

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO 01 OF 2016

CORAM: HON. MR. JUSTICE ALPHONSE OWINY DOLLO, DCJ

HON. MR. JUSTICE KENNETH KAKURU, JA

10 HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA

HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA

HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

ROGERS KINOBE BINEGA)..... PETITIONER

VERSUS

15 1. THE ATTORNEY GENERAL)

2. UGANDA REVENUE AUTHORITY)..... RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

The Petitioner is an advocate of the Courts of Judicature and avers that he is employed as a Senior Inspectorate Officer with the Office of the

20 Inspectorate of Government (IGG). His terms of employment entitle him to gratuity equivalent to 30% of basic salary for each completed year of employment. The petition against the respondent is based on the reliance by the respondent on section 19 (1) (a) of Income Tax Act Cap 340 (referred to as the ITA) to tax gratuity paid to pensioners and other staff of the IGG in

25 contravention of Article 254 (2) of the Constitution of the Republic of Uganda 1995 which prohibits taxation of Pension. The background of the petition as appears in the Petition and supporting affidavit is that on the 23rd December, 2015, the Solicitor General rendered an opinion to the Secretary to the Inspectorate of Government in which he opined that

5 gratuity paid to the officers of the Inspectorate was subject to income tax
under section 19 (1) of the ITA. Secondly, the Respondents asserted that
the Petitioner's gratuity is rightly taxed under Section 19 (1) (a) of the ITA
and that the exemptions under Article 254 (2) of the Constitution and
Section 8 of the Pensions Act do not apply to the gratuity paid to the
10 Petitioner and other staff of the IGG.

The Petition challenges the constitutionality of Section 19 (1) (a) of the ITA
which defines employment income to include gratuity, making it liable to
tax and is for the following declarations and orders:

1. That section (1) (a) of the Income Tax Act Cap. 340 which defines
15 employment income to include Gratuity and thus making it liable to
income tax is inconsistent with and in contravention of Article 254 (2)
of the Constitution which exempts all pension from tax and further
contrary to Articles 2, 26 and 40 of the Constitution.
2. That the opinion of the Solicitor General dated 23rd December, 2015
20 which maintained that Gratuity paid to staff of the Inspectorate of
Government is taxable under the said impugned S. 19 (1) (a) of the
Income Tax Act Cap. 340 is inconsistent with and in contravention of
Articles 2, 20, 24, 26, 40 and 254 (2) of the Constitution.
3. That section 9 of the Pensions Act Cap. 286 which provides that
25 no proceedings shall be brought in any Court on the ground that any
provision of that Act has not been complied with denies access to
redress from the Courts, contravenes and is inconsistent with Articles
30 2, 21, 28, 126, 128, 137 and 254 of the Constitution.
4. Furthermore, it is for a permanent injunction to issue against the
Respondent, any authority or person, restraining them from imposing

5 or charging income tax on gratuity under the impugned provisions of S. 19 (1) (a) of the Income Tax Act Cap. 340.

5. Finally, the petitioner prays for costs and any other or further declaration or orders as court may deem fit.

10 At the hearing of the petition, Counsel Fred Muwema appeared for the petitioner, Ms Imelda Adong State Attorney holding brief for Jacqueline Amusugut State Attorney, appeared for the Attorney General who is the first Respondent and counsel Gloria Twinamasiko, holding brief for Counsel George Okello appeared for the 2nd Respondent (Uganda Revenue
15 Authority). With leave of court sought and granted the counsel addressed court in written submissions on the following issues framed in the petitioners written submissions.

1. Whether **S.19 (1) (a) of the Income Tax Act Cap. 340** which defines employment income to include Gratuity and thus making it
20 liable to income tax, is inconsistent with and in contravention of Article 2, 26, 40 and 254 (2) of the Constitution?
2. Whether the opinion of the Solicitor General dated 23rd December, 2015 which maintained that Gratuity paid to
25 staff of the Inspectorate of Government is taxable under the said impugned S.19 (1) (a) of the Income Tax Act Cap. 340 is inconsistent with and in contravention of Articles 2, 20, 24, 26, 40 and 254 (2) of the Constitution?
- 30 3. Whether S. 9 of the Pensions Act Cap. 286 which provides that no proceedings shall be brought in any Court on the ground that any provision of that Act has not been complied with denies access

5 to redress from the Courts, contravenes and is inconsistent with Articles 2, 21, 28, 126, 128, 137 and 254 of the Constitution?

4. Whether the Petitioner is entitled to the orders and declarations sought?

10 Whether **S.19 (1) (a) of the Income Tax Act Cap. 340** which defines employment income to include Gratuity and thus making it liable to income tax is inconsistent with and in contravention of Article 2, 26,40 and 254 (2) of the Constitution?

Learned counsel for the petitioner submitted that he had, had the benefit
15 of reading the first Respondent's Submissions which had already been filed in Court on 27th September, 2018 and they do not agree with the arguments and conclusions therein namely:

a) **Whether the Petition raises questions for Constitutional Interpretation:**

20 He submitted that the first Respondent contended that the Petition does not raise any issues for constitutional interpretation but that contention has no merit and ought to be rejected. The Petitioner maintains that the petition discloses a complaint to the effect that Section 19 (1) (a) of the Income Tax Act Cap 340 (ITA) contravenes or is inconsistent with
25 Articles 254 (2) of the Constitution of the Republic of Uganda (also referred to as the Constitution). He submitted that this is the kind of cause of action or question for constitutional interpretation envisaged under Article 137(3) of the Constitution. He submitted that Article 137 (3) of the Constitution enables any person who alleges that any Act of Parliament
30 contravenes a provision of the Constitution to file a petition for a declaration to that effect. He relied on the case of **Baku Raphael Obudra**

5 **& Another v AG; Constitutional Appeal No. 1 of 2013**, for the holding of the Supreme Court that:

10 "Where a Petition challenges the constitutionality of an Act of Parliament, it sufficiently discloses a cause of act if it specifies the Act or its provisions complained of and identifies the provisions of the Constitution with which the Act or its provision is inconsistent or in contravention of and seeks a declaration to that effect. A liberal and broader interpretation should be given to a Constitutional Petition than is given to a Plaint in Civil Suits when determining whether a cause of action has been established".

15 The second issued raised by the respondent is **whether Pension under Article 254 (2) of the Constitution also refers to gratuity?** The petitioner's counsel submitted that this was the most contentious and important matter to be resolved in the Petition. The origin of this contention is section 19 (1) (a) of the ITA which includes gratuity as taxable
20 income yet section 8 of the Pensions Act Cap 286 (PA) prohibits the charging of income tax on pension and gratuity. Counsel for the petitioner submitted that these two Acts namely the ITA and the Pension Act (hereinafter referred to as PA) are both Acts of Parliament made under authority conferred by Constitution and have the force of law. He submitted
25 that there was a need to inquire into and settle the apparent conflict before getting a better understanding of the context in which the word Pension is used in **Article 254 (Supra)**.

30 The third contention of the respondent is that the PA is an earlier Act which came into force on the 1st of January 1946. In its long title, it is said to be the Principal Act for "grant and regulating of pensions, gratuities and other allowances in respect of public service of officers under government of Uganda." The PA which is the specific statute on pensions and gratuity underwent several amendments namely: the Pensions Act (Amendment)

5 Decree No. 23 of 1973 and the Pensions Act (Amendment) Decree No. 11
of 1977 under which pension and gratuity are all exempt benefits from
taxation. Even under Article 106 of the repealed 1967 Constitution which
was titled "protection of pension rights" the words Pension and Gratuity are
placed together and the term "like allowance" was used with reference to
10 them in the same breath. Counsel submitted that when the ITA, a later
statute of general taxation was enacted, first as the Income Tax Decree No.
1 of 1974 and later as the ITA which came into force on the 1st of July 1997,
it did not make a cross reference to the PA or repeal it. It only makes
reference to other laws it was meant to affect like the Diplomatic Privileges
15 Act Cap 201, the Building Society's Act cap 108, Uganda Revenue Authority
Act Cap 196 and the Investment Code Statute No. 1 of 1991 among others.
The Petitioner's counsel submitted that in resolving the apparent conflict
on exemption between the PA and the ITA, this Court should rely more on
the specific Act granting and regulating pensions and gratuities. He urged
20 the court to be persuaded by the case of **R v Greenwood (1992) 7 O.R**
(30)1 where the Ontario Court of Appeal applied the maxim *generalia*
specialibus non-derogant which means that; for purposes of interpretation
of two statutes in apparent conflict, the provisions of a general statute must
yield to those of a special one.

25 With reference to the grounds of the petition learned counsel submitted
that section 19 (1) (a) of the ITA is inconsistent with and contravenes Article
254 (2) of the Constitution for the following reasons:

Article 254 (1) of the Constitution provides that: "A public officer shall on
retirement, receive such pension as is commensurate with his or her rank,
30 salary and length of service. Secondly Article 254 (2) provides that: "The
pension payable to any person shall be exempt from tax and shall be
subject to periodic review to take account of the changes in the value of
money."

5 The Petitioner's counsel submitted that two important words, namely public officer and pensions are introduced in the cited Article. A complete meaning of the words "Public Office" and "Pension" cannot be discerned from the Article alone. Under the rule of harmony, completeness and exhaustiveness, the entire Constitution has to be read
10 together as an integral whole with no particular provision destroying the other but each sustaining the other (**See PK Ssemwogerere & Anor v AG; Constitutional Appeal No. 1 of 2002 (SC)**). To read Article 254 alone would render it in disharmony incomplete and an in exhaustive interpretation rejected by this Court from time to time (**See Constitutional
15 Petition No. 46 & 54 of 2011; Hon. Sam Kuteesa & 2 Others v Attorney General Constitutional Petition No. 2 of 2013, Davis Wesley Tusingwire v A.G.**).

The petitioner's counsel submitted that the Articles of the Constitution to be read in harmony with Article 254 include Article 175 (a) which defines a
20 Public Officer to mean any person holding or acting in an office in the Public Service. Secondly, Article 175 (b) of the Constitution which defines Public Service to mean service in any Civil Capacity of Government, the emoluments for which are payable directly from the Consolidated fund or out of monies provided by parliament. He further referred to sections 2 and
25 6 of the Public Service Act 2008 which is the specific law made by Parliament to regulate the Public Service and has the same definition of a Public Officer as that under Article 175 of the Constitution. It further expands the meaning of "Public Service" to include all persons appointed by relevant appointing Authority to hold an office in the Public Service and
30 this includes the IGG. This is complimented by the provisions of Section 4 (2) and (4) of the Inspectorate of Government Act 2002 which provides that the office of the Inspectorate of Government shall be a public office and that the salaries and allowances of the Inspectorate shall be determined by Parliament and charged on the Consolidated Fund. In the premises, the

- 5 Petitioner and fellow staff of the Inspectorate of Government
are Public Officers within the meaning of Article 254 of the Constitution.
The submissions of the respondent's counsel that Article 254 excludes staff
of the IGG because it deals only with Public Officers on permanent and
pensionable terms is not supported by any of the cited laws. Furthermore, it
10 is not supported by any other Constitutional provision. Counsel suggested
that if the interpretation of the respondent is held to be true, it would
destroy other Constitutional provisions by promoting discrimination and
inequality among and between Public Officers contrary to
Article 21 of the Constitution.
- 15 Furthermore, the petitioner's counsel submitted that the meaning of
Pension under Article 254 can also be established by the same approach
above. The controversy is whether the word "pension" as used in the
Constitution includes "Gratuity". The petitioner contends that the words
"Pension: and Gratuity" though different in name and rate of computation
20 are part of the same genre, species or "nomenclature of benefits" payable
in addition to or over and above the salary of a public officer. Counsel
submitted that these benefits receive the same or similar treatment and
protection under the PA. For example both cannot be assigned /transferred
or attached in bankruptcy according to sections 16 and 17 of the PA.
- 25 The petitioner's counsel submitted that the first Respondent agrees that
Pension and Gratuity receives the same treatment of exemption by stating
that pension and gratuity which is exempt from tax under Article 254 (2) of
the Constitution and Section 8 of the Pensions Act applies only to public
officers on permanent and pensionable terms." Counsel suggested that this
30 is a concession that some pension and gratuity is exempt from Income Tax
except that it applies only to public officers on permanent and pensionable
terms. However, the assertions of the first Respondent are simply untrue.
The PA and section 8 thereof does not distinguish between permanent,

- 5 non-permanent, pensionable or non-pensionable public officers when it exempts all pension and gratuity from taxation. It provides that: *"Notwithstanding any provision in any written law to the contrary, no income tax shall be charged upon any pension, gratuity or other allowances granted under this Act"*.
- 10 The Petitioner's Counsel suggested that, notwithstanding the provisions of the ITA which are contrary no income tax is chargeable on any pension or gratuity under any circumstances. If there is any ambiguity and contradiction in the interpretation of both the ITA and PA in relation to the exemption, that ambiguity or contradiction should be resolved in favour of
- 15 the Petitioner, a taxpayer as held in **Stanbic Bank & Ors v URA; HCCA No. 170 of 2007**. In that case the court held that; *"...where the meaning of the tax statute is ambiguous, the tax payer must be given the benefit of doubt and the interpretation should be best calculated to give effect to the intention of the legislature in the interest of the tax payer"*. The Petitioner's
- 20 counsel submitted that the words "Pension and Gratuity" have a proximate legal relationship which is of significance. They appear together or are used interchangeably more than 25 times in the PA which has only 24 sections. In Section 19 (5) (b) of the PA the same words appear together as Ill and the two words are eventually merged to create a new word called
- 25 Commuted pension gratuity" which refers to gratuity payable to a public officer upon his/her death if his/her service under a scheduled Government had been wholly in Uganda. Counsel submitted that the joining of the words 'pension' and 'gratuity' to create a new word capable of one meaning removes the need to discriminate between and isolate the two
- 30 under Article 254 of the Constitution. He submitted that the first Respondent laboured to show the difference between pension and gratuity by invoking Regulations 4 of the Pensions Regulations which suggests that pension is payable only to public officers who hold pensionable office and must have been in service for 10 years or more. The first Respondent

5 holds the view that the Petitioner and his fellow employees of the IGG are not pensionable because they are contractual employees. Because of that, the Pensions Act and Article 254(2) do not apply to them.

10 In a pre-emptive submission, the petitioners counsel submitted that any differences which the first Respondent may care to show between Pension and Gratuity should not make a material difference to the reality under investigation in this Petition. Under the PA, there are many instances where pension is payable to a public officer who has otherwise not offered a pensionable service. For example under Section 4 of the Pensions Act, the service of teachers who are only eligible for gratuity before 1953 is
15 considered as pensionable service and those teachers paid pension regardless. Furthermore, counsel submitted that this should explain why the definition of annual pensionable emoluments under section 19 (5) (a) of the PA includes both pension and gratuity. This should also explain why in computing the amount of pension or gratuity payable under Regulations
20 23 Pension Regulations, the same thing is considered i.e. the full annual pensionable emoluments enjoyed by the Public Officer prior to retirement. The difference between pensionable and non-pensionable office does not count under section 20 (4) Pensions Act when dealing with pension payable to a public officer who dies while travelling on duty
25 because it provides that: *"In the case of an officer not holding a pensionable office, 'pensionable emoluments' in this section means the emoluments enjoyed by him/her which would have been pensionable emoluments if the office held by him/her had been a pensionable office".*

30 The petitioner's counsel submitted that if the PA which is an Act made under the Constitution to provide specific regulation for Pensions and Gratuity nearly 'erases' the difference between the two, there should be no reason to read a difference between the two words under Article 254 of the Constitution. Counsel suggested that the legislature kept the word Pension

5 in company of the word Gratuity in the PA for the last 72 years because
they bring meaning to each other. He invited the court to apply the legal
maxim of *noscitur a sociis*, in other words "a word should be known by the
company it keeps". The word "Pension" in Article 254 of the Constitution
10 should be presumed to keep the company of the word "Gratuity"
as a result.

The Petitioner's Counsel further submitted that the provisions of the PA are
saved by the Constitution under Article 274 which saved existing law
subject to modifications introduced by the Constitution. By the time Article
254 (2) of the Constitution came into force, section 8 of the Pensions Act
15 was in existence and it continued to exist and the exemption from income
tax of pension and gratuity remained in force. Further he contended that it
was unnecessary to include both words namely 'Pension' and 'Gratuity' in
Article 254 (2) of the Constitution. In that context counsel submitted that
the word 'Pension' in Article 254 (2) of the Constitution must be read
20 to include the word 'gratuity' to give meaning which is
consistent with the Constitution when read as a whole.

Counsel asked court to consider Article 45 of the Constitution which he
submitted recognizes that its provisions are not necessarily exhaustive. He
suggested that **Article 254 (2)** of the Constitution creates a kind of
25 Constitutional right envisaged under Article 45. It creates the right of
exemption from taxation of pension which exemption should be extended
to gratuity as well in the circumstances of this case. He prayed that the court
arrives at a conclusion after reading of Article 45 together with Article 254
(2), that the omission of the word gratuity in Article 254 (2) of the
30 Constitution was not meant to exclude it from its purview even though it
was not specifically mentioned. He further invited court to breathe life into
Article 254 (2) by reading the word "Gratuity" into it because by its nature,
a Constitution does not have to state every detail and 62 Articles require

5 Parliament to pass laws to explain the Constitution better. One of those laws accordingly passed is the Pensions Act.

The Petitioner's Counsel relied on some authorities. In **Supreme Court Constitutional Appeal No. 4 of 2016; Davis Wesley Tusingwire v Attorney General**, the Court read the word Magistrates in the composition
10 of the High Court and yet that word does not exist under Article 138 of the Constitution which gives the composition of the High Court. The Appellant in that case had faulted the Chief Justice for issuing the High Court (Anti-Corruption Division) Practice Directions 2009 which enabled Magistrates to sit in the High Court Anti-Corruption Division. The Appellant
15 had argued that this distorted the composition of the High Court which was supposed to comprise of Judges and Registrars as the only judicial officers in that Court. In dismissing the appeal, the Supreme Court emphasized the importance of giving Constitutional provisions much broader and encompassing interpretation. The Supreme Court cited with approval the
20 case of **Unlty Dow v Attorney General of Botswana [1992] LRC (Const) 623 at p. 668** for the proposition that the court breaths life in the constitution and allows it to help grow the society through constructive and progressive interpretation.

In conclusion, the petitioner's counsel submitted that the Court should find
25 that Section 19 (1) (a) of the ITA contravenes and is inconsistent with Article 254 (2) of the Constitution which exempts pension and gratuity from Income Tax. Furthermore, the authority of **URA v Siraje Hassan Kajuura SCCA No. 9 of 2015** relied on by the first Respondent, did not consider the Constitutionality of Section 19 (1) (a) of the ITA viz a viz Article 254 (2) of
30 the Constitution and is therefore not relevant to the petitioner's case.

Submissions of the 1st Respondent

5 **In reply, the first respondent's counsel** relied on the affidavit in reply
filed on behalf of the first respondent deposed to and dated 17th February,
2017 by Elisha Bafirawala, a Senior State Attorney, from the Attorney
General's Chambers. She submitted that the allegation/averments by the
Petitioner do not raise any issues that require constitutional interpretation
10 at all in response to the entire petition. On issue No. 1 as to: **Whether S.19
(1) (a) of the Income Tax Act is inconsistent and in contravention of
Articles 2, 26, 40 and 254 (2) of the Constitution?**

The 1st respondent's Counsel submitted that **Article 79 of the
Constitution** gives Parliament power to make laws and Parliament, in
15 making the provisions of the Constitution operational under Article 79,
enacted the Income Tax Act Cap 340 to specifically address Income Tax in
Uganda. On the other hand **Article 137 (3)** of the Constitution gives the
Constitutional Court jurisdiction to hear petition that any Act of Parliament,
act, omission or law is in contravention of any provision of the Constitution.
20 The petitioner challenged sections 19 (1) (a) of the Income Tax Act and
Section 9 of the Pensions Act. She submitted that it is trite law under Article
152 (a) of the Constitution that no tax shall be imposed except under the
authority of an Act of Parliament. Tax on the Petitioner's gratuity was
charged in accordance with Section 19 (1) (a) of
25 the Income Tax Act and the income being subjected to tax is gratuity not
pension as the Petitioner wants this court to believe.

Article 254 (2) of the Constitution which the petition alleges has been
contravened deals with "Pension" and not "Gratuity". The respondent's
counsel concedes that under Article 254 (2) Pension is exempt from tax.
30 This is supported by the provisions of Section 21 (1) (n) of the Income Tax
Act which provides that Pension is exempt from tax.

In light of the above provisions and submissions supported by the affidavit
in reply counsel submitted that:

- 5 ▪ The law for the taxation of gratuity is expressly provided for under section 19 (1) (a) of the Income Tax Act Cap 340 which makes it an obligation for an employer to deduct Income Tax from resident employees and remit income tax known as PAYE by listing the employees' benefits under the law (gratuity inclusive) and adding all
- 10 of them to get the employees' gross employment which is taxed per month under part 1 of the 3rd Schedule of the ITA.
- The Petitioner has a constitutional duty to pay tax as clearly provided under Article 17(1) (g) of the Constitution.
- In **Uganda Revenue Authority v Siraje Hassan Kajura SCCA No. 09**
- 15 **of 2015** the Supreme Court held that the payment packages to the Respondents (gratuity inclusive) are taxable. Hon. Justice Opio Ruby Aweri, JSC said at page 26 of his judgment that: *".....I find that the claim by the Respondents that their packages are exempt from taxation and was a thank you payment was not based on law but*
- 20 *mere sentiments "*.

The first respondent's counsel submitted that the Petitioner misinterpreted and misconstrued the law relating to taxation of pension and gratuity. The pension and gratuity which is exempt from tax under Article 254 (2) of the Constitution and Section 8 of the Pensions Act applies to only public

25 officers on permanent and pensionable terms.

The respondent's counsel submitted that whereas officers from the office of the IGG are public servants, the Pensions Act Cap 286 does not apply to them on the following grounds:

- 30 • Under Section 1 (g) of the Pensions Act, a pensionable office means in respect of public service by a person under the Government, an office to which he or she has been appointed by the authority having power for the time being to make appointments to the public service of

- 5 Uganda on terms which include eligibility for grant of pension under the said Act.
- Secondly, under regulation 2 (a) of the Pensions Regulations it is further provided that "Pensionable Service" means service which may be taken into account in computing pension under these regulations.
- 10 • There are specific guidelines/terms and conditions for one to be granted pension under the Pensions Act and Regulations e.g. under Regulation 4 of the Pension Regulations, every officer holding a pensionable office in Government must have been in such service for 10 years or more.
- 15 The Pensions Act governs only Public Servants on permanent and pensionable terms and thus S.8 of the Pensions Act which exempts pension, gratuity or other allowance from tax is not intended for the benefit of all public servants. To construe or interpret it that way would be reading into the provisions of the Act as was clearly stated in the case of **URA v Siraje**
- 20 supra (page 21). The gratuity referred to under Section 8 of the Pensions Act is restricted to Public Servants on permanent and pensionable terms only.

Regulation 14(3) of the Pensions Regulations states thus:

25 *".....in this regulation, gratuity means a lump sum payable in respect of service in a pensionable office ,and shall not be construed as meaning a gratuity awarded in respect of service on contract or agreement or benefits payable under a Provident Fund Scheme".*

The annexed copy of the Petitioners contract of employment gives clear terms of employment for the officers employed by the IGG. These officers

30 are employed on contractual terms which are not pensionable terms and the Pensions Act and the provisions therein do not apply to them.

5 The respondent's counsel invited the court to find that the Petitioner
and other Inspectorate of Government officers do not qualify to be
pensionable officers and it follows that there is no contravention of the
provisions of the Constitution. Articles 254 (2) and Section 8 of the Pensions
Act are very clear in that regard. She prayed that the court finds no
10 contravention or inconsistency at all and dismisses the petition.

Submissions in reply of the 2nd Respondent

On the issue of whether pension under Article 254 (2) of the Constitution
also refers to gratuity? Learned counsel for the second respondent
submitted that at the heart of the petition is article 254 (2) of the
15 Constitution and the wording therein. She contended that the submission
of the petitioner's counsel is not tenable because the framers of the
Constitution did not include gratuity under that article for it to be exempt
from taxation. She submitted that the head note and wording of Article 254
of the Constitution is clear and unambiguous. It was inconceivable to
20 submit that the framers of the Constitution forgot or omitted to include
gratuity or any other form of benefit under article 254 of the Constitution.
She argued that if they intended to exempt any other employment benefit
due to the employee from taxation, they would have couched the article
differently. She further argued that to construe the article otherwise would
25 amount to an amendment of the Constitution without jurisdiction. She
relied on **Dr James Rwanyarare and Another v Attorney General
Constitutional Petition No 5 of 1999** for the proposition that the
Constitutional Court is not a super legislature and does not have power to
expand the jurisdiction given to it under the Constitution. Aggrieved parties
30 should direct their campaign to the proper quarters to have the
Constitution amended. She further submitted that judicial precedents
demonstrate that courts have been reluctant to second-guess the wisdom
of a statute and are unwilling to insert words into a statute that the court

5 believes legislative left out, be it intentionally or inadvertently (**See Matter of Adoption of Cheney, 12 554, 558, 887 P.2d 1061, 1065 (1993) and Saint Alphonse Reg'l Med. Ctr. v. Gooding Cty., 159 Idaho 84, 356 P.3d 377, 382 (2015)**). The duty of the court is to decide what the law is and apply it, not to make as said in the maxim *Judicis est jus dicere, non dare*.

10 She further submitted that it would be against the spirit of statutory interpretation and separation of powers for court to be moved to insert words in a statute that the legislature purposely left out. Counsel further relied on the holding of Platt JSC in **Registered Trustees of Kampala Institute v Departed Asian Property Custodian Board SCCA No 21 of**

15 **1993** at page 13 that "the words of a statute never should, in interpretation, be added or subtracted from without almost a necessity." She prayed that the court should find that its jurisdiction is circumscribed by article 137 of the Constitution and it cannot be dragged into inserting words in a constitutional provision which the framers of the Constitution purposefully

20 omitted.

The 2nd Respondent's counsel submitted that one of the cardinal principles in the interpretation of Constitutional provisions and Acts of Parliament is that the entire Constitution must be read as an integral whole and no one particular provision should destroy the other but each should sustain the

25 other (**See Foundation for Human Rights Initiative v the Attorney General (Constitutional Petition No 20 of 2006)**). Secondly, in determining the constitutionality of legislation, its purpose and effect must be taken into consideration (**See Attorney General v Salvatori Abuki Constitutional Appeal No 1 of 1998 (SC)**).

30 Furthermore, counsel submitted that the supreme law on taxation is the Constitution of the Republic of Uganda which, under article 152 (1), provides that no tax shall be imposed except under the authority of an Act of Parliament. The Income Tax Act is one of the statutes regulating taxes

5 imposed by Parliament pursuant to the legislative powers under article 79
(1) of the Constitution. Furthermore, under article 17 (1) (g) of the
constitution, it is the duty of every citizen of Uganda to pay taxes. She
contended that the law does not look with favour on tax exemption and
whoever wants to be accorded this privilege must justify it by words so
10 plain as not to be mistaken. Payment of taxes is mandatory. Furthermore,
legislature in enacting section 19 (1) of the ITA defined income derived
from employment which is liable to tax to include gratuity. Furthermore,
under section 22 (n) of the ITA, pension is exempt from tax. It would not be
fair to legislature to assume that it was not alive to the provisions of the
15 Pensions Act when enacting the Income Tax Act (or article 254 of the
Constitution).

With regard to the construction of the Pensions Act, it is an older Act than
the Constitution and should be construed with the necessary modifications
according to article 274 of the Constitution to bring it into conformity with
20 the Constitution. Secondly, the Pension Act is not tax legislation and there
is no conflict between it and the Income Tax Act. Legislature was aware of
the Pensions Act when enacting the Income Tax Act and there is a
presumption that legislature is aware of existing laws previously enacted
when passing new legislation (See **State v Betterton, 127 Idaho 562, 563,**
25 **903 P.2d 151, 152 (Ct. App. 1995); State v Perkins, 135, Idaho 17, 21,**
13 P.3d 344, 348 (Ct. App 2000).77.) It is also presumed that legislature in
enactment of a statute consulted earlier statutes on the same subject
matter. Furthermore, in **State v Gamino, 148 Idaho 827, 829, 230, P. 3d**
437, 439 (Ct. App. 2010) it was held that: "where two statutes are in
30 irreconcilable conflict, the one more recently adopted governs." In the
premises, section 19 (1) (a) of the ITA which is a specific statute on tax
overrides any other general statutory provision which precedes it and is in
conflict with it.

- 5 In the premises the 2nd respondent's counsel prayed that the court answers issue number 1 in the negative.

Resolution of issue No. 1

Whether Section 19 (1) (a) of the Income Tax Act is inconsistent and in contravention of Articles 2, 26, 40 and 254 (2) of the Constitution?

- 10 I have carefully considered the petitioner's petition, the submissions of counsel, the laws cited and the evidence adduced. The first issue brings out the central contention as to whether the gratuity paid to the petitioner and other officers of the Inspectorate of Government is liable to income tax in light of Article 254 (2) of the Constitution which exempts pension of public
15 officers from income tax. Secondly, the petitioner attacks section 19 (1) (a) of the Income Tax Act Cap 340 (hereinafter sometimes referred to as the ITA) which defines employment income to include gratuity as taxable income. The petitioner contends that the word "gratuity" should be read in harmony with other provisions of the Constitution to reach to the
20 conclusion that the word "gratuity" is a subset or in the same genre as the word "pension" and they have the same meaning of each other. For that reason, the Petitioner's is for court to hold that the exemption of pension from income tax should be taken to include gratuity. This demonstrates that there is a clear admission by the petitioner that Article 254 (2) of the
25 Constitution does not use the word "gratuity" but only uses the word "pension" and the controversy could be narrowed down to whether the term used in the Constitution namely the word "pension" includes in its ambit or purview the payments of "gratuity" for purposes of enjoying exemption from income tax.
- 30 Secondly, the petitioner attacks the acts of the Solicitor General in writing an opinion on the issue of whether gratuity is exempt from income tax in a letter dated 23rd December, 2015 in which he opined that the gratuity

- 5 payable to staff of the Inspectorate of Government was taxable income under section 19 (1) (a) of the Income Tax Act Cap 340. This section defines employment income for purposes of income tax to include gratuity. On the other hand, section 21 (1) (n) of the ITA expressly exempts pension from tax.
- 10 Thirdly, the petitioner contends that the provisions of Section 9 of the Pensions Act Cap 286 is illegal and unconstitutional in so far as it does not allow an aggrieved person to apply to a court of law for remedies in respect of any decision taken under the Pensions Act. This provision has however been the subject of a constitutional petition and was adjudicated upon and
- 15 I shall further deal with that at a later stage.

1. Whether S.19 (1) (a) of the Income Tax Act is inconsistent and in contravention of Articles 2, 26, 40 and 254 (2) of the Constitution?

- In a nutshell this first issue can revolve on the definition of the word
- 20 "pension" under Article 254 (2) of the Constitution and whether it is deemed to or should be construed to include in its ambit payments of "gratuity". Before delving into the matter, the first respondent raised a preliminary point of law based on the express wording of the constitutional provision exempting "pension" payable to public officers from income tax
- 25 as not including "gratuity" and therefore the petition is untenable on the face of it. Furthermore, the respondent's counsel argued that the petitioners are not public officers in the sense that their employment is contractual and not by the authority designated to employ permanent and pensionable staff for the public service whose pension emoluments are
- 30 governed by the Pension Act.

Is the petitioner a person who is pensionable in terms of those persons envisaged under Article 254 (2) of the Constitution of the Republic of

5 Uganda? In other words, is the petitioner and the category of employees of
the IGG of which he is one, "public officers" referred to under Article 254 (1)
of the Constitution? In the alternative does the phrase in Article 254 (2) of
the Constitution: "pension payable to any person" include persons
employed on contract or even employed by private persons/companies
10 who are entitled to pension? Secondly, if the above or any of the above
questions is answered in the affirmative, does the word 'pension' under
Article 254 of the Constitution include 'gratuity'?

Before delving into the principles for interpretation of provisions of
constitutions generally as set out in **Constitutional Petition No. 46 of**
15 **2011 and Constitutional Reference No. 54 of 2011 Hon Sam Kuteesa,**
Hon. John Nasasira and Hon. Mwesigwa Rukutana v Attorney General,
relied on by the petitioner's counsel, it is a cardinal rule of interpretation of
any statute that the first endeavour should be to ascertain the natural or
ordinary meaning of a word or phrase which needs to be interpreted.
20 Where the words or phrases are clear and unambiguous, there is no need
to go any further. **Sir Rupert Cross in Statutory Interpretation; London**
Butterworths 1976 at pages 29 and quotes Lord Reid on the canons of
statutory interpretation as written below:

25 "(i) "In determining the meaning of any word or phrase in a statute
the first question to ask is what is the natural or ordinary meaning of
the word or phrase in its context in the statute. It is only when the
meaning leads to some result which cannot reasonably be supposed
to have been the intention of legislature that it is proper to look for
some other possible meaning of the word or phrase. (*Pinner v Everett,*
30 *[1969] 3 All E.R. 257 at 258).*

(ii) "Then [in case of doubt] rules of construction are relied on. They
are not rules in the ordinary sense of having some binding force. They
are our servants, not our masters. They are aids to construction,

5 presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgement what weight to attach to any particular 'rule.'" (*Maunsell v Olins*, [1975] A.C. 373 at 382, *Maunsell v Olins and another* [1975] 1 All ER 10 16 at 18)

(iii) "It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between 15 those meanings, but beyond that you must not go." (*Jones v Director of Public Prosecutions*, [1962] AC 635, at page 688.)

I shall begin the inquiry into the word "pension" by ascertaining its natural or ordinary meaning. This could also be the meaning of the word used under the Pension Act Cap 286 and various other Acts of Parliament such as 20 the National Social Security Fund Act Cap 222 and the Income Tax Act whose section 19 (1) (a) is under consideration. The major premises would be to establish how legislature has used the words "Pension and Gratuity". The head note of Article 254 of the Constitution reads as "Pension". It follows that Article 254 concerns pension and the controversy is about what 25 the word "pension" means in the context of the Constitution. Article 254 reads as follows:

"254. Pension.

(1) A public officer shall, on retirement, receive such pension as is commensurate with his or her rank, salary and length of service.

30 (2) The pension payable to any person shall be exempt from tax and shall be subject to periodic review to take account of changes in the value of money.

5 (3) The payment of pension shall be prompt and regular and easily accessible to pensioners."

Before definition of the word "pension" as used in Article 254 of the Constitution and which had formed the main thrust of the submissions in this petition, I will first go step-by-step according to the wording of Article
10 254 to get a literal, ordinary or natural meaning by reading the Article. Can the meaning of the Article be ascertained from a literal reading of the words in the Article?

Article 254 (1) of the Constitution firstly deals with right of a public officer on retirement to receive such pension as is commensurate with his or her
15 rank, salary and length of service. It establishes the right to pension on retirement of a public officer. Secondly, it provides that the pension of the public officer shall be commensurate with the rank of the public officer; their salary and length of service. The amount of final payment of pension should take into account the rank of the public officer, their salary and
20 length of service. The principle is that the higher the rank the higher the pay and the longer the period of service, the larger the sum paid.

Secondly, Article 254 (2) of the Constitution provides that "the pension" payable to 'any person' shall be exempt from income tax. One wonders why the framers of the Constitution of the Republic of Uganda did not use the
25 words in Article 254 (1) of "public officer" instead of "any person". It may be argued that article 254 (2) should follow from 254 (1) and the use of the term "the pension payable" therein must mean Pension Payable to "Public Officers". However, a reading of other legislation will demonstrate that pension of other categories of employees who are no "public officers" is
30 also exempt from tax. In any case legislature chose to use the words "any person". In other words, it is plausible to say that under article, the pension payable to "any person" shall be exempt from taxation. The words 'public officer' is defined. On the other hand the expression; "any person", could be

5 applied to a wider category of persons than the expression; "public officer".
The submission that the petitioner is not a public officer to whom Article
254 (2) would apply, would not resolve the issue on its own and I do not
need to conclusively determine it here. I can only say that Article 254 (2)
seems not to be restricted to "public officers" only but extends to "any
10 person" and other enactments including the National Social Security Act
and the Income Tax Act, which apply to other categories other than "public
officers" support this view and therefore I am not ready to exclude
pensioners in the private sector or those who are not public officers from
enjoying exemption under article 254 of the Constitution though I need not
15 conclusively decide this point in this petition..

Secondly, Article 254 (2) of the Constitution provides that such 'pension'
payable shall be subject to periodic review to take into account changes in
the value of the money. It envisages periodic payments of pension and
ensures that the pension regularly paid over time does not lose value. It
20 also implies that, if the conclusion that Article 254 (2) applies to any person
entitled to pension is right; the periodic review applies to persons entitled
to pension who are not public officers as well. The court does not have to
resolve the issue of whether pension payable is exempt from income tax if
the word pension is held not to include gratuity in issue number 1 under
25 consideration.

Thirdly, Article 254 (3) of the Constitution prescribes a right to prompt,
regular and easily accessible payment of pension. It imports the idea of a
regular payment. The clear meaning to be obtained from the above
provisions is that pension is a periodic payment which is made regularly to
30 pensioners. This as I shall consider below is consistent with the dictionary
definitions of payment of periodic and regular pension instalment
payments. The second aspect of pension is that it ordinarily caters for people
who have retired from work due to old age or disability.

5 Article 254 of the Constitution is not ambiguous or unclear. It does not use the word "gratuity" at all. It uses the word "pension" in the context of a payment upon retirement in respect of public officers, but left Article 254 (2) of the Constitution wide enough to cover other pensions not based on retirement and covers pension payable to "anybody".

10 There are some dictionary definitions of the word "pension" which I can consider to set out how the word is used in ordinary English and also in its legal or technical sense. According to the **Oxford Dictionary of Law 5th Edition**, the word "pension" means:

15 "Income paid to a person who has reached the state "retirement age" (retirement pension) or who has retired from employment and benefits from a company or personal pension scheme."

There is a specific category of pension called "retirement pension" and this should not be mixed with other kinds of pension as set out below. According to **Black's Law Dictionary 8th Edition** pension is:

20 "A fixed sum paid regularly to a person (or to a person's beneficiaries), esp. by an employer as a retirement benefit."

Black's Law Dictionary 10th Edition gives an expanded definition of the word 'pension' which reads as follows:

25 "Pension. (16c) 1. A regular series of payments made to a person (or the person's representatives or beneficiaries) for past services or some type of meritorious work done; esp., such series of payments made by government. 2...."

The **Stroud's Judicial Dictionary** has several statutorily based definitions which show that the word 'pension' ordinarily refers to periodic payments
30 upon retirement and not a lump sum payment though one UK statute

5 included gratuity as a pension payment. This can be demonstrated by the various definitions of the word:

10 "Pension", in s.1 (2) of the Bankruptcy Act 1914 (c. 59), providing for an order for payment to the trustee in bankruptcy of all or part of any "pension" to which the bankrupt is entitled, applies to a police pension which by statute is inalienable and does not vest in the trustee in bankruptcy (Re Garrett [1930] 2 Ch. 137).

15 Pension money reduced into possession by the pensioner or his agent lost its character of pension, even within s. 141 of the Army Act 1881 (c. 58): see Jones v. Coventry, 25 T.L.R. 736. So, a lump sum granted to a retiring civil servant by way of additional allowance under Superannuation Act 1909 (c. 10), s.1, was part of his property and was divisible among his creditors in bankruptcy: see Re Lupton, 55 S.J. 689; but see Nixon v. A.-G. [1931] A.C. 184.

20 Stat. Def., includes lump sum, allowance or gratuity and return of contributions with or without interest or other addition (Coal Industry Act 1994 (c. 21), Sched. 5, para. 1(1))."

I am for the moment not concerned with the statutory definition quoted in the dictionary but with the ordinary use of the words in the legal sense.
25 One of the statutory definitions appears in **Words and Phrases Legally Defined Third Edition Volume 3 K – Q** where both the statutory and judicial definitions are given:

30 "'Pension', in relation to any person, means a pension, whether contributory or not, of any kind whatever payable to or in respect of him, and includes a lump sum or a gratuity so payable and a return of contributions to a pension fund, with or without interest thereon or

5 any other addition thereto. (Superannuation (Miscellaneous Provisions) Act, 1948, s 17)..."

There are other statutory definitions and I refer to the Canadian judicial definition captured in **Words and Phrases Legally Defined Third Edition** (supra) that:

10 "Canada 'One of the definitions of a pension in the New Oxford Dictionary is this; "An annuity or other periodical payment made, especially by a government, a company or an employer of labour, in consideration of past services." Here it is true a lump sum was voted but it was made payable in instalments, that is periodically. I would
15 not like to tie myself to the pronouncement that a pension, to attract ... tax, need always be paid in instalments. As one of the old examples in the Greater Oxford Dictionary says, "They who are maimed in the wars have to them a pension for life or the value of the pension in ready money".' *Re Nelson* (1971) 22 DLR (3d) 603, BCSC, per Wilson
20 CJ"

I will consider the statutory definition of pension from the Ugandan statutes which deal with Pension at a later state in this judgment.

Attached to the petitioner's list of authorities is the **Oxford Learner's Dictionary of Current English** 8th Edition which defines the word 'pension'
25 as:

"An amount of money paid regularly by a government or company to sb (somebody) who is considered to be too old or too ill/sick to work: *to receive an old age/a retirement pension, a disability/widow's pension, a state pension...*"

5 The **Cambridge International Dictionary of English**: Cambridge University Press 1995 and published in 1996 has a definition which rhymes with those of the legal dictionaries cited above. It provides that:

“pension. A sum of money paid regularly by the government or a private company to a person who does not work anymore because
10 they are too old or they have become ill.”

In contrast the **Cambridge International Dictionary of English** (supra) has a definition of the word “gratuity” as:

“A sum of money given as a reward for a service”.

The **Oxford Learner’s Dictionary of Current English** (supra) defines
15 gratuity as:

“(1) (*formal*) money that you give to sb who has provided a service for you (2) money that is given to employees when they leave their job.”

The above definitions of gratuity are supplemented by **Words and Phrases Legally Defined Third Edition** (supra) Volume 2 D – J and means inter alia:

20 ‘I ... read “gratuity”[in a local Act] as wide enough to cover any money gratuitously granted or paid, whether it is paid in one lump sum or in instalments.’ *Halloway v Poplar Corp*n [1940] 1 KB 173 at 178, per Asquith J

25 Canada ‘One of the meanings ascribed to the word “gratuity” in the Oxford English Dictionary is: A gift or present (usually of money) often in return for favours or services, the amount depending upon inclination of the giver ... Now applied exclusively to such a gift made to a servant or inferior official; a “tip”.

5 The Oxford English Dictionary also says that another meaning, viz,
"payment; wages" is obsolete. Webster's Third New international
Dictionary gives one of the meanings of "gratuity": "something given
voluntarily or over and above what is due, usually in return for or in
anticipation of some service".' *Re Vladicka and Board of School*
10 *Trustees of Calgary School District No 19* (1974) 45 DLR (3d) 442 at
448, Alta SC, per McDonald J"

There are some pointers that can be obtained from the way the word
'pension' was used in the above definitions. Firstly, the Constitution of the
Republic of Uganda, when using the word 'public officer' in Article 254 (1)
15 deals with retirement benefits called "pension". The other definitions
include retirement and disability benefits such as for a pension granted to a
war veteran who can no longer work due to injuries. Gratuity on the other
hand is given at the pleasure of the giver who ordinarily is an employer or
in appreciation of services rendered. It may be given in a lump sum or in
20 instalments in appreciation of a service. It also covers payment made when
an employee leaves the employment service. It does not cover retirement
pension which has a specific meaning or a disability pension. The word
gratuity seems to come from the word gratuitous. Pension is an entitlement
and normally based on statute or contract.

25 Without exhausting the possible meanings of the word pension, the
controversy in this petition is whether the terminal and contractual benefits
paid or payable to the petitioners is pension in the sense of it being a
retirement benefit.

I shall start with the erroneous premises used by the petitioner and the
30 respondent that Article 254 (2) exempts pension payable to public officers
only. From those premises, we were treated to the meaning of the
expression; "public service" and "public officer". I cannot read that meaning
in Article 254 (2) of the Constitution and particularly the contention that the

5 exemption of pension from tax mentioned therein is only applicable to the
pension of public officers because of the use of the words "any person" as
opposed to "public officer" in Article 254 (1) of the Constitution. Article 254
(1) of the Constitution is clear and unambiguous. It specifically addresses
the right of a public officer on retirement to receive pension as is
10 commensurate with his or her rank, salary and length of service. There is no
need to interpret that any further than to conclude that it deals with
retirement pension and not terminal benefits upon employment being
terminated per se or even gratuity when used in the context of payment
made to an employee on leaving the job. The word "retirement" in the
15 Article should not be stretched to mean termination of services by expiry of
contract or any other contractual or other forms of employment services
coming to an end.

This takes us to the contractual words used for the employment coming to
an end in the petitioner's case. The petitioner signed an employment
20 contract attached to the affidavit of Rogers Kinobe Binenga deposed to on
14th January, 2016 and annexure "A" thereof. The employment contract is
dated 13th April 2012 and is between the petitioner and the Inspectorate of
Government as employer. The duration of the contract is from 26th February
2012 to February 2016; a period of 4 years, renewable from time to time.
25 Clause 6.0 of the contract of employment is the specific clause concerning
the amount the petitioner seeks to be exempted from tax and it provides as
follows:

"6.0. Gratuity:

6.1. The Employee shall be entitled to gratuity equivalent to 30% of
30 the basic annual salary for each completed year of the contract, in
accordance with section 2.2.3 of the Human Resource Policy and
Procedures Manual.

5 6.2. The employee shall not be entitled to gratuity unless he/she has completed a minimum of one year of service to the Inspectorate.

6.3. Where the contract is terminated before the end of the period of service other than by dismissal, the Employee shall be paid gratuity for the period served as provided in paragraph 6.1 of this contract
10 document.

6.4. In case the Employee dies during the term of his or her service, the Inspectorate shall pay through the Administrator General's Office the deceased's gratuity to his/her next of kin registered with IG."

Before taking leave of the service contract, clause 7.0 thereof provides that
15 the Inspectorate of Government Human Resource Policy and Procedures Manual shall form an integral part of the contract of employment.

The petitioner's counsel advised the court to consider the historical use of the word "Pension and Gratuity" and submitted that each has a meaning of the other.

20 The obvious problem with issue 1 of whether section 19 (1) of the ITA is unconstitutional arises from a simple matter. Section 19 of the ITA defines taxable employment income and includes in 19 (1) (a), gratuity. On the other hand section 19 (2) (g) expressly provides that employment income does not include contributions to a retirement benefit in the following
25 words:

"(2) Notwithstanding subsection (1), the employment income of an employee does not include-

(g) any contribution or similar payment by an employer made to a retirement fund for the benefit of the employee or any of his or her
30 dependents."

5 In other words the Income Tax Act exempts contributions to a retirement fund from income tax. This exemption is supplemented by the National Social Security Fund Act Cap 222 which sets up a statutory contributory fund for categories of employees defined in the Act. Under section 38 of the NSSF Act it is provided that:

10 "Any benefit paid under this Act shall be exempt from income tax."

Furthermore, 19 (1) of the NSSF Act defines benefits to include: "age benefit, withdrawal benefit, emigration benefit; survivors benefit." The benefits accrue from a contributory scheme and ought to benefit those employees employed under defined employment other than exempted
15 employments. The beneficiaries of age benefits are only entitled to payment upon attaining a statutory minimum age. The provisions also analysed in context will lead to the inevitable issue of whether the petitioner and the other contractual staff of the Inspectorate fall under the exempted employees to whom the Pensions Act Cap 286 applies. This
20 comes from definitions of the NSSF Act which specify who falls under the mandatory statutory contributory scheme of NSSF towards their retirement benefits. Employees to whom the Pensions Act applies are not obliged to contribute to the NSSF contributory scheme. Section 6 of the National Social Security Fund Act Cap 222 (NSSF Act) specifies eligible employees
25 who are obliged to contribute to the social security scheme and those employees who are exempted or employed in excepted employment. Section 1 (l) and (m) of the Act defines the category of excepted employment to mean any one of the employments specified in the First Schedule to the Act. In section 1 (m) of the NSSF Act an "excepted person"
30 means 'a person in excepted employment.' The First Schedule in item 6 thereof exempts those in employment by virtue of which employees are eligible for pension benefits under the Pensions Act. The issue of whether

- 5 the petitioner is a person to whom the Pensions Act applies is easy to establish.

Starting with the application of the Pensions Act, the petitioner's counsel drew the attention of court to among other things the preamble. The preamble provides that it is:

- 10 "An Act to provide for the grant and regulating of pensions, gratuities and other allowances in respect of the public service of officers under the Government of Uganda."

It was argued for the petitioner that his office was an office in the public service of the Government of Uganda. However, a critical reading of provisions of the Act specifies the persons to whom the Pensions Act
15 applies and what a "pensionable office" is. "Pensionable office" is defined by section 1 (g) as:

(g) "pensionable office" means—

- 20 (i) in respect of public service by a person under the Government, an office—

(A) to which he or she has been appointed, on probation or otherwise, by the authority having power for the time being to make appointments to the public service of Uganda on terms which include eligibility for the grant of a pension under this Act or under any
25 Ordinance repealed by this Act; and

(B) which he or she has not ceased to hold on such terms;

(ii) in respect of other public service, an office which is for the time being a pensionable office under the law or regulations in force in the service;

5 (iii) an office to which a Ugandan national was appointed on probation or otherwise by the authority having power for the time being to make appointments in the East African Community on terms which include eligibility for the grant of a pension under the Pensions Act of the Community and regulations made under it."

10 The meaning under section 1 (g) (A) is clear enough. The service in government has to be one "to which he or she has been appointed, on probation or otherwise, by the authority having power for the time being to make appointments to the public service of Uganda *on terms which include eligibility for the grant of a pension under this Act*" (emphasis added). It is
15 expressly provided that the terms of appointment should include eligibility for the grant of pension under the Pension Act. The simple question of whether the terms of appointment of the petitioner include eligibility to pension can only be answered in the negative on the following grounds:

The petitioner was appointed on contract annexure "A" to the petition
20 which specifies the terms of appointment. These terms do not include eligibility to pension at all or even pension under the Pension Act. As noted above clause 7 of annexure A" imports the **Inspectorate of Government Human Resource Policy and Procedures Manual** to form part of the contract of employment. This did not form part of the pleadings or
25 evidence adduced in this petition. In the list of authorities, the petitioner relies on the **Inspectorate of Government Act** and **Inspectorate of Government (Terms & Conditions of Service of Staff) (Amendment) Regulations, 2001**. These regulations do not make the Pensions Act applicable to the petitioner or categories of employees on contract. The
30 petitioner cited section 4 (2) of the **Inspectorate of Government Act 2002** which provides that the Inspectorate shall be a public service. The section does not answer the question as to whether the terms of service make the employment of the petitioner eligible for pension under the Pensions Act. I

5 further note that section 4 (4) of the Inspectorate of Government Act 2002 provides that:

10 "The remuneration and other conditions of service of members of the Inspectorate shall be determined by Parliament and the salaries and allowances of members of the Inspectorate shall be charged on the Consolidated Fund."

The above quoted section per se does not make the Inspectorate staff eligible for pension under the Pensions Act. In fact other staffs of the Inspectorate, other than the Secretary, are appointed under section 16 (1) and (2) of the Inspectorate of Government Act 2002 which provides that:

15 "(1) The Inspectorate shall have such other officers and employees as may be necessary for the efficient and effective performance of its functions under this Act.

20 (2) All officers and employees of the Inspectorate other than the Secretary shall be appointed by the Board upon such terms and conditions as the Board may determine."

The terms and conditions are determined by the board. Do those terms make the petitioner eligible to pension under the Pensions Act? I have considered The **Inspectorate of Government (Terms and Conditions of Service for Staff) Regulations, 2000**. Regulation 3 (1) (a) provides that the
25 Regulations apply to a person appointed by the Appointments Board under the Statute. Regulation 6 provides that:

"6. (1) All appointments of the Inspectorate shall be made by the Appointments Board established under section 4 of the Statute.

30 (2) Appointments by the Board shall be on contract for a period of two years and may be renewed as the board may determine.

5 Allowances are provided for in Regulations 14 – 21 of the Regulations (supra) and the Secretary may in consultation with the Inspector General pay any other allowance not mentioned in the Regulations (See regulation 22 (supra)). Finally Regulation 39 of **The Inspectorate of Government (Terms and Conditions of Service for Staff) (Amendment) Regulations, 2001** provides for gratuity to a person employed on contract as follows:

15 “39 (1) a member of staff appointed on contract shall be paid a terminal gratuity at the rate of thirty percent of the total salary paid to him or her upon successful completion of the contract; and where the contract is not completed or if it is terminated, he or she shall be paid thirty per cent of the total salary for the period of time worked”.

These regulations do not make the Petitioner eligible for Pension under the Pensions Act. Secondly, the words “pension and gratuity” have different meanings and are not interchangeably used. The Petitioner is not eligible for pension under the Pensions Act Cap 286. The gratuity under regulation 20 39 (1) of **The Inspectorate of Government (Terms and Conditions of Service for Staff) (Amendment) Regulations, 2001**, is not a retirement benefit or a pension. It is gratuity upon a contract coming into an end by expiry of term of time or other forms of termination except dismissal.

Under the Pension Act Cap 286 the word Pension is used differently from gratuity and even calculations are based on different formula. Section 10 (2) 25 of the Pension Act provides that:

30 “(2) Notwithstanding subsection (1); a pension, gratuity or other allowance shall be paid to an officer who retires on the attainment of the age of forty-five years if he or she has served for a continuous period of ten years or more.”

The section does not use the words pension and gratuity interchangeably as suggested by the petitioner’s counsel but separately with different

5 consequences in the Act. Section 15 provides that pension maybe granted to a person who has been dismissed as is deemed fit and just. Regulation 9 of the Schedule to the Pension Act allows gratuity to be paid to a person who has not clocked a period of service of 10 years.

"9. Gratuities where length of service does not qualify for pension.

10 Every officer, otherwise qualified for a pension, who has not been in the service of the Government in a civil capacity for ten years may be granted on retirement a gratuity not exceeding ten times the annual amount of the pension which, if there had been no qualifying period, might have been granted to him or her under regulation 4 of these
15 Regulations."

The word gratuity is clearly distinguished from the word 'pension'. It means a lump sum paid when a person does not qualify for pension. However, when a person qualifies for pension, he is paid both gratuity and pension where the word "pension" is used to mean a periodic and regular payment
20 as envisaged in Article 254 (1) of the Constitution.

Furthermore, section 21 (1) (n) of the Income Tax Act expressly exempts pension from tax. It provides as follows:

"21 (1) The following amounts are exempt from tax-

(a)...

25 (n) a pension; ..."

Legislature under the Income Tax Act Cap 340 treats gratuity and pension as different categories. Pension is used in the sense of retirement or disability pension and is not gratuity.

1

5 The final conclusion is the section 19 (1) (a) of the Income Tax Act is a
section of general application to all categories of employees including
those in the public service and private sector employment and cannot on
that basis be declared unconstitutional because it taxes gratuity. The
specific Statute applicable to a public officer to whom the Pensions Act
10 applies, of which the petitioner is not, exempts pension and gratuity from
tax. The Income Tax Act expressly excludes any contribution or similar
payment by any employer made to a retirement fund for the benefit of the
employee or any of his or her dependants (See section 19 (2) (g) of the ITA).
Even if the petitioner was a contributor to the NSSF Fund for any benefit
15 inclusive of retirement benefit under the NSSF Act, the Income Tax Act and
the NSSF Act exempt such contribution from any tax. Nothing stopped the
petitioner from being a contributor to a retirement fund. Thirdly, section 21
(1) (n) of the ITA, exempts pension from income tax.

In the premises, the Income Tax Act exempts all forms of pension and
20 retirement benefits paid to a retirement fund through periodic
contributions from tax. It does not exempt gratuity and other allowances
specified in Section 19 (1) (a) of the Income Tax Act. Last but not least in the
context of Article 254 of the Constitution, the word "pension" used therein
is consistent with the use in the Pension Act, The National Social Security
25 Act and the Income Tax Act and does not include in its ambit gratuity. It
follows that the issue number 1 as to whether section 19 (1) (a) of the
Income Tax Act, Cap 340 Laws of Uganda is inconsistent with Article 254 of
the Constitution is answered in the negative.

Issues No. 2

30 **Whether the opinion of the Solicitor General dated 23rd December,
2015 which maintained that Gratuity paid to staff of the inspectorate
of Government is taxable under the said impugned S.19 (1) (a) of the**

- 5 **Income Tax Act Cap. 340 is inconsistent with and in contravention of Articles 2, 20, 24, 26, 40 and 254 (2) of the Constitution.**

The Petitioners Counsel submitted that on the 23rd of November, 2015 the Secretary of the Inspectorate of Government wrote to the Solicitor General seeking his opinion on the application of Section 19 (1) (a) of the Income
10 Tax Act (ITA) to gratuity paid to the staff of the Inspectorate. On the 23rd December 2015, the Solicitor General wrote back rendering an opinion in which he analysed the impugned section of the ITA viz-a-viz the case of **Hassan Kajura v URA** and maintained the imposition of income tax on gratuity. The Petitioner's Counsel submitted that the same Solicitor General
15 had earlier on 7th December, 2013 rendered an opinion to the Secretary of the Human Rights Commission that deductions of income tax on gratuity paid to staff of the Commission was prohibited under Section 8 of the Pensions Act.

The Petitioner's Counsel reiterated the submissions in issue 1 that section
20 19 (1) (a) of ITA contravenes Article 254 of the Constitution. If the court finds for the petitioner on that issue he submitted that it should automatically find the said opinion of the Solicitor General is inconsistent with Article 254 of the Constitution.

Further, the inconsistency in the opinions of the Solicitor General/the office
25 of the Attorney General (the Principal Legal Adviser to the Government under Article 119 (3) of the Constitution) in respect of a similar subject matter creates confusion in Government agencies which rely heavily on the advice of the Solicitor General in their day to day decision making.

The Petitioner's counsel further submitted that the Respondents turned a
30 blind eye to the controversy created by the conflicting opinions of the Solicitor General and their position should be rejected. He invited the court to resolve the issue in favour of the Petitioner because he contended that

5 the opinion of the Solicitor General which maintained that gratuity is taxable income was influenced by section 19 (1) (a) of the ITA which contravenes or is inconsistent with Article 254 of the Constitution.

In reply, the 1st Respondent's counsel submitted that under Article 119 (4) (a) of the Constitution, the Attorney General is empowered to give legal
10 advice and legal services to the Government on any subject. Therefore, the Solicitor's General's opinion challenged in the petition was given in the exercise of the Attorney General's Constitutional mandate under the Constitution. The opinion is not illegal or unconstitutional and the court should hold that there was no contravention or inconsistency with any
15 provisions of the Constitution by giving that opinion at all.

Consideration of Issue 2

**Whether the opinion of the Solicitor General dated 23rd December, 2015 which maintained that Gratuity paid to staff of the inspectorate of Government is taxable under the said impugned S.19 (1) (a) of the
20 Income Tax Act Cap. 340 is inconsistent with and in contravention of Articles 2, 20, 24, 26, 40 and 254 (2) of the Constitution.**

I have carefully considered the issue and conclude that there is no question for interpretation under Article 137 of the Constitution. An opinion can be erroneous but cannot be unconstitutional on account of error only.

25 That notwithstanding, and in light of my finding in issue number 1 as to whether section 19 (1) (a) of the Income Tax Act is inconsistent with Article 254 of the Constitution, the opinion of the Solicitor General came to the correct conclusion that the taxation of gratuity of the petitioner did not contravene Article 254 of the Constitution and issue number 2 is answered
30 in the negative.

Issue No 3

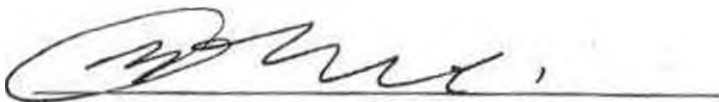
5 Whether S. 9 of the Pensions Act Cap. 286 which provides that
no proceedings shall be brought in any Court on the
ground that any provision of that Act has not been complied
with denies access to redress from the Courts, contravenes and is
10 inconsistent with Articles 2,21,28,126,128, 137 and 254 of the
Constitution.

I have duly considered the above issue concerning a challenge to section 9
of the Pensions Act Cap 286 and would not handle the issue as it has been
the subject of litigation before and the Constitutional Court declared the
provision null and void in **Constitutional Petition No. 12 of 2008**
15 **Christopher Martin Madrama Izama v Attorney General**, in a decision
dated 20th November 2015 which portion of the judgment was not
appealed to the Supreme Court. The issue is *res judicata*.

Issue 4: What remedies are available to the parties?

In light of the resolution of issues numbers 1, 2 and 3, this petition lacks
20 merit and I would dismiss the petition with costs to the respondents.

Dated at Kampala the 8th day of July 2019



HON. MR. JUSTICE CHRISTOPHER MADRAMA, JCC

Delivered in
Chambers on
8/7/19
f.h.

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Muhanguzi, Madrama Izama, JJCC / JJA]

CONSTITUTIONAL PETITION NO. 1 OF 2006

BETWEEN

RODGERS KINOBE BINEGA=====PETITIONER


AND

ATTORNEY GENERAL=====RESPONDENT

JUDGMENT OF ALFONSE C. OWINY-DOLLO, DCJ

1. I have read the draft judgment of my brother, Madrama Izama. JCC / JA. I agree that this petition should be dismissed for the reasons he gives.
2. As Kakuru, Egonda-Ntende and Muhanguzi, JJCC / JJA, agree this petition is dismissed with costs.

Dated, signed and delivered at Kampala this 8th day of July 2019


ALFONSE C. OWINY-DOLLO
DEPUTY CHIEF JUSTICE

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ; Kakuru, Egonda-Ntende, Muhanguzi, Madrama Izama, JJA / JJCC]

CONSTITUTIONAL PETITION NO. 1 OF 2006

BETWEEN

RODGERS KINOBE BINEGA===== **PETITIONER**

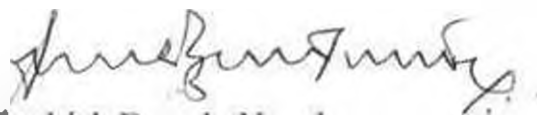
AND

ATTORNEY GENERAL===== **RESPONDENT**

JUDGMENT OF FREDRICK EGONDA-NTENDE, JCC / JA

1. I have read the draft judgment of my brother, Madrama Izama. JA / JCC. The facts of the case and arguments of counsel are ably set out in the said judgment. I agree that this petition should be dismissed for the reasons he gives.
2. I would dismiss this petition with costs.

Dated, signed and delivered at Kampala this 8th day of July, 2019



Fredrick Egonda-Ntende
Justice of the Constitutional Court / Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

(Coram: Owiny – Dollo, DCJ. Kakuru, Egonda-Ntende, Madrama and Muhanguzi, JCC)

CONSTITUTIONAL PETITION NO. 01 OF 2016

BETWEEN

ROGERS KINOBE BINEGA.....PETITIONER

AND

1. ATTORNEY GENERAL

2. UGANDA REVENUE AUTHORITY..... RESPONDENT

JUDGMENT OF EZEKIEL MUHANGUZI, JCC.

I have had the benefit of reading in draft the judgment prepared by my learned brother, The Hon. Mr. Justice Christopher Madrama, JCC.

I agree with the reasons given, the conclusions made and the orders proposed and have nothing useful to add.

Dated at Kampala this 8th day of July, 2018.



EZEKIEL MUHANGUZI

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA
IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA
CONSTITUTIONAL PETITION NO. 01 OF 2016

ROGERS KINOBE BINEGA PETITIONER

VERSUS

- 1. THE ATTORNEY GENERAL**
- 2. THE UGANDA REVENUE AUTHORITY RESPONDENTS**

CORAM: Hon. Mr. Justice Alfonse C. Owiny-Dollo, DCJ

Hon. Mr. Justice Kenneth Kakuru, JA/ JCC

Hon. Mr. Justice Egonda-Ntende JA/ JCC

Hon. Mr. Justice Ezekiel Muhanguzi JA/ JCC

Hon. Mr. Justice Christopher Madrama JA/ JCC

Judgment of Hon. Mr. Justice Kenneth Kakuru

I have had the opportunity of reading in draft the Judgment of my learned brother Madrama JA/JCC.

I agree with him that this petition lacks merits and ought to be dismissed, for the reasons he has given.

I have nothing useful to add.

Dated at Kampala this 8th day of July, 2018.



Kenneth Kakuru
JUSTICE OF APPEAL/ JUSTICE CONSTITUTIONAL COURT