue is whether the learned majority Justices of the Constitutional Court erred when they applied the substantiality test in determining the petitions before them.

This Court in **Amama Mbabazi v. Yoweri Kaguta Museveni & 2 ors, Presidential Election Petition No. 01 of 2016** comprehensively analyzed the substantiality test. The Court noted inter alia that the application of this test in Presidential Elections Petitions was statutorily provided for under our laws. The Court further noted that in its earlier Judgments in 2001 and 2006, it had held that *'a Court cannot annul an election on the basis that some irregularities had occurred, without considering their mathematical impact.'* This Court maintained this position but emphasized that:

> ***We must however emphasize that although the mathematical impact of noncompliance is often critical in determining whether or not to annul an election, the Court's evaluation of evidence and resulting decision is not exclusively based on the quantitative test. Court must also consider the nature of the alleged noncompliance. It is not every violation that can be evaluated in quantitative terms. But whatever the nature of the violation alleged, the quantum and quality of evidence presented to prove the violation must be sufficient to satisfy the Court that what the Constitution envisaged as a free and fair election, as the expression of the consent and will of the people on who should govern them, has been circumvented. Annulling of***

presidential election results is a case by case analysis of the evidence adduced before the Court. If there is evidence of such substantial departure from constitutional imperatives that the process could be said to have been qualitatively devoid of merit and rightly be described as a spurious imitation of what 10 ***elections should be, the Court would annul the outcome. The Courts in exercise of judicial independence and discretion are at liberty to annul the outcome of such a sham election.***

Thus, from the above case it is clear that in applying the substantiality test, both the quantitative test and qualitative test are applicable.

I am aware that this test is specifically provided for in respect of election petitions and that in the present case we are dealing with a Constitutional Petition. I note that neither Article 137 of the Constitution nor the **Constitutional Court (Petitions and References) Rules, 2005** provide a yardstick for determining whether a law, act or omission contravenes the Constitution. Be that as it may, it is trite under our legal system that a person who alleges a certain fact usually has a duty to prove to Court that indeed such state of affairs as alleged exists. (See sections 101, 102 and 103 of our Evidence Act.) Such a party usually does this by adducing evidence before Court.

In the present case it was the appellants that had a duty at the Constitutional Court to prove that they were entitled to a declaration that the Amendment Act was inconsistent with the Constitution. To do this, they adduced evidence which in their opinion was sufficient to prove their assertions. As I pointed out

earlier, it was not a guarantee that once they had prayed for such a declaration and adduced their evidence, it would follow that Court would grant their prayer. The Court had the discretion to either grant it or not to grant it. To exercise its discretion one way or the other, the Court had to evaluate the evidence adduced before it. In regard to this particular matter, the main issue at hand (in regard to the application of the substantiality test) concerned the impeding of Members of Parliament from making consultations in regard to the Bill which was later enacted into the Amendment Act.

To prove that there was impediment to the consultation process through violence, the appellants relied on affidavit evidence of among others Members of Parliament who alleged that they themselves and/or their colleagues were violently impeded by the police and other security personnel from consulting the people. The appellants also relied on the letter written by the Police Director of Operations ordering among others the District Police Commanders to ensure that Members of Parliament only consult in their respective constituencies.

Having analyzed this evidence, the Justices found that this impediment, unconstitutional as it was, occurred in isolated places in the country. They also found that majority of Members of Parliament (both on the Government and opposition sides) made consultations and presented their findings on the floor of Parliament.

The appellants argued that once this finding of impediment, however minor, was made by the Constitutional Court in respect to consultation, the Constitutional Court should have stopped there and made a declaration of unconstitutionality. I respectfully find this argument without merit. In my opinion, the Court had a duty to evaluate the evidence before it as a whole. I should add that in my view they rightly did so in this respect. Having found

that in certain isolated instances there was interference with the consultation process the Justices were also alive to the other evidence on record which showed that in the majority of instances a bigger percentage of the Members of Parliament consulted their constituents on the provisions of the Bill that was later enacted in the Amendment Act. Should the Court have turned a blind eye on this evidence before it? In my view, it could not. The Court had the duty to weigh the evidence before it jointly and arrive at a just decision. This, in my view, is where the substantiality test as a tool of evaluation of evidence comes in.

I should also note at this stage that the application of the substantiality test is not only permissible where it is provided for statutorily as the appellants appear to suggest but is also applied in other instances where it was not provided for in a statute. In this aspect, I find the East African Court of Appeal case of **Prabhudas (N.) & Co. v. Standard Bank, [1968] EA, 671** cited by the Attorney General quite persuasive. In the above case, the respondent had been served with a copy of Summons rather than a Notice of the Summons. The East African Court of Appeal agreed with the respondent that *'service of the summons on the defendant instead of a notice was incorrect.'* Having so found, Newbold, P. who wrote the lead Judgment of the Court [and with whom others concurred with] posed the following question:

> ***"The question then is, did that incorrect action result in the service being a nullity?"***

In holding that this irregularity could not among other things, nullify the Judgment of Court arising therefrom, the learned Justice, in reaching this conclusion opined as follows:

> ***"The Courts should not treat any incorrect act as a nullity, unless the incorrect act is of a most***

fundamental nature. Matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as of so fundamental a nature that it results in a complete nullity and vitiates everything following would appear to me to be completely unreal unless there is a very good reason for this distinction between the service of the summons and the service of a notice." [Emphasis mine].

In the present case, the argument is not that the procedure in enacting the Amendment Act was irregular because there was no consultation at all. Rather the appellants' argument is that the procedure in enacting the Amendment Act was irregular because in certain instances the consultation process was interfered with by the Police and other security agents. I had earlier in issues 2 and 3 found that the impediments, unlawful as they were, happened in isolated cases. The bulk of the Members of Parliament freely consulted their constituents and reported their findings on the floor of Parliament. Perhaps I should also add that no evidence was adduced by the appellants to show how long this impediment to consultations in these isolated instances lasted or persisted? Was it for a day, week or month?

Bearing in mind the persuasive ratio decidendi in **Prabhudas (N.) & Co** (supra), I am of the view that the learned majority Justices of the Constitutional Court did not err in applying the substantiality test while evaluating the whole evidence before them before coming to the conclusion that the isolated incidents of violent impediments to consultation could not lead to the nullification of the Amendment Act.

The appellants also faulted the learned Justices of the Constitutional Court for applying the substantiality test in evaluating and assessing the extent to which the Speaker and Parliament failed to comply with the Parliamentary Rules of Procedure. I also find this argument by the appellants untenable.

I held in issue 2, while bearing in mind **Prabhudas (N.) & Co** (supra) that irregularities differ in degree. Some can be so fundamental while others can be minor. Thus, in my view, it would for instance be stretching the need for strict compliance too far by nullifying an Act of Parliament simply because the Speaker did not close the Doors to the Chamber of Parliament at the time of commencing voting and/or during voting, especially when she advanced a reason for failing to do so. The same argument would apply on the issue of signatures. I canvassed this in issue 2 as well. Even if the 2 signatures of the members of the Committee that did not participate in the proceedings of the Committee were to be expunged from the Committee Report, the requisite minimum number of signatures that would be necessary to validate the Committee Report as provided for in the Rules would still be met.

In conclusion, it is my finding that the learned Justices of the Constitutional Court did not err when they applied the substantiality test in determining the petitions before them.

Issue 6:

Whether the Constitutional Court erred in law and fact in holding that the president elected in 2016 is not liable to vacate office on attaining the age of 75 year

Appellant's Submissions

Mr. Mabirizi submitted that the President ceases to be qualified to hold office on attaining the age of 75 years. He argued that the Constitutional Court erred when they found that the qualification requirements were only restricted to the eligibility to be elected. He contended that Articles 102 (c), 83 (1) and 105(3) must be read together to arrive at this conclusion and that the qualifications cannot be separated from the disqualifications of the President and members of Parliament.

He relied on the case of **Ssemwogerere vs. Attorney General** (supra) for the proposition that constitutional provisions relating to the same subject must be given meaning and effect in relation to other provisions. He argued that Article 83(1) (b) provides that a member of Parliament shall vacate his or her seat in Parliament if such circumstances arise that if that person were not a member of Parliament, it would result in that person being disqualified for election as a member of Parliament under Article 80 of the Constitution. That this should equally apply to the President.

The Attorney General supported the decision of the Justices of the Constitutional Court who, he argued, rightly directed themselves to the law when they found that Article 102 (b) which provides for the qualifications of a person wishing to stand for election as President, only relates to the qualifications prior to nomination for election and not during the person's term in office.

He contended that prior to the amendment of Article 102 (b) of the Constitution under Constitutional Amendment Act No. 1 of 2018, a person qualified for election as President if that person was above thirty-five years and not more than seventy-five years of age and

that the Constitutional Court unanimously agreed that the said provision was clear and unambiguous and purely related to qualifications prior to nomination for election and not to vacation of office.

Consideration of the issue

Article 105(1) prescribes the tenure of office of the holder of the presidential office. It states inter alia that:

"(1) A person elected President under this Constitution shall, subject to clause (3) of this article, hold office for a term of five years."

Clause 3 provides for vacation of office:

"(3) The office of President shall become vacant-

(a) on the expiration of the period specified in this article; or

(b) if the incumbent dies or resigns or ceases to hold office under article 107 of this Constitution."

In dealing with this issue, the Constitutional Court unanimously agreed that the requirement for not having attained 75 years of age only applied to the nomination and not during the tenure of office. Owiny-Dollo, DCJ, stated as follows:

> "***The defining provision for this issue is Article 105 (3) (a); and we take it that 'on the expiration of the period specified in this article', means until the expiration of the 5 years for which the President was elected. What this means is that a President who attains the age of 75 years, while serving a 5 year term would still***

continue in office until the expiration of the term. We find the requirement of age as a qualification for being elected President is at the point of election; and not at the end or during the incumbency. A President who is elected on the day he or she attains the age of 74 years would be entitled to stay in office for the next five years. This means he or she can stay in office up to the age of 79 years!"

I respectfully agree with the Justices of the Constitutional Court. Article 105 (3(a)) is clear and unambigious. It should therefore be given its plain and ordinary meaning. In ***S vs. Marwane 1982 (3) SA 717 (AD)***, at p.745, MILLAR JA of the Appellate Division of the South African Supreme Court stated, with regard to acceptable approach to interpretation of a Constitution, as follows:

"...when construing a particular provision therein, they would give effect to the ordinarily accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring absurdity; or unless there were indications in the Act – considered as a whole in its own peculiar setting and with due regard to its aims and objects – that the legislator did not intend the words to be understood in their ordinary sense. ...

Mr. Mabirizi argued that on the attainment of the age of 75 years, a person holding the office of the president ceases to possess the qualifications necessary to hold that office and that for that reason

alone he or she should vacate office. He relied on the provisions of Article 83(1(b)) to support his argument.

Article 83(1(b)) states as follows:

(1)A member of parliament shall vacate his or her seat in Parliament-

(b) if such circumstances arise that if that person were not a member of parliament would cause that person to be disqualified for election as a member of parliament under article 89 of this constitution.

Article 80 states as follows:

"Qualifications and disqualifications of members of parliament.

(1). A person is qualified to be a member of parliament if that person-

(a)Is a citizen of Uganda

(b)Is a registered voter ; and

(c)Has completed a formal education of advanced level standard or its equivalent……"

(2). A person is not qualified for election as a member of Parliament if that person –

(a) is of unsound mind

(b) is holding or acting in an office the functions of which involve a responsibility for or in connection with the conduct of an election…."

I respectfully do not agree with this argument. The Constitution clearly makes provisions relating to vacation of office of the President as aforementioned. In my view if vacation of office on

attaining the age of 75 had been intended by the framers of the Constitution, they would have included it among the provisions for vacation of office of the President.

I, therefore, find no merit in Mr. Mabirizi's argument and agree with the finding of the Constitutional Court on this issue.

Issue 7

Issue 7 was framed as follows:

"7a. Whether the learned Justices of the Constitutional Court derogated the appellants' right to fair hearing, "injudiciously" (sic) exercised their discretion and committed the alleged procedural irregularities.

7b. If so, what is the effect of the decision of the Court?"

Appellants' submissions

The appellants argued that their right to a fair hearing was compromised in a number of ways by the Constitutional Court. They argued that this right was non derogable and had received judicial consideration in a number of decisions of this Court.

Instances of the Court breaching this right was evident, inter alia, in: (i) ordering appellants to proceed with submissions before cross examination of the respective witnesses; (ii) restricting the appellants and their counsel on what was to be asked in cross examination in contravention of Section 137(2) of the Evidence Act; (iii) excessive interjections by the Court thus the Court descending into the arena and in certain instances proposing answers to witnesses; (iv) failure to give the appellants the right to make a

rejoinder after the Attorney General had made a reply; (v) omitting the authorities cited; and (vi) applying and granting an unpleaded remedy of severance; and (vii) framing sub-issues of *'whether severance can be applied'* and *'whether the non-compliance affected the Act in a substantial manner'* which did not arise out of the pleadings.

The appellants also argued that the Constitutional Court "injudiciously" exercised their discretion by: (i) failing to invoke their power to summon key Government Officials and individuals that played a key role in the process leading to the enactment of the Amendment Act. Such key people included the Speaker and the Deputy Speaker, the Minister of Finance, Hon. Raphael Magyezi and the Chairperson of the Legal and Parliamentary Affairs Committee; (ii) awarding UGX. 20,000,000/= (Twenty Million Shillings) as professional fees and two-thirds of the taxed disbursements to all the Petitioners, a sum which, according to the appellants, was manifestly meagre considering the nature and significance of the matter; (iii) failing to award professional costs to some of the appellants on the ground that they represented themselves; (iv) .

The appellants also contended that there were other actions of the Court which were irregular. According to the appellants, these included: (i) maltreatment of some of the appellants. For example one of the appellants submitted that he was ordered to vacate the bar and ended up presenting his case from the dock; (ii) failing to give reasons for dismissing an application by one of the appellants requesting Court to summon the Speaker of Parliament; (iii) failure

to make a decision on an application to strike out the affidavits of Mr. Keith Muhakanizi and Gen. David Muhoozi; and (iv) failure to determine the issue of constitutional replacement.

The appellants contended that the above actions and omissions of the Constitutional Court led to a miscarriage of justice since the above irregularities limited the Constitutional Court's scope of investigation thereby failing in its duty vested under Article 137 (1) of the Constitution and thus came to a wrong decision.

In light of this, appellants contended that the failure by the court to give them a fair hearing and the manifest procedural irregularities rendered all the proceedings and the outcome null and void. They invited this Court to declare so. Without prejudice to the above, they prayed that this Court also be pleased to order a retrial before the Constitutional Court.

Attorney General's submissions

The Attorney General refuted the appellants' contentions. He submitted that the appellants did not satisfy or otherwise meet the threshold required for this Court to fault the Constitutional Court for the way it conducted the hearing of the Petitions. He prayed that this Court finds the issue entirely without merit.

On the issue of fair hearing, the Attorney General contended that: (i) no prejudice was occasioned on the appellants by the Court permitting cross examination after submissions had commenced. He argued that the Appellants had an opportunity to extensively submit on the matters raised during the cross examination. Further that the Appellants did not object to the mode adopted by

the Court and this is therefore an afterthought; (ii) the Court duly and within its discretion established ground rules for cross-examination and that the Appellants had the opportunity to duly cross examine the witnesses presented. Further, that beyond making general submissions that the cross-examination was guided by the ground rules established by the Hon. Justices, the Appellants had failed to demonstrate how they were prejudiced or otherwise denied a fair hearing in the circumstances; (iii) the appellants could only submit in rejoinder in regard to new matters raised during the course of the Attorney General's submissions; (iv) Court gave the appellants ample time to present their cases and the alleged extreme and unnecessary interference was because Court was seeking clarification on the proper construction of the contents of documents and enquiring into the legality of the passage of the Constitutional Amendment Bill, No. 1/2018 as part of its duty under Article 137(1) of the Constitution; (v) the Court had discretion to regulate cross examination and guide litigants to cross examine witnesses on pertinent matters related to the litigation and surrounding circumstances. In the Attorney General's view, the court has the authority to limit cross examination on matters that are speculative, irrelevant and otherwise inconsistent with the Evidence Act, Cap. 6.

Further, that the court may make enquiry of the witnesses even beyond the enquiry made by the lawyer cross examining the witnesses for the purpose of clarification and obtaining wholesome testimony depending on the circumstances of the case. He prayed that this Court finds that the Justices of the Constitutional Court were fully justified in making their enquiry; (vi) All the appellants'

pleadings, submissions and authorities were considered and indeed each and every Hon. Justice of the Constitutional Court acknowledged these in their respective Judgments; (vii) On the allegation that the Constitutional Court erred when they allegedly proposed and granted a remedy of severance which was not pleaded by the Respondent, the Attorney General submitted that the core role of the Constitutional Court under Article 137(1) of the Constitution is to interpret its provisions while Article 137(3)(b) and 137(4) provide for the grant of redress within the discretion of the Court based on the circumstances pertaining. Accordingly, while declarations are its primary duty, the Court may grant redress including the remedy of severance either at the pleading or prayer of counsel or a litigant or exercising its own discretion.

Further, that the Court has the discretion to require Counsel or litigants to address it even on unpleaded issues and remedies and even to accordingly frame issues for Counsel and litigants to address. Severance is a well-established legal remedy and there is no bar to the Hon. Justices of the Constitutional Court exercising their discretion to grant the remedy of severance.

It was also the Attorney General's contention that he addressed the Constitutional Court on the remedy of severance and that the Appellants had every opportunity to address the Hon. Justices of the Constitutional Court on the issue of severance, did not suffer any prejudice and were duly accorded a fair hearing; (vii) the learned Justices of the Constitutional Court duly heard and determined the Consolidated Petition after according all parties an equal chance to present their respective cases and the record of

proceedings demonstrates that the appellants fully participated in the proceedings and had ample time to present their case;

On the alleged "injudicious" exercise of discretion, the Attorney General submitted that: (i) With the exception of the Speaker of Parliament, nowhere in the record did the appellants apply under Rules 12(2) or urge the Court to exercise its discretion to summon the witnesses cited. In the Attorney General's view, the appellants' submissions were simply an afterthought; (ii) Court was exercising its discretion to award costs the way it did.

Regarding other actions of the Constitutional Court that were allegedly irregular, the Attorney General contended that: (i) all the appellants were treated courteously and that the record of appeal clearly demonstrates that the Appellant who represented himself was accorded every opportunity to present his case including; - conferencing, making applications, cross-examination of witnesses, submissions and receiving Judgment and suffered no prejudice whatsoever or derogation of his right to a fair hearing. In the Attorney General's view, no eviction occurred; (ii) a review of the record demonstrates that Court gave its reason why it did not find it necessary to summon the Speaker.

It was also the Attorney General's contention that the designated custodian of the records of Parliament is the Clerk to Parliament who fulfilled her duty by making the Hansard and Certificate of Compliance available to Court and that the appellants had an opportunity to cross examine her at length.

In conclusion, the Attorney General submitted that the appellants participated at each and every stage of the proceedings in the Constitutional Court and duly received a fair hearing in accordance with Article 28 of the Constitution. He further emphasized that the procedures adopted by the Constitutional Court were entirely within its discretion and did not in any way prejudice the Appellants or occasion derogation of their right. The Respondent, submitted that the Appellants had not proved any of their respective Grounds of Appeal and prayed that the Consolidated Appeals should be dismissed with costs.

Consideration of Issue 7

The appellants raised a number of complaints against the conduct of the learned Justices of the Constitutional Court in the course of the petition hearing. They alleged that the court violated, inter alia, their right to a fair trial, unjudicially exercised their discretion and committed other procedural irregularities falling outside the ambit of fair hearing and discretion.

I will first determine the alleged violation of the right to a fair hearing. Article 28 of the Constitution provides for this right and there is a plethora of authorities of this Court that have expounded on this right. The appellants allege that their right to a fair hearing was violated through various acts of the Constitutional Court as I highlighted earlier.

A review of the record shows that no prejudice was occasioned on the appellants by the Court permitting cross examination after submissions had commenced. I agree with the Attorney General

that the Appellants had an opportunity to extensively submit on the matters raised during the cross examination and that the Appellants did not object to the mode adopted by the Court with regard to the Rules laid down by it regarding the mode of proceedings.

Regarding the issue of rejoinder, I note that the appellants were allowed by the Court to make concluding remarks wherein the appellants comprehensively addressed issues raised by the Attorney General. The above notwithstanding, I agree with the Attorney General's contention that the issue of rejoinder could only be restricted to new matters raised by the Attorney General.

I also note that the Constitutional Court gave all parties ample time to present their cases. The alleged interjections as alleged by the appellants, in my view, were no more than the Court seeking clarification on certain issues and guiding the parties to stay focused on the issues at hand.

Further review of the Judgments of the Justices of the Constitutional Court shows that indeed they acknowledged the great efforts that the parties put in the case. They were also very appreciative of the authorities cited by the parties. However, it is not incumbent upon Court to accept and use every authority cited by the parties.

On the allegation that the Constitutional Court erred when they allegedly proposed and granted a remedy of severance which was not pleaded by the Respondent, I note that under Article 137 of our Constitution, the Court after making a finding can grant a

remedy. In my view, if such remedy lies in the application of the severance doctrine, then Court cannot be faulted for applying it.

In conclusion, it is my finding that the learned Justices of the Constitutional Court duly heard and determined the Consolidated Petition after according all parties an equal chance to present their respective cases and the record of proceedings demonstrates that the appellants fully participated in the proceedings and had ample time to present their case.

Alleged Unjudicial exercise of discretion

Mr. Mabirizi alleged that this was manifest in three main instances: (i) failing to summon key players that participated in the passing of the Amendment Act; (ii) awarding meagre costs; and (iii) failure to award professional fees to some of the appellants.

A review of the record shows that indeed with the exception of the Speaker of Parliament, the appellants did not apply to the Constitutional Court to summon the listed witnesses. The appellants cannot therefore turn around and fault Court for not calling witnesses when they did not bring the request before it.

On the issue of costs, it is trite that costs are awarded at the discretion of the Court. The appellants, in my view, have failed to make out a case before this Court showing how the Court unjudicially exercised its discretion in awarding costs the way it did.

Other actions of the Constitutional Court that were allegedly irregular

The appellants alleged that the learned Justices: (i) failed to give reasons why they declined to summon the Speaker of Parliament, (ii) failed to make a decision on an application to strike out the affidavits of the Secretary to the Treasury and the Chief of Defence Forces; (iii) failed to determine the issue of constitutional replacement; and (iv) maltreated some of the appellants.

On the alleged failure to advance reasons for declining to summon the Speaker, at page of the Record, the following passage appears:

> ***"We have taken into account the fact that this is not an ordinary Petition. We have five consolidated Petitions seeking answers to a number of issues that are of great public importance. The peculiar circumstances of these Petitions require that we stretch our discretion and grant the Application to call for cross examination of the witnesses whose names have been set out and whose affidavits are on record. We decline to grant an order calling the Speaker of Parliament for examination as we have found no reason to do so. The detailed reasons for our decision shall be set out in the final Judgment or Judgments".*** [Emphasis mine.]

From the above excerpt, it is clear that the Court advanced a reason why it did not summon the Speaker. The reason was that they found no reason to do so. In my view, the only ground on which the learned Justices can be faulted is in respect to their failure to furnish the detailed reasons for their decision but not for failing to furnish a reason for not summoning the Speaker.

I, however, note that only one out of the five Justices on the Coram made a Ruling with regard to the application to strike out the affidavits of the Secretary to the Treasury and the Chief of Defence Forces. To this end, I find that the Court erred in failing to make a Ruling on this aspect. Further review shows that the learned Justices of the Constitutional Court did not resolve the arguments on constitutional replacement. To this extent they also erred.

Regarding the maltreatment, I note that the major contention was by one appellant who contended that he was directed by the Court to vacate the bar. It is not in contention that the bar is reserved for Advocates. It is also not in contention that the appellant concerned was not an advocate. Nevertheless, it is my view that the court should have, prior to the hearing, organized an appropriate place for the appellant to sit since the court knew well in advance that he was going to represent himself. Still, I find that in spite of the court ordering him to vacate his seat at the bar the appellant was afforded all the necessary facilities to present his case in court without any further inconvenience.

In conclusion, the appellants' contentions under this issue substantially fail.

Issue 8

"What remedies are available to the parties?"

Appellants' Submission

The appellants' major prayer was that the appeal should be allowed in the terms and prayers specified in their memoranda of

appeal. Specifically they prayed that the Amendment Act be annulled and that the Attorney General pays costs of this Appeal and in the Court below.

Without prejudice to the above prayer, the appellants submitted that since the Constitutional Court committed procedural irregularities in the course of the hearing, a retrial before the Constitutional Court should be ordered.

Attorney General's Submission

In the Attorney General's view, the Constitutional Court was right in relying on the provisions of Article 2 of the Constitution while applying the principle of severance. He observed that our Constitution allows for the application of the doctrine of severance under Article 2(2). He therefore contended that the majority Justices of the Constitutional Court properly applied the principle of severance when they upheld sections of the Amendment Act that had been validly passed into law and invited this Court to uphold the decision of the Constitutional Court.

While acknowledging that this Court under Rule 31 of its Rules can order a retrial, vary or reverse an order of the Constitutional Court, the Attorney General submitted that the appellants had not made out any case on appeal to justify this Court granting the said orders.

In the premises, the Respondent prayed that this Court finds that the appeal lacks merit and dismisses the appeal with costs.

Consideration of the Issue

I have already analyzed the issue of retrial in the preceding issue and I have found no basis for this Court to order a retrial.

I also discussed the issue of applying the principle of severance by the Constitutional Court earlier and reached a conclusion that the Court did not err in applying the principle.

Costs

I note that the appellants prayed for costs and indeed submitted on the same before this Court. This is a public interest matter. The issue of award of costs in public interest litigation matters was succinctly addressed by this Court in ***Kwizera Eddie v. Attorney General, Constitutional Appeal No. 01 of 2008*** and ***Muwanga Kivumbi v. Attorney General, Constitutional Appeal No. 06 of 2011.*** The position of the Court in these two decisions is that costs, even in constitutional matters, ordinarily follow the event, as provided for under section 27 of the Civil Procedure Act.

What then is the event in this appeal? I have in the course of my analysis found that the appellants' appeal substantially fails. It would therefore follow that the appellants should be condemned in costs. I however find that the appellants through their cases both in this Court and in the Constitutional Court have ensured that constitutionalism prevails. In the circumstances, I find that this is a proper case for this court to exercise its discretion and not condemn the appellants in costs. I would therefore order that each party bears its own costs.

Since the Attorney General did not cross appeal on the order of award of costs by the Constitutional Court, the order of costs made by the Constitutional Courts is upheld.

Conclusion

In conclusion, I make the following findings:

On issue 1, it is my finding that the learned Justices of the Constitutional Court did not misdirect themselves on the application of the basic structure doctrine.

On issue 2, it is my finding that the learned majority Justices of the Constitutional Court did not err in law and fact when they held that the process of enacting the retained provisions of the Amendment Act did not contravene the Constitution and the Rules of Procedure of Parliament.

On issue 3, it is my finding that the learned Justices of the Constitutional Court erred by not finding that the members of Parliament who were arrested and detained after their suspension were maltreated by security forces and their right to freedom from torture and human dignity violated. However, it is my finding that this in itself did not affect the passing of the Amendment Act.

On issue 4, it is my finding that the learned Justices of the Constitutional Court did not err in law when they applied the substantiality test in determining the consolidated constitutional petitions before them.

On issue 5, it is my finding that the learned majority Justices of the Constitutional Court did not misdirect themselves when they held that the provisions of the Amendment Act removing the age

limit for the President and District Chairman was not inconsistent with the provisions of the Constitution.

On issue 6, it is my finding that the Constitutional Court did not err in law and in fact in holding that the President elected in 2016 is not liable to vacate office upon attaining the age of 75 years.

On issue 7, it is my finding that the appellants' right to a fair hearing was not compromised.

In light of the above findings, I would dismiss the appeal and make the following declarations and orders:

(1) That sections 1, 3, 4 and 7 of the Constitution (Amendment) (No. 01) Act, 2018 were passed in compliance with the Constitution of Uganda.

(2) The order of the Constitutional Court regarding professional fees and disbursements is upheld.

Lastly, each party will bear its own costs of this appeal in this court.

Dated at Kampala this ..... day of ..... 2019.

.....
JUSTICE JOTHAM TUMWESIGYE
AG. JUSTICE OF THE SUPREME COURT