

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION NO. 035 OF 2021**

**1. ABONEKA MICHAEL**

**2. KIRYA MARTINS:.....PETITIONERS**

**VERSUS**

**ATTORNEY GENERAL:.....RESPONDENT**

**CORAM: HON. MR. JUSTICE FREDRICK EGONDA-NTENDE, JCC**

**HON. LADY JUSTICE ELIZABETH MUSOKE, JCC**

**HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC**

**HON. LADY JUSTICE MONICA K. MUGENYI, JCC**

**HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JCC**

**JUDGMENT OF ELIZABETH MUSOKE, JCC**

The petitioners filed this Petition, under the provisions of **Article 137 (1) and 3 (a)** of the **1995 Constitution** and **Rules 3 and 4** of the **Constitution Court (Petitions and References) Rules, 2005**, challenging the constitutionality of certain provisions of the Customary Marriage (Registration) Act, Cap. 248, the Marriage and Divorce of Mohammedans Act, Cap. 252, and the Hindu Marriage and Divorce Act, Cap. 250.

**Background**

The provisions which the petitioners challenge include **Section 11 (a)** of the **Customary Marriage (Registration) Act, Cap. 248 ("CMRA")** to the effect that girls between 16 to 17 years may lawfully enter a customary marriage, which the petitioners claim contravenes **Article 31 (1)** of the **1995 Constitution** which sets the minimum age for marriage for women at 18 years. The petitioners challenge **Section 4 (a) and 5 (1) (a)** of the **Marriage and Divorce of Mohammedans Act, Cap. 252 ("MDMA")** and **Section 2 (1) (c)** of the **Hindu Marriage and Divorce Act, Cap. 250 (HMDA)** on similar grounds, and contend that all the impugned

provisions permit child marriages, which are illegal and contrary to public policy.

The petitioners also contend that Section 11 (a) and (b) of the CMRA sets a different minimum age for marriage – 16 years for the girl/woman and 18 years for the man, and contend that this contravenes the right of women to equal treatment with men and is inconsistent with **Articles 2, 21, 33 (4)** of the **1995 Constitution**.

Further, the petitioners challenge **Section 3** of the **HMDA** which allows for appointment of guardians for purposes of giving consent to marriage on behalf of a bride below the age of 18 years, and contend that the impugned provision is inconsistent with **Article 31** which provides that women may only marry if 18 years or older. In addition, the Petitioners contend that **Section 3** of the **HMDA** is inconsistent with **Article 126**, in so far as it empowers a Magistrate's Court, in certain circumstances, to appoint a guardian for a minor for purposes of giving consent for her to marry, yet the 1995 Constitution prohibits minors from marrying.

In light of the above averments, the Petitioners seek the following declarations and orders:

- "a) **A declaration that Section 11 (a) and (b) of the CMRA; Section 5 (1) (a) of the MDMA; and Sections 2 and 3 of the HMDA are in contravention and/or inconsistent with Articles 2 and 31 of the 1995 Constitution, in so far as they permit persons below 18 years to marry.**
- b) **A declaration that the impugned Acts promote discrimination on gender basis by setting different minimum ages at which men and women may enter marriages, which is inconsistent with Article 2, 21 and 33 of the 1995 Constitution.**
- c) **A declaration that Section 3 of the HMDA in so far as it allows for court appointed guardians for purposes of giving consent for girls below the age of 18 years to marry, is inconsistent with Article 126 in that it involves Courts in promoting unconstitutional marriages, and is also inconsistent with Article 31 which prohibits marriage of girls below the age of 18 years.**





- d) **An order that the impugned provisions are null and void to the extent of their inconsistency with the 1995 Constitution...**
- e) **An order granting any other reliefs that the Court deems fit."**

Each petitioner filed an affidavit in support of the Petition.

The respondent filed an Answer to oppose the Petition. He contended that the impugned provisions are part of existing law, which, under **Article 274** are required to be construed so as to be brought in conformity with the 1995 Constitution, and as such cannot be unconstitutional. The respondent contended that because the impugned laws could under Article 274 be construed to be brought in conformity with the 1995 Constitution, the Petition does not raise any questions for Constitutional Interpretation and ought to be dismissed with costs.

The evidence in support of the Respondent's Answer to the Petition is contained in an affidavit of Mr. Jimmy Oburu Odoi, a Principal State Attorney in the Respondent's Chambers.

### **Representation**

At the hearing, the 1<sup>st</sup> petitioner appeared for himself. Ms. Gorretti Arinaitwe, learned Senior State Attorney and Ms. Lydia Mugasa, learned State Attorney, both from the Chambers of the Attorney General, represented the respondent.

The parties filed submissions in support of their respective cases.

### **Resolution of the Petition**

I have carefully studied the Petition and the Answer to the Petition, and considered the submissions of counsel for either side, and the law and authorities cited therein. I have also considered other applicable authorities that were not cited.

The parties framed two issues to guide in determination of the Petition, as follows:

- "1. Whether the impugned provisions are in contravention of and/or inconsistent with the cited provisions of the 1995 Constitution.**

2. **Whether the petitioners are entitled to the remedies sought."**

I will proceed to deal with the issues below.

**Issue 1 – Whether the impugned provisions are in contravention of and/or inconsistent with the cited provisions of the 1995 Constitution.**

Counsel for the petitioners submitted that the impugned provisions are inconsistent with **Articles 2, 21, 31, 33 and 34** of the **1995 Constitution** because they permit girls below the age of 18 years to marry, yet under the 1995 Constitution, marriage is only permitted where both the man and woman are 18 years or older.

In reply, counsel for the respondent, while seeming to admit that the impugned provisions are inconsistent with **Article 31 (1)**, as they permit girls below 18 years to marry contrary to the stated Article which provides that only girls above 18 years can marry, submitted that the impugned provisions are part of the existing law envisaged under **Article 274** and ought to be dealt with as thereunder provided, by construing them in a manner that brings them in conformity with the 1995 Constitution and not by filing a constitutional petition. Counsel therefore contended that it was unnecessary for the petitioners to bring this Petition as the impugned provisions could be dealt with under Article 274.

I have considered the submissions of counsel on issue 1. I will begin by setting out the impugned legislation and the provisions of the 1995 Constitution the said legislation is alleged to be in contravention and/or inconsistent with.

**Section 11 (a) and (b) of the CMRA provides:**

**"A customary marriage shall be void if—**

**(a) the female party to it has not attained the age of sixteen years;**

**(b) the male party to it has not attained the age of eighteen years"**

**Section 4 of the MDMA provides:**

**"4. Registrars to keep books.**





Every registrar shall keep up the following register books, which shall be supplied to him or her by the Minister—

(a) Book 1—register of marriages in the Form A in the Schedule to this Act; and

(b) Book 2—register of divorces in the Form B in that Schedule.”

**Section 5 (1) (a)** of the **MDMA** states:

“Marriages and divorces to be registered.

(1) Application for registration shall be made within one month from the date of the marriage or divorce, before a registrar in the manner and by the persons following—

(a) in the case of a marriage, by the husband, or in the event of his death before the expiration of one month from the date of the marriage, by the widow; but if either party whose duty it is to apply is a minor, the application shall be made by his or her lawful guardian, and if the widow be a purdah-nisheen the application shall be made by her personally or on her behalf by her duly authorised vakil;”

**Section 2 (1) (c) and (d)** of the **HMDA** provides:

“2. Conditions for marriages.

(1) A marriage may be solemnised if the following conditions are fulfilled—

(a) ...

(b) ...

(c) the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of the marriage;

(d) where the bride has not attained the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage;

(e) ...”

**Section 3** of the **HMDA** states:

“3. Guardianship in marriage.

(1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the guardian in marriage shall be—

- (a) the father; whom failing;
- (b) the mother; whom failing;
- (c) the paternal grandfather; whom failing;
- (d) the paternal grandmother; whom failing;
- (e) the brother of the full blood, as between brothers the elder being preferred; whom failing;
- (f) the paternal uncle of the full blood, as between paternal uncles; the elder being preferred; whom failing;
- (g) the maternal grandfather; whom failing;
- (h) the maternal grandmother.

(2) No person shall be entitled to act as guardian in marriage under this section unless that person has himself or herself attained the age of twenty-one years.

(3) Where the person entitled to be the guardian in marriage refuses, or is for any cause unable or unfit, to act, the person next in order shall be entitled to be the guardian.

(4) If there is no such person as is referred to in subsection (1), a guardian in marriage may be appointed by a chief magistrate or a magistrate grade I on the application of any interested party."

The CMRA, MDMA and HMDA regulate marriages by, inter alia, prescribing the minimum age for marriage. Section 11 (a) of the CMRA is to the effect that girls aged between 16 years and 17 years are permitted to marry. Section 2 (1) of the HMDA is of a similar import, although Section 2 (1) (c) requires that girls between 16 and 17 years may only get married if consent of their guardians for marriage is obtained. On the other hand, **Section 3** of the **MDMA** states:

## "2. Mohammedan marriages and divorces.

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





Therefore, marriages under the MDMA are celebrated in accordance with the conditions set by the Mohammedan Religion. The petitioners did not give evidence of the applicable conditions and whether they allow marriage of girls below 18 years. However, I note that **Section 5 (1) (a)** of the **MDMA** provides that:"

**"(a) in the case of a marriage, by the husband, or in the event of his death before the expiration of one month from the date of the marriage, by the widow; but if either party whose duty it is to apply is a minor, the application shall be made by his or her lawful guardian, and if the widow be a purdah-nisheen the application shall be made by her personally or on her behalf by her duly authorised wakil;"**

The underlined part can be interpreted as meaning that under the Mohammedan religion, minors may, in certain circumstances, be permitted to marry, since the provision lays out modalities for registration of marriages involving minors. I therefore understood the petitioners' challenge against Section 5 (1) (a) of the MDMA to be that the provision is unconstitutional to the extent that it permits the registration of marriages involving minors. My analysis will seek to address this challenge.

I must also comment on the challenge against Section 4 of the MDMA. The said section empowers the Registrar to keep a register of marriages and divorces. I do not find it unconstitutional.

It therefore follows from my earlier analysis that the case for the petitioners is that the provisions of Section 11 (a) of the CMRA; Section 5 (1) (a) of the MDMA; and Sections 2 (1) (c) and (d) and 3 of the HMDA, insofar as they can be understood as permitting girls or in some cases boys below the age of 18 years to marry, are in contravention and/or inconsistent with **Article 31 (1)** of the **1995 Constitution (as amended)**, which provides:

### **"31. Rights of the family**

**1. A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age-**

**a. to found a family; and**



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

On his part, the respondent admitted that the impugned provisions have the import ascribed to them by the petitioners. The respondent, however, submitted that the impugned provisions are part of existing laws enacted before the coming into force of the 1995 Constitution and are not unconstitutional. Counsel further submitted that the impugned provisions are instead, under **Article 274**, supposed to be construed in a manner that brings them in conformity with the 1995 Constitution. **Article 274** of the **1995 Constitution** provides:

"274. Existing law.

(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.

(2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date."

Counsel for the respondent correctly submitted that the impugned provisions are part of existing law, that is, in terms of Article 274 (2), laws that existed before the 1995 Constitution came into force on 8<sup>th</sup> October, 1995. It will be noted that the CMRA, MDMA and HMDA, respectively, came into force on 1<sup>st</sup> October, 1973, 15<sup>th</sup> April, 1906 and 1<sup>st</sup> September, 1961. I also noted that counsel for the respondent further submitted that because the impugned legislation is existing law and comes within the operation of Article 274, it cannot be declared unconstitutional. In **Uganda Association of Women Lawyers and 5 Others vs. Attorney General, Constitutional Petition No. 02 of 2003 (unreported)**, this Court addressed a similar objection. It was argued for the Attorney General, in that case, that legislation that falls





within the operation of Article 274 is saved and cannot be declared to be in contravention of the 1995 Constitution. The Court unanimously rejected that contention. Twinomujuni, JCC (as he then was) held that:

"Article 273 [now 274] enables all courts to construe legislation which existed at the coming into force of the Constitution with such modifications, adaptations, qualification and exceptions as may be necessary to bring into conformity with the Constitution."

This was intended to empower all courts to modify existing laws without having to refer all such cases to the Constitutional Court. This court, sitting as a Court of Appeal of Uganda can avail itself of the provisions of article 273 where appropriate. However, article 273 does not oust the jurisdiction of this court, the Constitutional Court when exercising its jurisdiction under article 137 (3). Under that provision, this Court is only required to declare whether or not an Act, act or omission is inconsistent with or in contravention of any provision of the constitution and to grant redress where appropriate."

On his part, Okello, JCC (as he then was) held:

"I think that the message which the makers of the Constitution intended to send out in the article [274] is loud and clear. They enjoined courts to clear away existing laws that they did not find to be inconsistent with any provision of the Constitution. They are to do that by modifying them such that they do not exist but void (sic). That does not prevent the Constitutional Court from declaring such a law unconstitutional."

Mpagi-Bahigeine, JCC (as she then was) was of a similar view, holding that Article 274 can more suitably be applied in specific cases where a matter arising during the hearing requires it. Further, that the Constitutional Court is vested with power, under Article 137 (3), to declare existing law which is inconsistent with the 1995 Constitution null and void. It will be noted that in the **Uganda Association of Women Lawyers' case (supra)**, the Court entertained a Petition challenging provisions of the Divorce Act, Cap. 249, existing law, which came into force on 1<sup>st</sup> October, 1904.

I agree with the approach adopted in the **Uganda Association of Women Lawyers' case (supra)**. This Court's role is to interpret the 1995 Constitution and pronounce itself on whether any provisions of the law,





whether existing law or not, challenged in a Petition are inconsistent with cited provisions of the Constitution. Article 274 serves its own purpose, too, which is to provide a quick remedy for trial or appellate Courts, when deciding a specific case, to construe existing laws in conformity with the 1995 Constitution and avoid application of existing laws in an unconstitutional manner. An instance of proper application of Article 274 can be seen in the case of **Osotraco Ltd vs. Attorney General, High Court Civil Suit No. 1380 of 1986 (unreported)** where Egonda-Ntende, J. (as he then was) construed **Section 15 (1) (b)** of the **Government Proceedings Act (now 14 (1) (b))** in conformity with the notion of equality and right to property under the 1995 Constitution and ordered for eviction of officials of the Ministry of information from the plaintiff's property. Egonda-Ntende, J. considered Section 15 (1) (b) to be inconsistent with the 1995 Constitution as it prevented courts from making orders of recovery of land against Government, even where Government unlawfully occupied a citizen's property.

It is therefore my view that a person is entitled to file a petition in this Court to challenge provisions of existing law as being in contravention or inconsistent with the 1995 Constitution. Since I earlier found all the impugned provisions of **Section 11 (a)** of the **Customary Marriage (Registration) Act, Cap. 248**; **Section 5 (1) (a)** of the **Marriage and Divorce of Mohemmedans Act, Cap. 252** (to the extent that it allows the registration of marriages involving minors); and **Sections 2 (1) (c) and (d) and 3** of the **Hindu Marriage and Divorce Act, Cap. 250** to be in contravention of and/or inconsistent with **Article 31 (1) of the 1995 Constitution**, I would answer issue 1 in the affirmative.

### **Issue 2 – Whether the petitioners are entitled to the remedies sought**

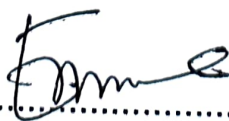
I would answer this issue in the affirmative having found the impugned provisions to be unconstitutional. Accordingly, I would allow the Petition and make the following declaration and orders:





- a) I would declare that **Section 11 (a) of the Customary Marriage (Registration) Act, Cap. 248; Section 5 (1) (a) of the Marriage and Divorce of Mohammedans Act, Cap. 252** (to the extent that it permits registration of marriages involving persons below the age of 18 years) and **Sections 2 (1) (c) and (d) and 3 of the Hindu Marriage and Divorce Act, Cap. 250** are in contravention and/or inconsistent with **Article 31 (1) of the 1995 Constitution (as amended)**, because they permit girls between the age of 16 and 17 years to marry, yet the highlighted constitutional provision permits marriage of only girls aged 18 years or older.
- b) I would therefore declare that the impugned provisions in (a) are null and void. However, **Section 5 (1) (a) of the Marriage and Divorce of Mohammedans Act, Cap. 252** is null and void to the extent mentioned in (a) above.
- c) The declarations in (a) and (b) above notwithstanding, **Section 11 (a) of the Customary Marriage (Registration) Act, Cap. 248; Section 5 (1) (a) of the Marriage and Divorce of Mohammedans Act, Cap. 252; Sections 2 (1) (c) and (d) and Section 3 of the Hindu Marriage and Divorce Act, Cap. 250** should be construed as permitting marriage only where the man and woman are 18 years or older.
- d) I would make no order as to costs, since this Petition was brought in the public interest, and it is the practice of this Court not to award costs in such matters.

Dated at Kampala this 20<sup>th</sup> day of February 2023.



**Elizabeth Musoke**

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
(CORAM: EGONDA-NTENDE, MUSOKE, MADRAMA, MUGENYI,  
GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 035 OF 2021.

1. ABONEKA MICHAEL

2. KIRYA MARTINS:..... PETITIONERS

VERSUS

ATTORNEY GENERAL:..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER GASHIRABAKE, JCC.

I have read in draft the judgment of Hon. Lady Justice Elizabeth Musoke, JCC.

I concur with the judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the <sup>20<sup>th</sup></sup>..... day of <sup>February</sup>.....2023.

  
Christopher Gashirabake

JUSTICE OF THE CONSTITUTIONAL COURT.



THE REPUBLIC OF UGANDA,  
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA  
(CORAM; EGONDA NTENDE, MUSOKE, MADRAMA, MUGENYI,  
GASHIRABAKE, JJCC/JJCA)

CONSTITUTIONAL PETITION NO. 035 OF 2021

1. ABONEKA MICHAEL}  
2. KIRYA MARTINS} ..... PETITIONER

VERSUS

ATTORNEY GENERAL} ..... RESPONDENT

JUDGMENT OF JUSTICE CHRISTOPHER MADRAMA IZAMA, JCC

I have read in draft the Judgment of my learned sister Hon. Lady Justice Elizabeth Musoke, JCC.

I concur with the Judgment and the orders proposed and I have nothing useful to add.

Dated at Kampala the 20<sup>th</sup> day of February 2023



Christopher Madrama Izama

Justice Constitutional Court



THE REPUBLIC OF UGANDA

**THE CONSTITUTIONAL COURT OF UGANDA  
AT KAMPALA**

*(Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC)*

**CONSTITUTIONAL PETITION NO. 35 OF 2021**

1. MICHAEL ABONEKA  
2. MARTINS KIRYA ..... PETITIONER

**VERSUS**

THE ATTORNEY GENERAL ..... RESPONDENTS



**JUDGMENT OF MONICA K. MUGENYI, JCC**

1. I have had the benefit of reading in draft the judgment of my sister, Lady Justice Elizabeth Musoke, JCC in respect of this Petition
2. I agree with her findings, conclusions and the orders issued, and have nothing useful to add.

Dated and delivered at Kampala this .....<sup>20<sup>th</sup></sup> day of .....<sup>February</sup>....., 2023.

*Monica K. Mugenyi*

**Monica K. Mugenyi**

**Justice of the Constitutional Court**

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
(*Coram: Egonda-Ntende, Musoke, Madrama, Mugenyi & Gashirabake, JJCC*)  
Constitutional Petition No. 35 of 2021

**BETWEEN**

Aboneka Michael=====Petitioner No.1  
Kirya Martins=====Petitioner No.2

**AND**

Attorney General=====Respondent

**Judgment of Fredrick Egonda-Ntende, JCC**

- [1] I have had the opportunity to read in draft the judgment of my sister, Musoke, JCC. I agree with the result but I take a different route to that result. I will therefore set out below, briefly, my reasons for doing so.
- [2] The particulars of pleadings, facts of the case, the impugned provisions, legal representation of the parties and the submissions of their counsel have been set out in the judgment of Musoke, JCC and I shall not repeat them.
- [3] The main issue at law that must be decided in this petition is whether the marriage of a girl below 18 years of age to a man is constitutionally prohibited by article 31 (1) of the Constitution. And if the answer is in the affirmative then all provisions under the Registration of Customary Marriages Act, Marriage and Divorce of Mohammedans Act, and the Hindu Marriage and Divorce Act, that permit marriage of girls who are below 18 years of age would be void.
- [4] I shall set out article 31 of the Constitution below.

**‘31. Rights of the family**

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



entitled at that age—

(a) to found a family; and

(b) to equal rights at and in marriage, during marriage, and at its dissolution. [*clause (1) substituted by section 10(a) of Act 11 of 2005*]

(2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.

(2a) Marriage between persons of the same sex is prohibited. [*clause (2a) inserted by section 10(b) of Act 11 of 2005*]

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

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.'

- [5] What is the meaning of the clause 1 above? It is about a man and a woman who are 18 years old and or above. It confers upon them the right to marry by use of the word or verb 'entitled'. Secondly the man and woman are entitled to start a family or procreation directly (by conceiving and giving birth to children) or indirectly (by adoption of children). Thirdly it confers upon them equal rights 'in the marriage, during the marriage and at its dissolution.'
- [6] Does the provision provide anything directly about men and women below the age of 18 years? I am unable to see any words that relate to men and women below 18 years of age. Does the provision prohibit marriage between men and women below 18 years of age? Not on its face. The provision is about the rights that the Constitution has conferred on men and women 18 years old and above. It is only men and women of 18 years of age or above, who can enforce such right or rights conferred upon them under that provision. No other person, other than those who are the subject of the provision, can claim such rights, under the said provision.

[7] Normally when the Constitution prohibits an act or conduct or a relationship it does so in clear language rather than by implication. An example is article 31 (2a) which states, '**Marriage between persons of the same sex is prohibited.**' This provision is in the same article as 31 (1) relied upon by the petitioners. It was inserted in the said article by the same amendment law, Act 11 of 2005. It prohibits marriage between people of the same sex. I would expect that if Parliament intended to prohibit marriage of people above 16 years but below 18 years of age it would have directly provided so as it did with clause (2a).

[8] In my view clause 1 of article 31 does not on its face prohibit marriage of persons below the age of 18 years. Its provisions relate to persons who are 18 years and above only. In my view clause (3) of article 31 might have a greater bearing on whether or not men and women below 18 years of age are constitutionally permitted to marry or not. This provision states, '**Marriage shall be entered into with the free consent of the man and woman intending to marry.**'

[9] Before any marriage is entered into after the coming into force of the 1995 Constitution there must be free consent of the man and woman intending to marry. Prior to the 1995 Constitution the law accepted that a parent may provide consent in case of a girl who is a minor and is getting married for such marriage to take place. Article 31 (3) sets a new standard. The parties marrying must be able to consent freely to such intended union. No third party can provide this consent on their behalf.

[10] Secondly the age of consent is 18 years old as set out in section 11 of the Contract Act. A person below 18 years of age save in excepted matters which do not apply in this instance is incapable of giving consent to a contract. Marriage is a contract between a man and a woman. It follows that only a person who is 18 years old or above is capable of providing the necessary consent to satisfy article 31 (3) of the Constitution. I would hold that to the extent that the impugned provisions in the Registration of Customary Marriages Act, Marriage and Divorce of Mohammedans Act, and the Hindu



Marriage and Divorce Act contravene the Constitution, those provisions are void to the extent of the inconsistency.

[11] As Madrama, Mugenyi and Gashirabake, JJCC, agree with Musoke, JCC, this petition is allowed in the terms and with the orders proposed by Musoke, JCC.

Dated, signed and delivered at Kampala this 20<sup>th</sup> day of February 2023



Fredrick Egonda-Ntende  
**Justice of the Constitutional Court**