THE REPUBLIC OF UGANDA

THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Kibeedi, Mulyagonja, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 36 OF 2019

DUKE MABEYA GWAKA ..... PETITIONER

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT OF MONICA K. MUGENYI, JCC

A. Introduction

1. Duke Mabeya Gwaka, a Kenyan national that is serving a 45-year sentence at Luzira Upper Maximum Prison ('the Petitioner'), lodged this petition challenging what in his view is the selective application by Ugandan courts of the interpretation of Article 23(8) of the Ugandan Constitution as rendered by the Supreme Court in **Moses Rwabugande vs Uganda (2017) UGSC 8**. The Supreme Court's disinclination to retrospectively apply that decision to his appeal, **Duke Mabeya Gwaka vs Uganda, Criminal Appeal No. 59 of 2015** (unreported), is perceived to have been unfair, discriminative and inconsistent with Articles 1, 2, 20, 21(1) and (3), 28(1) and 44(c) of the Constitution.

2. The supposed failure by that court to engender the Petitioner's rights as expounded in the **Rwabugande** case is additionally opined to be a violation of Articles 2(1) and (2), 20, 44 and 50 of the Constitution, and the 45-year sentence imposed on him by the trial court and upheld by the Ugandan appellate courts is purported to have flouted section 82(5) of the Trial on Indictments Act, Cap. 23 and Articles 23(8), 28(3)(a), (8) and (12), 126(1) and 127 of the Constitution.

3. The petition is opposed by the office of the Attorney General ('the Respondent'), which denies any constitutional violation either in the decision of the Supreme Court in the Petitioner's appeal [**Duke Mabeya Gwaka vs Uganda** (supra)] or in the sentence in respect thereof as upheld by that appellate court. The petition is opined to be a disguised appeal from the decision of the Supreme Court in that case, which is bad in law, prolix and raises no question for constitutional interpretation.

4. At the hearing, the Petitioner was represented by Mr. Kefa Nyambane; while Mr. Mark Muwonge, a State Attorney, appeared for the Respondent.

B. Issues for Determination

5. The parties were apparently unable to agree on the issues for determination, the Petitioner proposing the following substantive issues:

I. *Whether the selective application by the courts of the interpretation of Article 23(8) of the Constitution as pronounced in Rwabugande Moses versus Uganda SCCA No. 25 of 2014 is fundamentally unfair, amounts to unequal treatment before and under the law thus inconsistent with and in contravention of Articles 1, 2, 20, 21(1), (2) and (3), 28(1) and 44(c) of the Constitution of the Republic of Uganda.*

II. *Whether the act of the Supreme Court giving the petitioner a different treatment (applying a different constitutional standard) from what is applied to other appellants in the judicial system while applying the interpretation of Articles 23(8) of the Constitution as pronounced in Rwabugande's case is discriminative before and under the law thus inconsistent with and in contravention of Article 1, 2, 20, 21(1) and (2), 20, 28(1) and 44(c) of the Constitution of the Republic of Uganda.*

6. On its part, the Respondent framed the following issues:

I. *Whether the Petition raises any question or issue of constitutional interpretation.*

II. *Whether the courts selectively interpreted Article 23(8) of the Constitution as pronounced in Rwabugande Moses versus Uganda SCCA No. 25 of 2014 is fundamentally unfair and discriminative before and under the law and thus inconsistent with and in contravention of Articles 1, 2, 20, 21(1), (2) and (3), 28(1) and 44(c) of the Constitution.*

III. *Whether the sentence of 45 years' imprisonment imposed on the Petitioner by the trial court and subsequently upheld by the Appellate Court is inconsistent with and in contravention of Article 23(8), 28 (3)(a), (8) and (12), 126(1) and 127 of the Constitution.*

IV. *Whether the Supreme Court failed to accord the Petitioner the widest enjoyment of the fundamental rights enshrined in Articles 23(8) as expounded in Rwabugande's case and Article 28(3a) Constitution is inconsistent with and in contravention of Articles 2(1) and (2), 20, 44 and 50 of the Constitution.*

7. Insofar as the jurisdiction of this Court to entertain the Petition is contested in paragraph 2(a) of the Answer to the Petition, the first issue framed by the Respondent would be valid. Similarly, the Respondent's third and fourth issues are validly raised to the extent that they directly ensue from paragraphs 3(b) and (c) of the Petition. On the other hand, *Issues 1* and *2* as proposed by the Petitioner, and *Issue No. 2* as framed by the Respondent do all address the question of unfair and discriminatory treatment, save that the Respondent additionally takes issue with the supposedly selective interpretation of Article 23(8) of the Constitution. That

contestation arises from paragraphs 3(a) of the Petition and 2(c) of the Answer to the Petition. For the avoidance of doubt, the cited pleadings are reproduced below.

Petition

3(a) *THAT the act of the selective application by courts of the interpretation of Article 23(8) of the constitution as pronounced in **Rwabugande Moses vs Uganda SCCA No. 25 of 2014 (2017 UGSC 8** on the appellants in the judicial system is fundamentally unfair and discriminative….*

Answer to the Petition

2(c) *That the decision oif the Supreme Court in Criminal Appeal No. 59 of 2015 Duke Mabaya Gwaka v Uganda is not inconsistent with or in contravention of …*

8. I would therefore merge and paraphrase *Issues 1* and *2* as raised by the Petitioner. The Petitioner particularly protests the Respondent's reframing of the issues for determination to include its fourth issue, arguing that the matters raised thereunder are canvassed under the issues he proposes. I would agree that what is proposed as the fourth issue by the Respondent falls within the Petitioner's now merged issues. In my view, the constitutionality of the 45-year sentence would also fall within that merged issue. Accordingly, I propose to address the following issues:

    I. *Whether the Petition raises any question or issue as to the interpretation of the Constitution.*

    II. *Whether the allegedly selective application by the courts of the interpretation of Article 23(8) of the Constitution as pronounced in Rwabugande Moses versus Uganda SCCA No. 25 of 2014 is fundamentally unfair and discriminative before and under the law and thus inconsistent with and in contravention of Articles 1; 2; 20; 21(1), (2) and (3); 28(1), (3)(a), (8) and (12); 44(c), 50; 126(1) and 127 of the Constitution.*

    III. *What remedies are available to the parties.*

C. **Determination**

Issue No. 1: *Whether the Petition raises any question or issue as to the interpretation of the Constitution*

9. It is the Respondent's contention that the Petition does not present circumstances that invoke this Court's interpretative jurisdiction but rather seeks the enforcement of the Petitioner's right to liberty as highlighted in Article 23(8) of the Constitution. Article 23(8) reads as follows:

> **Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.**

10. Learned State Counsel cites the authority of **Jude Mbabaali v Edward Sekandi (2014) UGCC 15** for the proposition that a litigant that seeks redress for the infringement of his/ her right need not apply to the Constitutional Court as such redress would not necessitate the interpretation of the Constitution before the applicable constitutional applications can be enforced. It is argued that to the extent that the Petitioner faults the courts for failure to deduct the actual pretrial remand period at sentencing, he seeks redress that ought to have been pursued by review not constitutional petition. It is further argued that the petition is a disguised appeal insofar as it seeks to have this Court interrogate whether the Supreme Court determined the Petitioner's criminal appeal in accordance with the **Rwabugande** decision. However, in Counsel's view, the Supreme Court was at liberty to apply its latter decision in **Abelle Asuman vs Uganda (2018) UGSC 10** to the Petitioner's criminal appeal, thus upholding the constitutionality of his sentence.

11. Conversely, learned Counsel for the Petitioner contends that it is the selective application of Article 23(8) and the **Rwabugande** case to the benefit of some prisoners and not the Petitioner that is in issue presently for its perceived contravention of Article 21(1), (2) and (3) of the Constitution. The discriminatory aspect of the Supreme Court's conduct is opined to lie in the court's refraining from

the retrospective application of the **Rwabugande** decision to the Petitioner's case, but departure from that position to so apply it in other appeals.

12. The case of **Wamutabanewe Jamiru vs Uganda (2018) UGSC 8** is cited to illustrate that position. In that case, the Court of Appeal had rendered its decision against the appellant on 27th April 2011, long before the Supreme Court's decision in the **Rwabugande** case on 3rd March 2017. On appeal to the Supreme Court, the apex court did on 11th April 2018 render its decision, upholding its earlier decision in the **Rwabugande** case to state that '**a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision ... we do not agree with the finding of the court of appeal that the period the appellant spent on remand was four years. It was five years, one year more. That extra year should have been considered by the court of appeal when it passed sentence**.'

13. By contrast, the Supreme Court's decision in the Petitioner's appeal was delivered on 21st December 2018 but in that case the court held:

> We note that in the instant case, the decision of the Court of Appeal upholding the sentence of the trial court was delivered on 28th August 2015, before the Rwabugande's case decision. The Court of Appeal cannot be faulted for upholding the trial court's sentence because it was guided by what was then accepted as the meaning of Article 23(8) of the Constitution.

14. It is thus argued that the Supreme Court ought to have applied its interpretation of the law as had been correctly rendered in the **Rwabugande** case to its determination of the Petitioner's appeal, the said appeal having been decided after both the **Rwabugande** and **Wamutabanewe** decisions. Short of that, the petition is opined to illustrate the discriminatory treatment of the Petitioner, a matter that squarely falls within the jurisdiction of this Court.

15. This Court's interpretative jurisdiction is delineated in Article 137(1) and (3) of the Constitution as follows:

(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

(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.

16. That constitutional provision has been given extensive interpretation by the Supreme Court. In **Attorney General v Major General David Tinyefuza (1998) UGSC 74**, the court was quite categorical on the scope of Article 137(1) of the Constitution, succinctly clarifying that '**unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction**.'

17. In the latter case of **Ismail Serugo v Kampala City Council & Another (1999) UGSC 23** a distinction was drawn between a constitutional violation that requires constitutional interpretation for its determination, and a similar violation the remedy for which lies not in constitutional interpretation but the enforcement of the infringed rights as envisaged under Article 50 of the Constitution. It was observed (per Wambuzi, CJ):

> For the constitutional Court to have jurisdiction the petition must show, on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a Constitutional provision has been violated. If therefore any rights have been violated as claimed, these are enforceable under Article 50 of the Constitution by another competent Court.

18. The dichotomy between the redress sought under Articles 50 and 137(4) of the Constitution was further clarified as follows in the same case (per Mulenga, JSC):

> Such application for redress can be made to the Constitutional Court, only in the context of a petition under Article 137 brought principally for the interpretation of the Constitution. It is the provisions in clauses (3) and (4) of Article 137 that empower the

> Constitutional Court, when adjudicating on a petition for interpretation of the Constitution, to grant redress where appropriate. Clause (3) provides, in effect, that when a person petitions for a declaration on interpretation of the Constitution, he may also petition for redress where appropriate. .... It follows that a person who seeks to enforce a right or freedom guaranteed under the Constitution, by claiming redress for its infringement, but whose claim does not call for an interpretation of the Constitution, has to apply to any other Court.

19. For ease of reference, both constitutional provisions are reproduced below.

> Article 50(1)
>
> **Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation**.
>
> Article 137(4)
>
> **Where upon determination of a 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**.

20. The foregoing provisions and authorities were considered by this Court in **Stephen Asiimwe & Others v Attorney General, Constitutional Petition No. 15 of 2016** (unreported), where it was observed that the judicial process delineated in Article 50(1) pertains to the enforcement or application of the Constitution by the ordinary civil courts, while the redress that might arise under Article 137(4) is purely incidental to the constitutional interpretation mandate of the Constitutional Court.

21. In the matter before the Court presently, the Petitioner basically contests what he perceives to be the differential treatment accorded to his appeal by the Supreme Court, considering it unfair and discriminatory. Without delving into the merits of the petition at this stage, it seems to me that the Petitioner's contestations raise the question of the function of judicial precedent in engendering the right to a fair hearing by the courts. The determination of that question would necessitate an

interrogation of the import and scope of the notion of freedom from discrimination under Article 21 of the Constitution, within the context of the non-derogable right to a fair hearing and the exercise of judicial power as respectively contemplated under Articles 28 and 126 of the Constitution. The petition thus raises a discernible question, the resolution of which is entirely dependent on the interpretation of such clauses under the above constitutional provisions as have been specifically invoked by the Petitioner in this case.

22. I am satisfied, therefore, that the petition does raise questions for constitutional interpretation and is properly before this Court. I would resolve *Issue No. 1* in the affirmative.

Issue No. 2: *Whether the allegedly selective application by the courts of the interpretation of Article 23(8) of the Constitution as pronounced in Rwabugande Moses versus Uganda SCCA No. 25 of 2014 is fundamentally unfair and discriminative before and under the law and thus inconsistent with and in contravention of Articles 1; 2; 20; 21(1), (2) and (3); 28(1), (3)(a), (8) and (12); 44(c), 50; 126(1) and 127 of the Constitution.*

23. The Petitioner asserts that the Supreme Court was alive to the fact that the trial court had not sentenced him in accordance with Article 23(8) of the Constitution but nonetheless declined to set aside the sentence. The High Court had rendered itself as follows in **Uganda vs. Duke Mabeya Gwaka, Criminal Case No. 9 of 2009**:

> *Looking at the circumstances of this case, it is evident that the maximum penalty which is death would not be misplaced. Court however takes into account that the convict is a first offender and at 27 years he is definitely still a young man. He has been on remand for 2 years …. in the premises, I consider a sentence of 45 years imprisonment appropriate taking into account the period spent on remand.*

24. On appeal, the Supreme Court re-stated its earlier decision in the **Rwabugande** case (advancing the arithmetic deduction of the remand period) but nonetheless declined to set aside the Petitioner's sentence for the following reason:

We note that in the instant case, the decision of the Court of Appeal upholding the sentence of the trial court was delivered on 28th August 2015, before the ***Rwabugande Moses*** *decision. The Court of Appeal cannot therefore be faulted for upholding the trial court's sentence because it was guided by what was then accepted as the meaning of Article 23(8) of the Constitution.*

25. That decision is contrasted with the same court's decision in **Wamutabanewe Jamiru vs Uganda** (supra) to argue that the Petitioner's appeal was subjected to differential and unequal treatment. The Supreme Court's decision in the **Wamutabanewe** case was as follows:

> *Indeed, in* ***Rwabugande Moses vs Uganda (supra)****, this court stated that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision … our perusal of the records reveals that the appellant was arrested on the night of the offence on 4th April 2002 and was handed over to police. Eventually he was taken to court and charged. He was convicted and sentenced by the High Court on 8th August 2007. Clearly, there was a span of five years between arrest and conviction, the appellant was in lawful custody. We do not agree with the finding of the court of appeal that the period the appellant spent on remand was four years. it was five years, one year more. That extra year should have been considered by the court of appeal when it passed sentence.*

26. The US (United States) Supreme Court case of **Griffith vs Kentucky, 479 U.S 314, 328 (1987)** is cited in support of the proposition that the selective application of the **Rwabugande** decision by the Uganda Supreme Court violated the ideals of non-discrimination and equality under the law as enshrined in Article 21(1), (2) and (3) of the Constitution. The effect of the Uganda apex court's failure to apply its **Rwabugande** decision to the Petitioner's appeal is further opined to have denied him a fundamental right as encapsulated under Article 23(8), which in turn flouted Articles 2, 20, 44 and 50 of the Constitution. It is argued that the failure by that court to pronounce itself on whether its **Rwabugande** decision had retrospective or prospective application has caused a lot of confusion hence the selective application of that decision. Counsel for the Petitioner seeks to have this Court determine the question as to whether the interpretation of constitutional provisions can have retrospective effect, cognizance being made of the fact that unrestrained retroactivity without a cut-off date can be costly to the administration of justice.

27. Conversely, the Respondent contends that the Ugandan courts do not selectively apply the Supreme Court's interpretation of Article 23(8) of the Constitution but follow the position of the law in place at the time of sentencing a convict. Thus, given the pronouncement by the Supreme Court in **Abelle Asuman vs Uganda** (supra) that '**the case of Rwabugande (supra) would not bind courts for cases decided before the 3rd March 2017**,'[1] neither the trial court not the Supreme Court could be faulted for applying that position of the law to the Petitioner's appeal and sentence respectively. An attempt is made to distinguish the decision in the **Wamutabanewe Jamiru** case from the circumstances of the Petitioner's appeal on the premise that the issue that was before the apex court in the former case was not the retrospective application of the **Rwabugande** case but the inaccurate finding by the Court of Appeal of the period the convict therein had spent on remand.

28. It is further argued by learned State Counsel that the 45-year sentence handed down to the Petitioner is legal given that it falls within the range of the maximum penalty available for the offence of murder, and was arrived at with due regard to the applicable mitigating circumstances. Furthermore, to the extent that the Supreme Court in **Abelle Asuman vs Uganda** (supra) adjudged the demonstration by a trial court of having taken the remand period into account as adequate compliance with Article 23(8) of the Constitution, the application of that authority to the Petitioner's appeal is opined to have underscored his constitutional rights thereunder.

29. By way of rejoinder, Counsel for the Petitioner cites the decisions in **Tigo Stephen vs Uganda (2011) UGSC 77** and **Griffith vs Kentucky** (supra) to reiterate the need for express pronouncement by the Supreme Court on the retrospective application of its decisions, where the need arises. Counsel further reiterates his earlier position that the Petitioner's appeal ought to have been determined in accordance with the **Rwabugande** decision, and the constitutionality of the differential application of Article 23(8) of the Constitution having never been determined before, this petition is neither tantamount to an appeal nor a matter of

[1] When the **Rwabugande** decision was rendered.

rights enforcement. It is within that context that the constitutionality of the Petitioner's 45-year sentence has been challenged.

30. The material facts of this case, as garnered from the parties' legal arguments, are that the Supreme Court had previously construed the constitutional requirement for a sentencing court to '*take into account*' the period spent in lawful custody not to necessitate '***a sentencing court to apply a mathematical formula***.' This was the consistent decision in numerous cases including **Kabuye Senvewo vs Uganda (2005) UGSC 23**, **Katende Ahamed vs Uganda (2007) UGSC 11** and **Bukenya Joseph vs Uganda (2012) UGSC 3**.

31. The Petitioner's criminal case and subsequent appeal to the Court of Appeal were determined on that basis but, while the determination of his second appeal to the Supreme Court was pending, the apex court reconsidered its decision above and on 3rd March 2017 handed down its decision in the **Rwabugande** case that explicitly departed from the previous legal position and unequivocally imposed a duty on sentencing courts to arithmetically deduct the period spent on remand from a prospective sentence. It was held:

> The principle of *stare decisis et non quieta movera*, which is applicable in our judicial system, obliges the Supreme Court to abide or adhere to its previous decisions. However, **Article 132 (4) of the Constitution** creates an exception and states that the Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so. We have found it right to depart from the Court's earlier decisions mentioned above in which it was held that consideration of the time spent on remand does not necessitate a sentencing court to apply a mathematical formula. It is our view that the taking into account of the period spent on remand by a court is necessarily arithmetical. This is because the period is known with certainty and precision; consideration of the remand period should therefore necessarily mean reducing or subtracting that period from the final sentence. That period spent in lawful custody prior to the trial must be specifically credited to an accused.

32. However, when the Petitioner sought to apply that standard to his second appeal by contesting the failure by the Court of Appeal to deduct the period he had spent on remand; the Supreme Court in its judgment of 21st December 2018 declined to apply its **Rwabugande** interpretation of Article 23(8) on the premise that the Court

of Appeal had considered the Petitioner's case on 25th August 2015, before the **Rwabugande** decision was rendered. The apex court in effect applied the position it had expounded in its 19th April 2018 judgment in **Abelle Asuman vs Uganda** (supra), where it had held as follows:

> This Court and the Courts below before the decision in **Rwabugande (supra)** were following the law as it was in the previous decisions above quoted since that was the law then. After the Court's decision in the **Rwabugande case** this Court and the Courts below have to follow the position of the law as stated in **Rwabugande (supra).** This is in accordance with the principle of precedent. ... A precedent has to be in existence for it to be followed. The instant appeal is on a Court of Appeal decision of 20th December 2016. The Court of Appeal could not be bound to follow a decision of the Supreme Court of 03rd March 2017 coming about four months after its decision. **The case of *Rwabugande* (supra) would not bind Courts for cases decided before the 3rd of March 2017**. *(my emphasis)*

33. To that extent, the Supreme Court upheld its **Rwabugande** decision as good law albeit apparently without retroactive application to decisions delivered prior to the date it was rendered. However, in the same **Abelle Asuman** case the Supreme Court upheld the arithmetic approach as but one of the ways time spent in lawful custody could be taken into account, stating as follows:

> What is material in that (Rwabugande) decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution. Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution. ... We find in the instant Appeal, that the Court of Appeal Justices complied with provisions of **Article 23(8) of the Constitution** and that the sentence of 18 years that they imposed was lawful.

34. I return to a more detailed consideration of the import of the **Abelle Auman** decision to the petition before us later in this judgment. However, I am constrained to respectfully state from the onset that this Court does not purport to preside over the present petition as a first appellate court inquiring into the decisions of a second appellate court (which would be utterly untenable), but as a court of original jurisdiction in the determination of the questions for constitutional interpretation that are presently before it.

35. By way of contextual background, in the **Rwabugande** case the Supreme Court was clearly alive to the principle of *stare decisis*, which it observed '**obliges the Supreme Court to abide or adhere to its previous decisions**.' Nonetheless, on the premise that '**the taking into account of the period spent on remand by a court is necessarily arithmetical** (as) **the period is known with certainty and precision**,' the apex court exercised its constitutional prerogative under Article 132(4) of the Constitution to depart from the practice of non-arithmetic consideration of the remand period established in its earlier decisions to decide that henceforth the only way that time spent on remand (or in other lawful custody) could be *taken into account* within the ambit of Article 23(8) of the Constitution was by arithmetic deduction. That is the *ratio decidendi* in the **Rwabugande** case.

36. A year later, the court again exercised its constitutional prerogative to decide in the **Abelle Asuman** case that in fact the Constitution is silent on how time spent in lawful custody should be taken into account, not explicitly providing for any arithmetic deductions and, therefore, judicial officers' drafting style should not be the basis for interference with a sentence, provided that there is demonstration of the period spent in lawful custody having been taken into account. The **Abelle Asuman** case thus sought to revisit the restrictive interpretation in the **Rwabugande** case, where the application of Article 23(8) had been limited to arithmetic deductions, to include that arithmetic approach as one of the different ways in which time taken in lawful custody could be '*taken into account*'.

37. However, two years later in **Nashimolo Paul Kibolo vs Uganda (2020) UGSC 24** the apex court was to declare the decision in the **Abelle Asuman** case to have

been arrived at *per incuriam* and reinstated the **Rwabugande** decision as the correct position of the law in the following terms:

> The decision (Rwabugande Moses decision) was delivered on 3rd March 2017. In accordance with the principle of precedent, this Court and the courts below have to follow the position of the law from that date ... The case of ***Abelle Asuman vs. Uganda*** *(supra)* .... was delivered on 19th April 2018 a year after the decision in the case of ***Rwabugande Moses vs Uganda*** *(supra).* This Court was therefore bound by its previous decision. The principle of horizontal precedent, which means that a court is bound by its own decisions in the absence of exceptional reasons to warrant the departure from its decision applies. ... The decision in **Abelle Asuman vs, Uganda** (supra) was made per incuriam to the extent that it made reference to an outlawed position.

38. Therefore, until the apex court considers it necessary (for good reason) to revisit this position, the **Rwabugande** decision represents the law on sentencing under Article 23(8) of the Constitution. Be that as it may, the foregoing turn of events brings into purview two fundamental issues, namely, the doctrine of *stare decisis* and the retroactivity of new constitutional rules following a clear departure from previously established rules. These issues are critical to the determination of the constitutional violations alleged in this petition.

39. The doctrine of *stare decisis* was appositely restated in **The Attorney General v Uganda Law Society (2009) UGSC 2** as follows (per Mulenga, JSC):

> Under the doctrine of *stare decisis*, which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decisions save in exceptional cases where the previous decision is distinguishable or was over-ruled by a higher court on appeal or was arrived at *per incuriam* without taking into account a law in force or a binding precedent. In absence of any such exceptional circumstances, a panel of an appellate court is bound by previous decisions of other panels of the same court.

40. Simply stated, the doctrine hinges on the Latin phrase *stare decisis* that literally means '**to stand by things decided**' or, as more explicitly expressed in *Black's Law Dictionary*, '**to stand by things decided, and not to disturb settled points**.'[2] Thus, where similarities exist between a decided case and a case before a court,

[2] Black's Law Dictionary, 8th Edition (1st Reprint), 2004, p. 1443.

the precedent set by the court should be followed; but where there is little or no similarity, the material facts of the case under consideration must be distinguished so as to justify a departure from the precedent. As was observed in *Stone, Christopher, '**The doctrine of judicial precedent with special reference to the cases involving seriously ill new born infants'**, November 2009*,[3] '**the *ratio decidendi*** (that underlies the precedent) **is central to this process, for it identifies the material facts upon which the judgment is based and is indicative of the scope of application of the precedent to subsequent cases**.' The obligation of a court to follow decisions of a higher court within its jurisdiction (*precedent*) and the obligation of a court to abide its earlier decisions (*stare decisis*) are central common law principles that contribute to certainty, consistency and predictability in the law. See *Mason, Anthony, '**The Nature of the Judicial Process and Judicial Decision-Making**.'*[4]

41. It is nonetheless recognized that there are exceptional circumstances under which courts may depart from positions taken in previous decisions. In Uganda, Article 132(4) of the Constitution explicitly mandates the Supreme Court to depart from its previous decisions under the circumstances delineated thereunder. That provision reads as follows:

> **The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.** *(my emphasis)*

42. In **The Attorney General v Uganda Law Society** (supra), the exceptional circumstances under which such a departure may *ordinarily* ensue were adjudged to include '**where the previous decision is distinguishable; was over-ruled by a higher court on appeal, or was arrived at *per incuriam* without taking into account a law in force or a binding precedent**.' Admittedly, these considerations are in no way exhaustive and do not address, for instance, a scenario where a court reconsiders its previous decision, deducing it to be plainly

[3] Published at https://www.medicalandlegal.co.uk
[4] Published in *Sheard, Ruth (Editor), '**A Matter of Judgment: Judicial decision-making and judgment writing**', Judicial Commission of New South Wales, 2003, p. 1 at p. 9.*

wrong albeit without necessarily offending either an existing law or a binding precedent. Judicial best practice in those circumstances is espoused in the same authority – **The Attorney General v Uganda Law Society** (supra) – in the following terms (per Mulenga, JSC):

> It does not make good sense in case of a controversial issue, for a panel of an appellate court by a majority of three to two to overturn a precedent set by a panel of the same court by a majority of four to one. **The best practice observed in other jurisdictions where a court is empowered to depart from its previous decision, is to empanel the full court in case of a controversial issue so as to give more clout to the decision in the event of departure from precedent.** To permit one panel of the Court of Appeal to overturn a precedent set by another on such pretext as in the instant case, would lead to the antithesis of the doctrine of *stare decisis* and would be a recipe for uncertainty, instability and unpredictability of the law that the courts have the responsibility to interpret and apply. *(my emphasis)*

43. In principle, therefore, rather than one panel of the Supreme Court simply overturning the decision of another panel of the same court; where a matter before the court raises sufficient controversy to present the possibility of departure from a previous decision it would be prudent for the apex court to handle the matter *en banc* by empanelling the full court to determine it. This would not only avert the uncertainty, instability and unpredictability of the law alluded to in **The Attorney General v Uganda Law Society** (supra) above, it would additionally cloth the resultant decision in relative acceptability as the position of the full court.

44. Undoubtedly, no court should be called upon to abide a judicial precedent that is plainly unsound and leads to unjust outcomes as this would erode public confidence in the administration of justice. However, the departure by a court (particularly the apex court) from its own decisions, should be approached with the greatest circumspection. Thus in *Mason, Anthony, '**The Nature of the Judicial Process and Judicial Decision-Making*** (supra) it is posited that whereas a court is not bound to follow any of its decisions which it subsequently views to be wrong, it should not lightly depart from its earlier decisions in the absence of compelling circumstances. The case of **Queensland v Commonwealth (1977) 139 CLR[5] 585**

[5] Commonwealth Law Reports

at 599 is cited in support of the proposition therein that '**it is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a justice may give effect to his own opinions in preference to an earlier decision of the Court**.' Even then, with the rider quoted from *Dixon, Owen, '**Concerning Judicial Method**'*[6], that judges should not depart from settled principle to give effect to their subjective opinion '**in the name of justice or of social necessity or of social convenience**.'

45. Might I add too, in the name of the emerging phenomenon of '*judicial activism*'. As was compellingly espoused in **Geelong Harbour Trust Commissioners v Gibbs Bright & Co. Ltd (1974) 129 CLR 576 at 582**, the fact that a judicial decision has given general satisfaction to court users and caused no difficulty in practice is an important factor to be weighed against the more theoretical interests of legal science in deciding whether a court should change the law.

46. I now turn to the question of the retroactive applicability of a new constitutional rule or interpretation. *Black's Law Dictionary*[7] defines the term 'retroactive' in relation to a ruling or decision as '**extending in scope or effect to matters that have occurred in the past**.' The concept of retroactivity is more succinctly defined in the same dictionary as follows:

> 'Retroactivity' is a term often used by lawyers but rarely defined. On analysis, it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called 'true retroactivity,' consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. The second concept, which will be referred to as 'quasi-retroactivity,' occurs when a new rule of law is applied to an act or transaction in the process of completion. (T)he foundation of these concepts is the distinction between completed and pending transactions.[8]

47. In the matter before us, the Supreme Court did in the **Rwabugande** case state that it was making a clear departure but did not pronounce itself on whether its decision therein took effect retroactively or prospectively. It declared the non-retroactive

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[6] (1956) 39 Australian Law Journal, 468 at 469.
[7] 8th Edition, p. 1343
[8] Citing Hartley, T. C., *The Foundation of European Community Law*, 1981, 129

application of the **Rwabugande** decision in the latter **Abelle Asuman** case when it held that '**the case of *Rwabugande* (supra) would not bind Courts for cases decided before the 3rd of March 2017**.' However, even that position was subsequently abandoned by the apex court in the **Nashimolo** case, when it declared the **Abelle Asuman** decision to have been made *per incuriam* and reinstated the **Rwabugande** decision.

48. In **Attorney General v Susan Kigula & Others (2009) UGSC 6** the Supreme Court pronounced itself on the retroactivity of its new rule on the death penalty. It held:

> We confirm the declarations made by the Constitutional Court and, we would modify the orders made by that court as follows:-
>
> (1) For those respondents whose sentences were already confirmed by the highest Court, their petitions for mercy under article 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the Executive, the death sentence shall be deemed commuted to imprisonment for life without remission.
>
> (2) **For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate Court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law**. *(my emphasis)*

49. The Supreme Court thus adopted a quasi-retroactive stance in relation to cases that were pending determination at the time it rendered its decision above. This is quite distinct from the *true retroactivity* posited in *Black's Law Dictionary* that the Petitioner would have this Court apply to the **Rwabugande** rule. The question before us, therefore, is whether new constitutional rules in Uganda ought to apply quasi-retroactively or fully retroactively.

50. In **Linkletter v Walker, 381 U. S. 618 (1965),** the US Supreme Court observed that the US Constitution (like the Uganda Constitution) had neither proscription against nor a requirement for the retrospective effect of new constitutional rules and therefore the determination of retroactivity must depend on the circumstances

of each case. It proposed what have since come to be referred to as the '*Stovall factors*'[9] to hold that retroactivity should depend on the following considerations:

> *(a) the purpose of the new rule or standard;*
> *(b) the extent of reliance on the old rule, and*
> *(c) the effect on the administration of justice of the retroactive application of the new rule.*

51. Following the decision in **Linkletter v Walker** (supra), the US Supreme Court's pronouncement of a new constitutional rule in the realm of criminal procedure was often accompanied by a separate decision explaining whether and to what extent that rule applied to past, pending and future cases. That would appear to be the approach adopted in **Attorney General v Susan Kigula & Others** (supra).

52. However, in **United States v Johnson, 457 U. S. 537 (1982)** the US apex court clarified the '*case-by-case*' approach to criminal reactivity espoused in **Linkletter v Walker** (supra). It considered the failure to apply a newly declared constitutional rule to criminal cases that were pending determination to defy basic norms of constitutional adjudication insofar as '**the integrity of judicial review requires that** (courts) **apply that rule to all similar cases pending on direct review** (and) **selective application of new rules violates the principle of treating similarly situated defendants the same**.' It then held as follows:

> When a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not, in fact, altered that rule in any material way. ..... **Conversely, where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past,"[10] it almost invariably has gone on to find such a newly minted principle nonretroactive. ..... *Once the Court has found that the new rule was unanticipated, the second and third Stovall factors -- reliance by law enforcement authorities on the old standards and effect on the administration of***

[9] On account of their detailed enunciation in **Stovall v. Denno, 388 U. S. 293, 388 U. S. 297 (1967).**
[10] As in **Desist v. United States, 394 U. S. at 394 U. S. 248**

justice of a retroactive application of the new rule -- have virtually compelled a finding of nonretroactivity. *(my emphasis)*

53. This '*clear break*' exception to retroactivity was, however, rejected in the latter case of **Griffith vs Kentucky** (supra). The court reinforced its earlier view in **United States v Johnson** (supra), on the need to apply a new constitutional rule to criminal cases pending determination in order to uphold basic norms of constitutional adjudication, on the following premise:

> It is a settled principle that this Court adjudicates only "cases" and "controversies." .... Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. **But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review. .....** As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. *(my emphasis)*

54. The US apex court thus underscored the general rule on reactivity as the retrospective application of new constitutional rules to all similar cases that are pending final determination; negating the selective application of such rules to different cases insofar as it violates the principle of equal treatment for defendants or accused persons with similar circumstances. This general rule is in tandem with the principle of equality before and under the law, and equal protection under the law as espoused in Article 21(1) of the Ugandan Constitution. It does indeed reflect the approach adopted by the Ugandan Supreme Court in the **Susan Kigula** case insofar as the court ordered the remission back to the High Court of all pending appeals on the mandatory death sentence. It will suffice to observe here that the US apex court's departure from the '*clear break*' exception was informed by the viewpoint that the '*Stovall factors*' were better suited to the decision as to whether '**convictions that already have become final should receive the benefit of a new rule'** than to cases pending final determination. The court emphasized that

different treatment of two pending cases was only constitutionally justified when the cases differed in some respect that warranted the differential treatment.[11]

55. I find the foregoing decision and reasoning most compelling. The retroactive application of new constitutional rules to fully concluded cases would have far-reaching effects on the administration of justice, not least being the constitutional and other litigation that could ensue from convicts that have since served their sentences under the former legal regime. Indeed, **Linkletter v Walker** (supra) alludes to '*the extent of reliance on the old rule, and the effect on the administration of justice of the retroactive application of the new rule*' as pertinent considerations in retroactivity. In the same spirit, the Supreme Court did similarly apply a quasi-retroactive approach in the **Susan Kigula** case, where the retroactive application of the new rule in that case would have opened an unnecessary pandora's box with regard to concluded criminal cases. Accordingly, I find that the integrity of the judicial process in Uganda warrants that a new constitutional rule in the realm of criminal procedure is applied quasi-retroactively, that is, equally applied to all cases pending final disposal.

56. I now turn to a determination of the specific constitutional violations raised in this petition. The primary provisions in contestation are Articles 20; 21(1), (2) and (3), 28(1), (3)(a), (8) and (12); 44(c), and 126(1) of the Constitution; Articles 1, 2 and 127 being but enabling provisions on the sovereignty of the people, the supremacy of the Constitution and the enactment of participatory laws by parliament. For ease of reference, the invoked constitutional provisions are reproduced below, save for Article 50(1) that is reproduced earlier in this judgment.

> Article 20 *Fundamental and other human rights and freedoms*
>
> **(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.**
>
> (2) **The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.**

[11] **Michigan v. Payne, 412 U. S. 47, 412 U. S. 60 (1973)** (Marshall, J, dissenting) cited with approval.

Article 21(1), (2) and (3) *Equality and freedom from discrimination*

(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

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

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

Article 28(1), (3)(a), (8) and (12) *Right to a fair trial*

(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

(2) .....

(3) Every person who is charged with a criminal offence shall—

(a) be presumed to be innocent until proved guilty or until that person has pleaded guilty;

(4) .....

(5) .....

(6) .....

(7) .....

(8) No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.

(9) .....

(10) .....

(11) .....

(12) **Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.**

Article 44(c) *Prohibition of derogation from particular human rights and freedoms*

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

(a) .....

(b) .....

(c) the right to fair hearing;

Article 126(1) *Exercise of judicial power*

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

57. Article 20 makes general provision for the inherent nature of human rights and freedoms, and engenders their respect by all persons, organs and agencies of Government. Article 44(c) specifically delineates the right to a fair hearing that is articulated in Article 28(1) as a non-derogable right. I understand the thrust of the petition before us presently to be that the Supreme Court exercised the judicial power entrusted to it in a manner inconsistent with the Petitioner's right to a fair trial and freedom from discrimination as enshrined in Articles 21 and 28, and acted in non-conformity with the law contrary to the dictates of Article 126(1) of the Constitution.

58. I commence my interrogation from the premise that I find no violation whatsoever of Article 28(12) of the Constitution as the definition of and penalty for the offence of murder, with which the Petitioner was indicted, are clearly and unambiguously articulated in sections 188 and 189 of the Penal Code Act, Cap. 120. Secondly, a 45-year sentence cannot be deemed to be more severe than the maximum penalty for murder, which is the death sentence, so as to invoke a violation of Article 28(8) of the Constitution.

59. In terms of the ideals of equality and freedom from discrimination as enshrined in Article 21(1) and (2) of the Constitution, Article 21(3) delineates the circumstances under which a finding of discrimination may be made, defining the term '*discriminate*' as according '**different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability**.' Proof of any of the foregoing parameters of discrimination is a question of fact that must be sufficiently established.

60. Although the Petitioner in this case is a Kenyan by nationality, I find nothing on record to suggest that the Supreme Court declined to interfere with his sentence on account of his ethnic origin or indeed any of the other parameters outlined in that constitutional provision. On the contrary, the apex court's decision would appear to have been premised on its earlier stance in the **Abelle Asuman** case. In that case, the court relied on the notion of judicial precedent to propose that lower court decisions that had been made before the **Rwabugande** decision was rendered should not be interfered with. Therefore, that legal position having crystallized in the Supreme Court's disinclination to apply the **Rwabugande** decision to the Petitioner's appeal, the discriminatory parameters highlighted in Article 21(3) would be inapplicable to this petition. Strictly speaking, therefore, there would have been no violation of Article 21(2) and (3) of the Constitution either.

61. However, Counsel for the Petitioner questions the differential application of the **Rwabugande** decision in his client's case vis-à-vis the **Wamutabanewe** case. Although not quite attributable to the parameters highlighted in Article 21(3) *per se*, the Petitioner's allegation brings to bear the notion of equality of all persons before the law, equal protection under the law and the right to a fair hearing as stipulated in Articles 21(1) and 28(1) of the Constitution. For clarity, I consider it necessary to reproduce below the impugned decision in the **Wamutabanewe** case in its entirety.

> *Indeed, in **Rwabugande Moses vs Uganda (supra)**, this court stated that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. In this connection it is worthwhile to look at the judgment of the Court of Appeal, genesis of this Appeal. At page 4 of the judgment the following appears:*
>
> > *`**The appellant has now been in custody for a total (of) eight (8) years. He was on remand for four (4) years before he was sentenced. We, are also conscious of the fact that, tragic as it is, the deceased was the biological father of the appellant. To sentence the appellant to suffer death is, therefore, in a way, to add to the suffering of the families of the deceased, and the appellant, by adding another death of a family member. While, the appellant deserves least sympathy for having brutally killed his father, the deceased, we find, having considered the above considerations and all the circumstances pertaining to this case and the fact that the appellant has been in custody for eight (8) years now, that a***

sentence of thirty five (35) years without any remission, is the most appropriate for the appellant'.

It is clear that the Court of Appeal took into account the four years it deemed the Appellant had spent on remand, amongst the considerations, before it passed sentence. Our perusal of the records reveals that the appellant was arrested on the night of the offence on 4th April 2002 and was handed over to police. Eventually he was taken to court and charged. He was convicted and sentenced by the High Court on 8th August 2007. Clearly, there was a span of five years between arrest and conviction, the appellant was in lawful custody. ***We do not agree with the finding of the court of appeal that the period the appellant spent on remand was four years. it was five years, one year more. That extra year should have been considered by the court of appeal when it passed sentence. Needless to say the sentence imposed by the court of appeal ought to be varied.***

Decision

For the reasons given above we set aside the sentence passed by the Court of Appeal and substitute it with a sentence of imprisonment of 34 years effective from the date the Appellant was first convicted. (emphasis mine)

62. The foregoing decision has a two-fold effect. On the one hand the Supreme Court corrected the Court of Appeal's computation of the time that had been spent on remand, noting that the remand period was 5 years and not 4 years, as the lower court had found. However, in its decision, the apex court went ahead to deduct the extra year from the final sentence, a clear indication of the application of the **Rwabugande** arithmetic formula to the sentence.

63. Conversely, in its determination of the Petitioner's appeal [**Duke Mabeya Gwaka vs Uganda** (supra)], the Supreme Court similarly re-stated its earlier decision in the **Rwabugande** case advancing the arithmetic deduction of the remand period as the correct position of the law but declined to set aside the Petitioner's sentence on the premise that it had been upheld by the Court of Appeal on 28th August 2015, before the **Rwabugande Moses** decision was handed down. The court thus declined to enforce the retroactive application of its **Rwabugande** decision, a stance similar to that adopted in the **Abelle Asuman** case.

64. This course of action highlights the disparity in the apex court's treatment of the Petitioner's appeal that was decided on 21st December 2018 vis-à-vis the **Wamutabanewe** and **Abelle Asuman** cases that had been decided on 12th and

19th April 2018 respectively. Having declined to apply its **Rwabugande** decision retroactively in the **Abelle Asuman** case, the same standard should have been extended to both the **Wamutabanewe** case and the Petitioner's appeal. Instead, the Supreme Court deducted the extra year it had found to have been spent on remand in the **Wamutabanewe** case to yield a reduced sentence of 34 years, but declined to make any such reduction in the Petitioner's appeal.

65. The decision in **Attorney General v Uganda Law Society** (supra) posits that it would only be right for the Uganda Supreme Court to exercise its prerogative under Article 132(4) of the Constitution to depart from a previous decision where distinguishable circumstances exist to warrant such a departure. So that where the circumstances pertaining to two cases are the same, as transpired in the matter before us, the previous position would not be distinguishable so as to warrant differential treatment. As was most persuasively observed in **Griffith vs Kentucky** (supra), differential treatment of two cases is only constitutionally justified when the cases differ in some material respect.

66. With the greatest respect, it becomes apparent that the Supreme Court extended unequal treatment to two comparable situations in this case and was, to that extent, unfair in its handling of the Petitioner's appeal. This denotes a violation of the right of equality of persons under the law; equal protection of the law, and the non-derogable right to a fair hearing contrary to 21(1) and 28(1) of the Constitution. Having found the foregoing constitutional violations, it follows that the Supreme Court did not exercise its judicial power '**in conformity with the law**' as required of it under Article 126(1) of the Constitution.

67. I therefore find that there was a violation of Articles 21(1), 28(1), 44(c) and 126(1) of the Constitution in contravention of the supremacy of the Constitution as stipulated in Article 2(1) thereof. In the result, I would partially resolve *Issue No.2* in the affirmative.

Issue No. 3: *What remedies are available to the parties.*

68. For clarity, I consider it necessary to reproduce verbatim the declarations and orders sought by the Petitioner in this case.

(a) Declaratory Orders

(i) A declaratory order that the selective application of the interpretation of article 23(8) of the constitution as pronounced in Rwabugande case amounts into unequal treatment, discriminative and is fundamentally unfair thus being inconsistent with and in contravention of articles 1, 2, 20, 21(1) & (3), 28(1) and 44(c) of the constitution of the Republic of Uganda.

In the alternative

A declaratory order that the act of the Supreme Court giving a different treatment (applying a different constitutional standard) to the petitioner from what is applied to other appellants in the judicial system while applying the interpretation of Article 23(8) of the constitution as pronounced in Rwabugande is fundamentally unfair, discriminative and amounts to unequal treatment before and under the law, thus inconsistent with and in contravention of Articles 1, 2, 20, 21(1) (3), 28(1) and 44(c) of the constitution.

(ii) A declaratory order that interpretations of the provisions of the constitution have retroactive/ retrospective effect and therefore the interpretation of Article 23(8) of the constitution as pronounced in the Rwabugande case have a retroactive/ retrospective effect traceable to the date of promulgation of the constitution of the Republic of Uganda.

(iii) A declaratory order that the failure by the Supreme Court to accord the petitioner a widest enjoyment of constitutional fundamental rights enshrined in Articles 23(8) as expounded in Rwabugande case and 28(3)(a) is inconsistent with and in contravention of Article 20, 44, 50, and 126(1) of the constitution.

(iv) A declaratory order that the sentence of 45 years imprisonment that was imposed on the petitioner by the trial court and subsequently upheld by the appellate courts and does not fully comply with the mandatory provisions of the constitution and is null and void.

(b) Redress Orders

(i) ***THAT*** *the discriminative, unequal treatment and unconstitutional decision of the Supreme Court that the petitioner was not entitled to benefit from the interpretation of article 23(8) as pronounced in Rwabugande case on the basis of the time his court of appeal*

decision was delivered be declared unconstitutional thus null and void.

(ii) ***THAT*** *the sentencing proceedings and decision in the petitioner's trial at High Court and upholding of sentence in the Supreme Court that resulted in to the violation of the petitioner's fundamental rights enshrined in articles 20, 21(1) (3), 23(8) and 28(1) & 3(a) be declared unconstitutional thus null and void and be set aside.*

(iii) ***THAT*** *the illegal sentence that was imposed by the trial court and upheld by the Court of Appeal and Supreme Court be declared unconstitutional, null and void and be set aside.*

(iv) ***THAT*** *your humble petitioner's case be remitted to the High Court in accordance with Article 137(4) of the constitution to investigate and determine an appropriate sentence that complies with the mandatory provisions of the constitution and observes the constitutional fundamental rights of the petitioner.*

(v) ***THAT*** *each party to bear its own costs.*

69. Having found a violation of Articles 2(1), 21(1), 28(1), 44(c) and 126(1) of the Constitution in my determination of the preceding *Issue*, I would grant a declaration to that effect. I would also grant the declaration sought that the sentence imposed on the Petitioner in this case is inconsistent with the provisions of Article 23(8) of the Constitution given that the Supreme Court did in **Nashimolo Paul Kibolo vs Uganda** (supra) state quite unequivocally that its **Rwabugande** decision represents the applicable legal position in respect of that constitutional provision.

70. Furthermore, having upheld the *quasi-retroactivity* of new constitutional rules in the realm of criminal procedure, I would decline to grant the declaration sought by the Petitioner for the *full* retroactive application of the rule in the **Rwabugande** case, and restrict that constitutional rule to quasi-retroactive application to only criminal cases pending final determination.

71. I now turn to the question of the nullification of the sentencing proceedings in respect of the Petitioner's criminal trial in the High Court and the remission of his case to the High Court for re-sentencing. The Petitioner seeks to rely on the dissenting judgment in his appeal to the Supreme Court – **Duke Mabaya Gwaya vs. Uganda, Criminal Appeal No. 59 of 2015**, where Tibatemwa-Ekirikubiinza, JSC observed as follows on the retroactive application of a new criminal rule:

> I also recognize that its unrestrained application could create chaos in the judicial system. The example I would think of in regard to the retroactivity of the Rwabugande decision would be if the decision is said to be applicable to persons whose cases had by the time of the Rwabugande decision been subjected to adjudication by the final court but were still serving sentence. If all such cases were to be re-opened with the demand that the time spent on pre-trial detention be specifically deducted from their term of imprisonment, perhaps the criminal justice system would be unduly burdened. It is thus critical that a logical limit be applied to retroactivity of the jurisprudential principle in Rwabugande. **The limit must be that the "new" principle applies to appeals which were still in the system at the time of delivery of the Rwabugande judgment**.

72. Indeed, the Petitioner's appeal to the Supreme Court having been determined on 21st December 2018, it was still pending final determination as at 3rd March 2017 when the **Rwabugande** decision was rendered.

73. However, the position advanced by the Petitioner above presupposes that the **Rwabugande** decision was the exclusive legal position on Article 23(8) of the Constitution when his appeal was heard by the Supreme Court. That is not entirely correct. The Supreme Court did in its **Abelle Asuman** decision of 19th April 2018 advance two positions: first, it clarified its decision in the **Rwabugande** case, stating as follows:

> We find that this appeal was premised on a misunderstanding of the decision of this Court in **Rwabugande Moses versus Uganda** (supra). .... What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution. Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.

74. Secondly, the apex court relied on the principle of precedent to pronounce itself on the non-retroactive application of its **Rwabugande** decision. It held:

> A precedent has to be in existence for it to be followed. The instant appeal is on a Court of Appeal decision of 20th December 2016. The Court of Appeal could not be bound to follow a decision of the Supreme Court of 03rd March 2017 coming about four months after its decision. The case of **Rwabugande (supra)** would not bind Courts for cases decided before the 3rd of March 2017.

75. The import of the **Abelle Asuman** decision was thus that non-arithmetic consideration of the period spent on remand was not fatal on appeal provided that it was demonstrated that it has credited that period to a convict in its determination of appropriate sentence. Secondly, and perhaps more importantly, the apex court categorically stated that the **Rwabugande** decision was not to apply retroactively to sentences rendered or appeals determined before 3rd March 2017. Indeed, it is on the basis of the latter position that the majority in the Petitioner's appeal declined to interfere with the Court of Appeal's decision of 28th August 2015, upholding of the trial court's sentence. The apex court only reinstated the exclusive application of the **Rwabugande** decision and its arithmetic approach in the **Nashimolo** decision of 9th September 2020, categorically declaring the deference in the **Abelle Asuman** case to the pre-Rwabugande position to have been decided *per incuriam*. By that time, however, the Petitioner's case had been finally determined by the Supreme Court.

76. This begs the question, would it be logical or legally expedient for the administration of justice (against the backdrop of scarce judicial resources) for the restated 'new' rule to apply retroactively to cases that had already been determined by the time clarity was finally brought to bear on the correct interpretation of Article 23(8) of the Constitution in 2020? I would respectfully think not. In my judgment, the **Abelle Asuman** decision, clarifying as it did the **Rwabugande** decision, was the applicable position of the law when the Petitioner's appeal was heard in 2018.

77. It follows, therefore, that the Petitioner's case having been finally determined by the Supreme Court when the **Nashimolo** decision was rendered, his prayer for the sentencing proceedings to be set aside and the matter remitted under Article

137(4) of the constitution for re-sentencing cannot be entertained by this Court. In the same vein, insofar as the quasi-retroactivity herein is restricted to cases pending final determination, I would decline to nullify the Supreme Court's decision in the Petitioner's Appeal, **Duke Mabeya Gwaka vs Uganda, Criminal Appeal No. 59 of 2015** (unreported) or the decisions of the lower courts upon which it was premised.

78. Finally, I am constrained to observe that if ever there was a case that genuinely raised a matter of immense public interest, this petition is one such case. The Petitioner is applauded for his courage in addressing a proverbial elephant in our criminal justice system. numerous case law abounds on not condemning losing parties in public interest litigation in costs. See **Kiiza Besigye v Museveni Yoweri Kaguta & Electoral Commission (2001) UGSC 4**. That principle was recognized in **Male Mabirizi & Others v Attorney General (2018) UGCC 4** by Musoke, JCC (as she then was) in her observation that parties who lose in public interest litigation '**should not be condemned to costs in favour of those who are victorious**.' This opinion was echoed by Cheborion, JCC in the same case, with the rider nonetheless that the peculiar circumstances of that case warranted the payment of costs to the petitioners. Indeed, the majority position in that case was that costs be awarded to the petitioners despite their unsuccessful petitions, deferring in that regard to the decision of the Owiny Dollo, DCJ (as he then was) in the following terms:

> There is no denying that the Petitioners took on an important national task, which was not intended to benefit them personally; but for the benefit of our beloved country. People such as the Petitioners herein are the true vanguards of the desired need to protect our Constitution, and nurture the culture of constitutionalism; and thereby uphold the rule of law. It is therefore proper that they be reasonably indemnified for the expenses and other resources they have put in their undertaking to promote the much–cherished wellbeing of the nation; and also to be rewarded for the energy, time, and expertise, they have put into the endeavour.

79. Indeed, in **Advocates for Natural Resources Governance and Development & 2 Others v Attorney General & Another (2013) UGCC 10**, it was recognized by this Court that there are circumstances under which public interest litigation may

attract an award of costs, hence the observation in that case that where costs are awarded in public interest litigation '**the actual amounts taxed and allowed should be nominal in respect of professional fees, the rest should simply be awarded only in respect of disbursements**.'

80. In **Kiiza Besigye v Museveni Yoweri Kaguta & Electoral Commission** (supra), the Supreme Court does clarify the role of costs in litigation, laying emphasis on their being an indemnification of expenses incurred. It was observed (per Odoki, CJ):

> It is well settled that costs follow the event unless the Court orders otherwise for good reason. The discretion accorded to the Court to deny a successful party costs of litigation must be exercised judicially and for good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation. Costs are not intended to be punitive but a successful litigant may be deprived of his costs in only exceptional circumstances.

81. I find such exceptional circumstances to obtain in this case where an incarcerated petitioner has incurred expenses attendant to engendering clarity on the critical constitutional issues highlighted in this petition. Consequently, in recognition of his partial success in this matter, I would enforce the general rule in section 27(2) of the Civil Procedure Act, Cap. 71 that costs follow the event to award partial costs to the Petitioner.

DISPOSITION

82. The upshot of my consideration hereof is that I would substantially allow this petition with the following declarations and orders:

I. The omission by the Supreme Court to determine the Petitioner's criminal appeal – **Duke Mabeya Gwaka vs Uganda, Criminal Appeal No. 59 of 2015** (unreported) – in a manner consistent with its determination of the earlier case of **Wamutabanewe Jamiru vs Uganda (2018) UGSC 8** constitutes a violation of Articles 2(1), 21(1), 28(1), 44(c) and 126(1) of the Uganda Constitution.

II. A new constitutional rule in the realm of criminal procedure shall only apply quasi-retroactively to all criminal cases and appeals that are pending final determination. It shall not apply retroactively to cases that have been finally concluded.

III. 70% costs are awarded to the Petitioner.

I would so order.

Dated and delivered at Kampala this ....6th.... day of ....10...., 2023.

Monica K. Mugenyi

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Kibeedi, Mulyagonja, Mugenyi & Gashirabake, JJCC*]

CONSTITUTIONAL PETITION NO. 36 OF 2019

BETWEEN

DUKE MABEYA GWAKA==========PETITIONER

AND

THE ATTORNEY GENERAL==========RESPONDENT

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC

[1] I have had the opportunity of reading in draft the judgment of my sister, Mugenyi JJC. I agree with her save when it comes to the relief that she proposes be granted to, or, not to be granted to the petitioner. For that reason alone I shall endeavor below to explain why I have reluctantly come to this position.

[2] Mugenyi, JCC, states, in paragraphs, 76 and 77 of her judgment, as follows:

> '76. This begs the question, would it be logical, prudent or the diligent utilisation of scarce judicial resources for the restated 'new' rule to apply retroactively to cases that had already been determined by the time clarity was finally brought to bear on the correct interpretation of Article 23(8) of the Constitution in 2020? I would respectfully think not. In my judgment, the **Abelle Asuman** decision, clarifying as it did the **Rwabugande** decision, was the applicable position of the law when the Petitioner's appeal was heard in 2018.
>
> 77. It follows, therefore, that the Petitioner's case having been finally determined by the Supreme Court when the **Nashimolo**

> The Court of Appeal decision that is subject of this appeal was delivered on 21st August 2017, approximately 6 months, after the decision in Rwabugande Moses vs Uganda (supra) became law.' (Emphasis is mine)

[4] The Supreme Court repudiated its own decisions that had attempted to re interpret or vary its decision in Rwabugande v Uganda (supra), and in particular, Abelle Asuman v Uganda [2018] UGSC 10. It put to rest the heresy in jurisprudence that Abelle Asuman v Uganda (supra) had raised at the apex court with the elucidation of the horizontal nature of binding precedent. In my view it would follow that the Supreme Court, in considering the appeal in the impugned decision, had to apply the Rwabugande rule to it as the appeal came before the Supreme Court after 3rd March 2017 after the Rwabugande rule had been enunciated.

[5] It is somewhat incongruous that it is Nasimolo v Uganda (supra) that is now relied upon to assert that the petitioner should not be entitled to any relief in this regard because the Supreme Court determined his appeal before Nasimolo v Uganda (supra) had been decided. The Supreme Court has clearly stated in Nasimolo v Uganda (supra) that the Rwabugande rule is applicable from the 3rd March 2017, when it was enunciated, by all the courts including the Supreme Court.

[6] The impugned decision of the Supreme Court was heard by the Supreme Court on 22nd September 2017 and the decision was delivered on 21st December 2018. By the time the Rwabugande rule was enunciated on 3rd March 2017 the petitioner's case was still alive in the system and had not been concluded. The hearing in the Supreme Court occurred 6 months after the enunciation of the Rwabugande rule and the decision came 18 months after the Rwabugande rule. The Supreme Court was under an obligation to apply that rule. It did not. Hence the complaint by the Petitioner in this petition which we have found, unanimously, meritorious.

[7] The petitioner prayed that this matter be referred to the High Court for resentencing. It is unnecessary to do so, not for reasons advanced, by Mugenyi, JCC. This court is empowered to grant redress on a hearing of

has proved was inflicted upon him. The matter was heard and it is being determined. What remained was probably a single paragraph granting him appropriate redress, as indicated above.

[11] However, I am in the minority. Kibeedi, Mulyagonja and Gashirabake agree with Mugenyi, JCC.

Decision

[12] This petition is allowed, in part, with the orders proposed by Mugenyi, JCC.

Signed, dated, and delivered at Kampala this 6th day of 10 2023

Fredrick Egonda-Ntende
Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Kibeedi, Mulyagonja, Mugenyi & Gashirabake, JJCC)

CONSTITUTIONAL PETITION NO. 36 OF 2019

DUKE MABEYA GWAKA :: PETITIONER

VERSUS

ATTORNEY GENERAL::RESPONDENT

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC

I have had the benefit of reading in draft the Lead Judgment prepared by my learned Sister, Mugenyi, JCC. I agree with the analysis, conclusions and orders proposed. But I wish to add the remarks and observations which follow simply for purposes of emphasis.

At the centre of the dispute before this court in exercise of its original jurisdiction as a constitutional court, is the principle of *stare decisis* and the constitutionality of its application in the criminal jurisprudence of Uganda by the apex court of Uganda, the Supreme Court.

The Supreme Court having pronounced itself on the 03rd of March 2017 *in* ***Moses Rwabugande vs Uganda (2017 UGSC 8*** that the requirement of a sentencing court under article 23(8) of the Constitution of the Republic to ***"take into account"*** the period spent by a convict in lawful custody before completion of his/her trial meant ***"arithmetical deduction"*** of the said period before the sentencing of the convict, then the apex court could only depart from that position in compliance with Article 132 (4) of the Constitution. For ease of reference, the article provides as follows:

"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

Whereas it is not in contention that the Supreme Court can depart from its previous decisions, from the review and analysis set out in the lead judgment, there is no doubt that the Supreme Court fell short of the constitutional expectations while discharging its role in the matter under consideration by this court. The Supreme Court, being the apex court, the mandate to depart from or vary its previous decisions should be exercised after very careful consideration, and with deliberate extra caution and responsibility in accordance with the established principles and best practices as enunciated in the lead judgment. This is because once the apex court pronounces itself on any question of law, all the courts in Uganda, including the Supreme Court itself, are bound to unquestioningly comply with the pronouncement of the apex court. This ensures legal certainty and consistency and guarantees public confidence in the judicial system, by all its stakeholders including the legal practitioners, the litigants (present and prospective) government, the academia, civil society, the international community and the general public. But for the apex to render one interpretation of the impugned article 23(8) of the Constitution in ***Moses Rwabugande vs Uganda (2017) UGSC 8*** and, before the proverbial cock crows, it modifies its own decision in ***Abelle Asuman vs Uganda (2018) UGSC 10***, and then soon thereafter overrules its "revised" *decision in* ***Nashimolo Paul Kibolo vs Uganda (2020) UGSC 24***, *it is* tantamount to courting what has been summarized in the military idiom ***"order + counter order = disorder***". This could not have been the intention of the makers of the constitution when they vested the apex court with the mandate to depart from its previous decisions when they upgraded the principle of *stare decisis* in Uganda to the constitutional status as set out in the terms of article 132 (4) of the Constitution.

As such, I concur with the finding in the lead judgment that the way the apex court handled the petitioner's complaints against his sentence was unconstitutional as detailed therein.

I would accordingly resolve the Petition in the terms proposed in the lead judgment.

Delivered and dated at Kampala this 6th day of 10 2023.

Muzamiru Mutangula Kibeedi

JUSTICE OF THE CONSTITUTIONAL COURT