THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA
AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ
HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSITCE C.K. BYAMUGISHA, JA
HON. S.B.K. KAVUMA, JA

CONSTITUTIONAL PETITON NO.08 OF 2007

LAW AND ADVOCACY FOR
WOMEN IN UGANDA……..…..PETITIONER

A N D

THE ATTORNEY GENERAL ……RESPONDENT

JUDGMENT OF TWINOMUJUNI, JA

[1] INTRODUCTION

This petition was filed by Law and Advocacy for Women in Uganda, an NGO, under 137(1)(3)(a) and (d) of the Constitution of Uganda and Rule 3 of the

Constitutional Court (Petitions and References) Rules. The petition is seeking for the following declarations and orders:-

(a) That the custom and practice of Female Genital Mutilation as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995 to the extent that it violates Articles 2(2) 21(1), 24, 27(2) 32(2) and 33 thereof.

(b) As a result of this violation, the custom and practice of Female Genital Mutilation should be declared null and void and unconstitutional.

(c) No order is made as to costs in any event.

(d) Any other further declaration that this Honourable Court may deem fit to grant.

[2] <u>THE PETITION:</u>

The cause of action of the petition is contained in paragraphs one and two of the petition as follows:-

> **"1. That your petitioner Law and Advocacy for Women in Uganda is an organization having an interest in the following matter which is in violation of the Constitution of the Republic of Uganda, 1995 and binding international human rights law.**
>
> **2. That the custom and practice of Female Genital Mutilation practiced by several tribes in Uganda, including but not limited to the Sabiny (found in Eastern Uganda-which includes the Districts of Kapchorwa, Bukwo, Bugiri); Pokot (found in Nakapiripirit District); and Tepeth (found in Moroto District) is inconsistent with the Constitution as follows:-**
>
> **(a) The excision of female genitalia parts practiced as a custom of Ugandan tribes aforesaid causes excruciating pain to the victim of Female Genital Mutilation and is thus a form of torture,**

cruel, inhuman and degrading treatment prohibited by Article 24 of the Constitution of Uganda;

(b) The excision of female genitalia may sometimes lead to death due to excessive bleeding and or sepsis and is therefore endangers the right to life guaranteed by Article 22(1) of the Constitution of Uganda;

(c) The Female Genital Mutilation is a custom and practice that is carried out by using crude implements which are used on victims to another and thus have the potential of spreading HIV/AIDS which endangers the right to life guaranteed by Article 22(1) of the Constitution;

(d) The excision of female genitalia may lead to urinary incontinence whereby damage is caused to the urethra during the operation and thus causes failure to contain urine. The failure to contain urine leads the victim to smell and become a social outcast, which is a form of torture, cruel and degrading treatment and is against the dignity, integrity and status of women, which contravenes Article 24 and Article 33.

(e) The custom and practice of Female Genital Mutilation as aforesaid is carried out on girls and women in the open where the public spectate, without due regard to the privacy of the victim, thus invading the victim's right to privacy guaranteed under article 27(2) of the Constitution;

(f) The custom and practice of Female Genital Mutilation has no medical and social advantages, it is not justifiable in a free and democratic society and is inconsistent with the aforesaid constitutional provisions and thus should be declared void in accordance with Article 2(2)."(sic)

The petition is supported by five affidavits sworn by the following witnesses:

1) Gertrude Chelangat Kulany a female from Kapchorwa District.
2) Kayonga Francis a male Member of Parliament for Upe County, Nakapriripirit District.
3) Sabila Herbert a male Member of Parliament for Tingey County, Kapchorwa District.
4) Beatrice Chellangat, a female adult from Kapchorwa District.
5) Chris Baryomunsi, a professional medical practitioner.

The evidence deponed by these witnesses is almost similar. I herebelow reproduce the affidavit of Mrs Gertrude Chelangat Kulany which contains the whole of the evidence deponed to by all other witnesses:-

"AFFIDAVIT IN SUPPORT OF PETITION.

I, Gertrude Chelangat Kulany a female adult Ugandan of sound mind of P O Box 10549, Kampala for purposes of this petition, do solemnly swear and state as follows:-

1. **THAT I am born and bred in Kapchorwa District located in the Eastern part of Uganda where I know that the Sabiny, Pokot and Tepeth among other people, practice the custom of Female Genital Mutilation.**

2. **THAT I have been involved in community activities, including research into the practice of Female Genital Mutilation and I have therefore a wealth of knowledge about its practical and potential adverse effects to girls and women on whom it is practiced.**

3. **THAT I know that Female Genital Mutilation is carried out crudely and without anaesthesia which makes victims suffer excruciating pain, excessive bleeding**

which may lead to death, leaves many such victims traumatized, and in some cases maimed for life.

4. **THAT the practice is carried out crudely by female traditional so called "surgeons" who cut girls' and women's genitalia wantonly and often times causes their victims urinary incontinence, (the failure to contain urine), which results in the continued urinary odour thus rendering such victim a social outcast.**

5. **THAT I have personally known of deaths of girls and women to have directly resulted from Female Genital Mutilation.**

6. **THAT I have known of some case where girls and women have lost their senses due to the trauma associated with Female Genital Mutilation; and other girls and women have suffered paralysis and lost their capacity to walk as a direct result of Female Genital Mutilation, thus being rendered disabled.**

7. **THAT use of same cutting implements on different victims endangers lives of Female Genital Mutilation victims because it exposes the victims to acquire HIV/AIDS.**

8. **THAT I believe that the cultural practice of Female Genital Mutilation has no medical and social benefits and violates human rights provided for under the Constitution of Uganda and international human rights Covenants such as The Convention on rights of the Child, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and is not justifiable in a democratic society.**

9. **THAT I swear this affidavit in support of the petition to the Honourable Constitutional Court to declare the practice of Female Genital Mutilation unconstitutional.**

10. **THAT what I have stated herein is true to the best of my knowledge, belief and information."**

The respondent in its short answer to the petition opposed the petition as follows:-

"<u>RESPONDENT'S ANSWER TO THE PETITION</u>.

1. **SAVE AS is hereinafter specifically admitted, the respondent denies all the contents of the petition as if the same were set forth and traversed seriatim.**

2. **In reply to paragraph 2(a) to (f) of the petition the respondent shall contend that no cause of action against the respondent has been disclosed in the petition.**

3. **In further reply to paragraph 2(a) to (f) of the petition the respondent shall aver and contend that it has not by any act or omission violated any provision of the Constitution.**

4. **The respondents shall contend that the petition is misconceived and does not raise any matter for constitutional interpretation under article 137 of the Constitution.**

5. **The respondent shall contend that the petitioner is not entitled to any of the declarations, orders sought in the petition."**

The answer is supported by the affidavit of one GEOFFREY ATWINE stated to be a State Attorney in the respondent's chambers who deponed as follows:-

"3. That I swear this affidavit in support of the respondents answer to the petition.

4. That I know that no cause of action against the respondent has been disclosed in the petition.

5. That I know that the respondent has not by any act or omission violated any provision of the Constitution.

6. That I know that this petition is misconceived and does not raise any matter for constitutional interpretation under article 137 of the Constitution.

7. That whatever I have stated herein is true and correct to the best of my knowledge."

[3] <u>THE ISSUES:</u>

At the Scheduling Conference which took place before the Registrar of this Court, the following issues were framed:-

(a) Whether the petition raises any matter for constitutional interpretation.
(b) Whether the custom and practice of female genital mutilation is unconstitutional and should be declared null and void.

At the trial Mr. L. Rwakafunzi of M/s Rwakafunzi & Co. Advocates represented the petitioner while Ms Patricia Mutesi a Senior State Attorney of the respondent represented the Attorney General. When the case was called for hearing, Ms Patricia Mutesi stated that the Attorney General did not wish to contest the petition. Mr. Rwakafunzi treated this as a concession by the respondent who had earlier in pleadings contested the validity and the merits of the petition. As a result, he did not make any submissions and left the matter to court to consider and deliver judgment. He, however, made

available to court two documents which in his view contained enough literature on Female Genital Mutilation that would assist the court to understand the meaning and the effects of Female Genital Mutilation.

[4] BACKGROUND LITERATURE:

The first document which Mr. L. Rwakafunzi made available to court is entitled:-

"ELIMINATING FEMALE GENITAL MUTILATION An Interagency Statement
ONCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO."

In order to appreciate the weight and importance to be attached to the contents of the documents, it is necessary to state in full the names of the agencies stated to be behind the statement:-

1) OHCHR – Office of the High Commissioner for Human Rights.
2) UNAIDS – Joint United Nations Programme for HIV/AIDS.
3) UNDP – United Nations Development Programme.
4) UNECA – United nations Economic Commission for Africa.
5) UNESCO– United Nations Education, Scientific and Cultural Organisation.
6) UNFPA – United Nations Population Fund.
7) UNHCR – United Nations High Commission for Refugees.
8) UNICEF – United Nations Children Fund.
9) UNIFEM – United Nations Development Fund For Women.
10) WHO - World Health Organisation.

The document was compiled and published in the year 2000 by the World Health Organisation. It was presented as an authoritative document on the subject of Female Genital Mutilation.

The second document which was presented by learned counsel for the petitioner is a small booklet entitled:

"FEMALE GENITAL MUTILATION IN UGANDA".

It was compiled by Hon. Dora C. Kanabahita Byamukama on behalf of Law and Advocacy for Women in Uganda (Law-Uganda), the NGO which happens to be the petitioner in this suit.

The NGO was established in Uganda in 1997 to fight for women's rights by using law to improve the status of women's lives. The authors of the booklet hope that

> **"the publication will create more awareness on the torturous practice of Female Genital Mutilation and hopefully spur more partners into action" – Dr. Dora Kanabahita Byamukama.**

In her acknowledgments, the author states:-

> **"The publication would not have been possible without research undertaken by Georgetown University in conjunction with LAW – Uganda in 2001. It would not have been possible without other publications on Female Genital Mutilation; which we have extensively referred to in the bibliography."**

The Interagency Statement on Eliminating Female Genital Mutilation compiled by WHO (supra) is one of the documents listed in the bibliography in Dora Byamukama's Booklet.

I intend to use these two documents [referred to here as the **WHO document** and the **LAW –Uganda document]** sparingly only for the purpose of enlightening the reader and answering unfamiliar questions such as:

- What is Female Genital Mutilation?
- Why is it practiced?
- Where in Uganda is it practiced?
- What is involved in the practice of Female Genital Mutilation?
- What are the consequences of Female Genital Mutilation?

WHAT IS FEMALE GENITAL MUTILATION [FGM]?

The WHO document defines Female Genital Mutilation as **"comprising all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons."**

WHAT IS INVOLVED IN FEMALE GENITAL MUTILATION?

WHO has categorised four broad types of Female Genital Mutilation:-

(a) Clitoridectomy: the excision of the prepuce without excision of the clitoris.
(b) Excision: the excision of the prepuce and the clitoris together with partial or total excision of the labia manora.
(c) In fibulation: the excision of part or all of the external genitalia and stitching or narrowing of the vaginal opening.
(d) Type IV: All other procedures involving partial or total removal of the female genitalia for cultural or any other non-therapeutic reasons.

WHERE IS IT PRACTICED?

It is said to exist on almost every continent in the World but with pronounced frequency in Africa, Asia and South America. In Uganda, it exists among the Sabiny, Pokot, Tepeth, Nubian, Nandi, among the Somali and Ethiopian immigrants and in Isingiro in refugee camps by Somali refugees.

WHY IS IT PRACTICED?

There are five reasons usually cited as justification for the practice of female genital mutilation.

(a) Custom and tradition: to maintain and preserve cultural identity by continuing the tradition.

(b) Women's sexuality: to control women's sexuality by reducing their sexual desire and fulfilment.

(c) Social pressure: where Female Genital Mutilation is widely practiced, family and friends create an environment in which the practice becomes a requirement of social acceptability.

(d) Economic Gain: Currently the "Surgeons" are reported to be earning fifty thousand shillings per girl circumcised. There is also an amount of respect bestowed on them by the community.

(e) Religion: Female Genital Mutilation is cultural and not a religious practice. However some Islamic religions use it to reinforce the practice. It is also practiced by Jews and Christians where it is not explicitly required.

LAW – Uganda Booklet concludes:-

> **"Most of the communities believed that when a woman/girl fails to undergo FGM the following would occur: She will not bear children; childishness, inability to reason; thinness and sickness; demon possessed; She will not be allowed to enter the kraal or granary to pick cow dung or food; no dowry should be paid; and she will not be allowed to serve the elders.**
>
> **With exception of Isingiro, Nakivale Camp, where some Somalis live, girls aged 7 – 13 yrs undergo circumcision. The reasons for the practice were: Religion (Islam); control libido of women; preservation of virginity; and a way of appeasing the gods."**

WHAT ARE THE CONSEQUENCES OF FEMALE GENITAL MUTILATION?

The answer to this question is extremely relevant to the disposal of the issues in this petition. I propose to quote vabatim from page 9 and 10 of the LAW – Uganda document:-

"Female Genital Mutilation has immediate, long term, psychosexual consequences and social consequences for a woman's physical and mental health.

Immediate Physical and Health consequences:-

- **Haemorrhage**
- **Pain**
- **Shock – loss of consciousness due to excessive pain, blood loss and trauma, which can even lead to death**
- **Infection and abscesses – FGM may cause risk of transmission of blood borne diseases such as hepatitis B and HIV**
- **Acute urine retention which often leads to urinary track infections**
- **Injury to the adjacent tissues – such as the urethra and the vaginal opening, perineum and rectum and anus**
- **Failure to heal- Due to irritation of urine or rubbing when walking, or an underlying condition such as anaemia or malnutrition. This can be due to a weeping wound or to a chronic infected ulcer.**

Long – term Physical Health Consequences:

They are more associated with severe types of mutilation and include:

- **Recurrent urinary track infections**
- **Difficulties in menstruation**
- **Chronic pelvic infection**
- **Obstetric complications**
- **Keloid Scar formation**

- **Development of a false vagina and**
- **Difficulties in providing gynaecological care.**

Psychosexual Consequences:

- **Sexual dysfunction. This may occur in both partners as a result of painful intercourse and reduced sexual sensitivity following clitoridectomy and narrowing of the vagina opening; and this may lead to hypersensitivity and painful intercourse.**

Social Consequences:

These include:

- **High school dropout rates**
- **Encourages polygamy because of sexual dysfunction**

FGM is closely related to maternal morbidity and maternal mortality. Without assisted delivery, the health complications of the practice on women and new born can be drastic and could conclude prolonged and obstructed labour leading to severe perennial lacerations (tears), bleeding, wound infection and womb infections. Prolonged labour can lead to brain damage to the baby (asphyxia) or death (Still birth).”

[5] <u>DETERMINATION OF ISSUES:</u>

At the Scheduling Conference held before the Registrar of this Court, two issues were agreed as I have already indicated in part [3] above. I will now proceed to discuss and determine them as requested by the parties to the petition. The first issue is whether the petition raises any matter for Constitutional Interpretation.

This issue was framed at the request of the respondent who in its pleadings had raised the issue as a defence to the petition. At the trial, however, the respondent decided not to contest the petition at all. This meant that it abandoned the issue altogether. Though it remains the duty of the court to consider the issue, I do not see any compelling reason to doubt the wisdom of the Attorney General who must have felt that the issue had no merit. I would therefore hold that the petition raised serious questions for constitutional interpretation and the issue is answered in the affirmative.

[6] THE MAIN ISSUE

The main issue in this petition is whether the custom and practice of female genital mutilation [FGM] is unconstitutional and should be declared null and void. I have stated above that at the trial of this petition, the respondent stated that it did wish to contest the petition although in the pleadings it had done so. This, however, did not relieve the petitioner of the duty to produce sufficient evidence to prove that the practice, now commonly known as FGM, contravenes the Constitution of the Republic of Uganda. It is specifically alleged that the practice contravenes articles 2(2). 21(1), 24, 27, 33(2) and 33 of the Constitution. I shall now proceed to consider whether the evidence which was adduced proves on a balance of probability the alleged contraventions.

THE EVIDENCE:

The total sum of the evidence adduced by the petitioners to support their case is contained in the evidence of Ms Gertrude Chelangat Kulany, a female community activist form Kapchorwa District of Eastern Uganda. She is a member of the Sabiny tribe, one of the tribes in Uganda who practice the

custom of Female Genital Mutilation. Her affidavit was reproduced in full earlier in this judgment. She does not state, for obvious reasons, whether she was a victim of Female Genital Mutilation herself but the gist of her evidence is that:-

(a) Female Genital Mutilation is carried out crudely without anaesthesia which makes the victim suffer excruciating, pain excessive bleeding which may lead to death, permanent main and trauma.

(b) It is carried out by traditional "surgeons" who cut girls and women's genitalia wantonly and often causes their victims urinary incontinence (failure to contain urine) which results in continued urinary odour and renders the victims social out casts.

(c) She has knowledge of many deaths which have directly occurred as a result of Female Genital Mutilation.

(d) She knows some girls and women who have suffered paralysis and capacity to walk and permanent disablement as a result of Female Genital Mutilation.

(e) To her knowledge Female Genital Mutilation has no medical or social benefits to the community or its victims.

This evidence was repeated by all other witnesses who gave evidence. It is not challenged and therefore this court treats the evidence as being the truth. The question then is whether a practice or custom which causes the above consequences contravenes any provision of the Constitution of Uganda.

THE CONSTITUTION

Article 37 provides-

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

We know that the practice of Female Genital Mutilation has existed in some communities for centuries. Does this constitutional provision permit such communities to continue such custom and tradition? We do not think so because article 44 of the Constitution provides:

> **"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) ……..**
>
> **(c) ……**
>
> **(d) ……."**

Respect for human dignity and protection from inhuman treatment are enshrined in article 24 of the Constitution which provides:

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

Furthermore, article 32(2) of the Constitution provides:-

> **"Laws, cultures, customs and traditions which are against the dignity, welfare or interest of women or any other marginalised group…..are prohibited."**

Lastly on women's rights, the Constitution provides in article 33(1) and (3):-

" (1) Women shall be accorded full and equal dignity of the person with men.

(2) ……

(3) The state shall protect women and their rights taking into account their unique status and natural maternal functions in society."

The meaning and effect of the above quoted provisions of the Constitution cannot be mistaken. Any person is free to practice any culture, tradition or religion as long as such practice does not constitute disrespect for human dignity of any person, or subject any person to any form of torture or cruel, inhuman or degrading treatment or punishment.

EVALUATION OF EVIDENCE AND THE LAW

I have in the earlier parts of this judgment given the description of the meaning, the rationale, the nature and the consequences of Female Genital Mutilation. I have also outlined the evidence adduced to support this petition which clearly show that the practice of Female Genital Mutilation does exist in Uganda especially in Eastern and North Eastern Uganda tribes. It has very harmful consequences to the health and dignity of women and girls. The UN Interagency Statement on the elimination of Female Genital Mutilation published by World Health Organisation (supra) states:-

"Female Genital Mutilation has harmful consequences

Female Genital Mutilation is associated with a series of health risks and consequences. Almost all those who have undergone female genital mutilation experience pain and bleeding as a consequence of the procedure. The intervention itself is traumatic as girls are usually physically held down during the procedure (Chalmers and Hashi, 2000; Talle, 2007). Those who are infibulated often have their legs bound together for several days or weeks thereafter (Talle, 1993). Other physical and psychological

health problems occur with varying frequency. Generally, the risks and complications associated with Types I, II and III are similar, but they tend to be significantly more severe and prevalent the more extensive the procedure. Immediate consequences, such as infections, are usually only documented when women seek hospital treatment. Therefore, the true extent of immediate complications is unknown (Obermeyer, 2005). Long-term consequences can include chronic pain, infections, decreased sexual enjoyment, and psychological consequences, such as post-traumatic stress disorder

<u>Dangers for childbirth</u>

Findings from a WHO multi-county study in which more than 28,000 women participated, confirm that women who had undergone genital mutilation had significantly increased risks for adverse events during childbirth. Higher incidences of caesarean section and post-partum haemorrhage were found in the women with type I, II and III genital mutilation compared to those who had not undergone genital mutilation, and the risk increased with the severity of the procedure (WHO Study group on Female Genital Mutilation and Obstetric Outcome, 2006).

A striking new finding from the study is that genital mutilation of mothers has negative effects on their newborn babies. Most seriously, death rates among babies during and immediately after birth were higher for those born to mothers who had undergone genital mutilation compared to those who had not: 15% higher for those whose mothers had Type I, 32% higher for those with Type II and 55% higher for those with type III genital mutilation. It was estimated that, at the study sites, an additional one to two babies per 100 deliveries die as a result of female genital mutilation.

The consequences of genital mutilation for most women who deliver outside the hospital setting are expected to be even more severe (WHO Study Group on Female Genital Mutilation and Obstetric Outcome, 2006). The high incidence of post-partum haemorrhage, a life-threatening condition, is of particular concern where health services are weak or women cannot easily access them."

There is no doubt in my mind that Female Genital Mutilation violates the rights of women enshrined in articles 21, 24, 32(2), 33 and 44 of the Constitution. To the extent that girls and women are known to die as a direct consequence of Female Genital Mutilation, it contravenes article 22 which provides protection to the right to life.

Female Genital Mutilation grossly violates the rights of women. The UN Interagency Statement on Eliminatic of Female Genital Mutilation states:-

"Female genital mutilation violates a series of well-established human rights principles, norms and standards, including the principles of equality and non-discrimination on the basis of sex, the right to life when the procedure results in death, and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment as well as the rights identified below. As it interferes with healthy genital tissue in the absence of medical necessity and can lead to severe consequences for a woman's physical and mental health, female genital mutilation is a violation of person's right to the highest attainable standard of health.

Female genital mutilation has been recognized as discrimination based on sex because it is rooted in gender inequalities and power imbalances between men and women and inhibits women's full and equal enjoyment of their human rights. It is a form of violence against girls and women, with physical and psychological consequences. Female genital mutilation deprives girls and women

from making an independent decision about an intervention that has a lasting effect on their bodies and infringes on their autonomy and control over their lives.

The right to participate in cultural life and freedom of religion are protected by international law. However, international law stipulates that freedom to manifest one's religion or beliefs might be subject to limitations necessary to protect the fundamental rights and freedoms of others. Therefore, social and cultural claims cannot be evoked to justify female genital mutilation (International Covenant on Civil and Political Rights, article 18.3; UNESCO, 2001, Article 4)"

[7] CONCLUSION

From the foregoing, it is clear beyond any doubt that the practice of Female Genital Mutilation is condemned by both the Constitution of Uganda and International Law [The treaties, covenants, conventions and protocols to which Uganda is a party]. In particular, the practice contravenes the provisions of articles 21(1), 22(1), 24, 32(2), 33(1) and 44(a) of the Constitution.

Article 2(1) and (2) provides:-

"(1) This Constitution is the Supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.

(2) If any 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."

The practice of Female Genital Mutilation is a custom which is wholly inconsistent with the above mentioned provisions and it is now the duty of this court to declare the custom void.

I am aware that during the pendancy of this petition in this court, the Government of Uganda tabled a bill to outlaw the practice of Female Genital Mutilation. I have read from the press that the law has now been passed and assented to. If that is true, then it is a very welcome move but more importantly, it is consistent with my findings and declaration that Female Genital Mutilation must be outlawed for being inconsistent with the Constitution of Uganda.

Dated at Kampala this …**28th**……day of …**July**….2010.

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Hon. Justice A. Twinomujuni

JUSITCE OF APPEAL.

JUDGMENT OF HON. L.E.M. MUKASA-KIKONYOGO, DCJ

This petition was brought by Law and Advocacy for Women in Uganda under 137(1)(3)(a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petitions and References) Rules.

The petitioner is an NGO interested in the matters stated in the petition below which are in violation of the Constitution of Uganda 1995 and the binding international human rights law.

The main concerns of the petitioners include the following: -

(a)That the custom and practice of Female Genital Mutilation as practiced by several tribes in Uganda is inconsistent with the Constitution of the Republic of Uganda, 1995 to the extent that it violates Articles 2(2) 21(1), 24, 27(2) 32(2) and 33 thereof.

(b)As a result of this violation, the custom and practice of Female Genital Mutilation should be declared null and void and unconstitutional.

The court had, hence, to rule on two major issues namely: -

(1) Whether the custom and practice of female genital mutilation is unconstitutional.

(2) Whether the custom and practice of female genital mutilation should be declared null and void.

The petition was supported by a number of affidavits sworn by some five individuals.

The Attorney General who was the respondent had earlier denied liability and contended that the petition discloses no cause of action. The respondent had not violated any provisions of the Constitution. The petition was misconceived and did not raise any matter that required interpretation of the Constitution under Article 137(1)(3)(a) and (d) of the Constitution of Uganda and Rule 3 of the Constitutional Court (Petitions and References) Rules.

When the petition was called for hearing the Senior State Attorney Patricia Mutesi intimated to Court that the Attorney General did not wish to contest the petition.

I am in full agreement with Mr. Rwakafuzi, counsel for the petitioners that the respondent conceded to the petition and had, hence, succeed.

The Court did not consider it necessary to proceed with the hearing. In any case there was sufficient documentary and affidavit evidence on record which could be relied on for a decision. The petition was hence adjourned for judgment on notice.

I had the advantage of reading in draft the judgment prepared by Twinomujuni, JA, he ably set out the background, the law and he correctly evaluated the evidence with which I concur. I have nothing useful to add.

Furthermore, it should also be noted that this judgment is more for the purposes of putting the record right, because whilst the petition was pending in this Court, Parliament passed and assented to the Bill outlawing the practice of Female Genital Mutilation.

Since all the justices on the Coram agree with the lead judgment the petition is allowed with the declarations and orders prayed for by the petitioner.

Dated at Kampala this...**28th**...day of .....**July**....**2010**.

L.E.M. Mukasa-Kikonyogo
DEPUTY CHIEF JUSTICE
HEAD OF COURT OF APPEAL &
PRESIDENT OF THE CONSTITUTIONAL COURT

JUDGEMENT OF HON. A.E.N MPAGI-BAHIGEINE, JA

I have read in draft the judgment of Twinomujuni, JA. I entirely agree with it especially the exhaustive way he has treated the subject.

I would only add that since Parliament has already outlawed the practice of female genital mutilation in accordance with the International Treaties, it is now incumbent upon the judiciary to play the very important role in completely eliminating any form of violence against women including female genital mutilation.

The judiciary being part of the State machinery is enjoined to address this issue aggressively whenever it comes before court by involving innovative and progressive interpretation of the laws. Failure to do so would be tantamount to a breach by the State of its international obligations.

The Petition succeeds uncontested as indicated in the lead judgement.

Dated at Kampala this…**28th**..day of …**July**…2010.

A.E.N MPAGI-BAHIGEINE

JUSTICE OF APPEAL

JUDGMENT OF S.B.K.KAVUMA, JA

I have had the advantage of reading, in the draft, the judgment prepared by my brother A.Twinomujuni, JA.

I concur.

Dated at Kampala this ….**28th**…day of …**July**…2010

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S.B.K.Kavuma

Justice of Appeal