THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Barishaki Cheborion, Musoke, Kibeedi & Mulyagonja; JJCC]

CONSTITUTIONAL PETITION NO. 58 OF 2013

BETWEEN

KAKAIRE SADIKI ========== PETITIONER NO.1

SULEMAINISOTAHMAGUMBA ========== PETITIONER NO. 2

AND

UGANDA NATIONAL EXAMINATION BOARD ========== RESPONDENT NO.1

FAGIL MANDY ========== RESPONDENT NO. 2

Judgment of Fredrick Egonda-Ntende, JCC

[1] I have had the benefit of reading in draft the judgment of my sister, Musoke, JCC. I agree with it and have nothing useful to add.

[2] As Barishaki Cheborion, Kibeedi & Mulyagonja, JJCC, agree, the petition against respondent no. 1 is allowed with the orders proposed by Musoke, JCC. The petition against the respondent no.2 is struck out.

Dated, signed and delivered at Kampala this 11th day of May 2021

Fredrick Egonda-Ntende

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 0058 OF 2013

1. KAKAIRE SADIKI

2. SULEIMAN ISOTAH MAGUMBA::::::::::::::::::::::::::::PETITIONERS

VERSUS

1. UGANDA NATIONAL EXAMINATIONS BOARD (UNEB)

2. FAGIL MANDY::RESPONDENTS

CORAM: HON. MR. JUSTICE FREDRICK EGONDA NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHEBORION BARISHAKI, JCC
HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC
HON. LADY JUSTICE IRENE MULYAGONJA, JCC

JUDGMENT OF ELIZABETH MUSOKE, JCC

The petitioners herein brought their Petition pursuant to **Rule 5** of the **Constitutional Court (Petitions and References) Rules, 2005**, and although not stated in the Petition, under **Article 137 (3) (b)** of the **1995 Constitution** as well, and by it, they are asking the Court to interpret the Constitution and find that certain acts and omissions of the respondents are inconsistent with and/or in contravention of the 1995 Constitution.

The petitioners' general allegation against the respondents, is that their acts, in organizing National Examinations to be written on days coinciding with the Idd Adhua, and Idd el Fitr Muslim religious holidays ("the relevant Muslim religious holidays"), were inconsistent with and in contravention of **Articles 7, 20, 21 (1) (2) & (3), 24, 29 (1), (b) & (c), 37, 43 and 44 (a)** of the **1995 Constitution**. The petitioners claim that the impugned acts of the respondents took place in 2003, 2004, 2005, 2006, 2012. The petitioners further claim that in 2013, the respondents had organized national examinations on Idd Adhua day, although they were forced to reschedule the examinations due to pressure from the Muslim community.

As and against the 2nd respondent, alone, the petitioners allege that as then Chairman of the 1st respondent, he acted in a manner inconsistent with and/or in contravention of **Article 99 (1)** of the **1995 Constitution** when in the year 2013, he declared that National Examinations would be conducted on the Idd Adhua day despite it being a gazetted public holiday.

The petitioners prayed that, owing to the impugned acts of the respondents, this Court grants the following:

> "(a) **A declaration that the action of the respondents of organizing and conducting National Examinations on Idd Adhua and Idd El-Fitr which are gazetted public holidays in the Republic of Uganda is inconsistent with and/or is in contravention of Articles 7, 20, 21, (1), (2), & (3), 24, 29 (1), (b) & (c), 37, 43, 44 (a) of the Constitution of the Republic of Uganda 1995.**
>
> (b) **A declaration that the action of the Chairman of Uganda National Examination Board, Mr. Fagil Mandy in declaring that National Examinations and/or can be conducted on Idd Adhua despite the day being gazetted and announced by Government as a Public Holiday is inconsistent with and in contravention of Article 99 (1) of the Constitution of the Republic of Uganda 1995.**
>
> c) **An order of a permanent injunction that the respondents desist from the contravention of the said Articles of the Constitution and hence forth embark on measures aimed at preventing further infringement of the 1995 Constitution of the Republic of Uganda and the Public Holidays Act, 255.**
>
> d) **An order that the petitioners are awarded general and exemplary damages for infringement of their Constitutional rights and costs of the Petition."**

The 2nd petitioner deponed an affidavit setting out evidence in support of the Petition. The respondents opposed the Petition and filed an Answer thereto. The affidavit in support of the Answer was deponed by Mr. Matthew Bukenya, then Executive Secretary of the 1st respondent.

Representation

At the hearing, Mr. Najib Mujuzi, learned counsel, appeared for the petitioners. Mr. Geoffrey Atwiine, learned Principal State Attorney from the

Attorney General's Chambers, appeared for the respondents. The 2nd petitioner was also in Court. Counsel addressed the Court by way of written submissions after leave was granted for that purpose. However, the Court put some oral questions to the respective counsel at the hearing date.

Preliminary objections to the Petition

In their Answer, the respondents objected to the propriety of the Petition in the following respects: 1) The 2nd respondent was wrongly added as a party to the Petition; and 2) The Petition is frivolous, vexatious, misconceived, speculative and hypothetical. Accordingly, the respondents prayed that the Petition be dismissed with costs. I will deal with each of those objections below.

Whether the 2nd respondent was rightly added as a party to Petition

Rather than building on the averments in the Answer to the Petition with regards to whether the 2nd respondent could be rightly added as a party to the present Petition, in the submissions, counsel for the respondents instead submitted that the impugned acts of the 2nd respondent as the Chairman of the 1st respondent in declaring that the 2013 National Examinations for Uganda Certificate of Education candidates would be conducted on the day on which Idd Adhua fell, were inconsequential given that those examinations were not conducted on that day as alleged by the petitioners. In counsel's view, the petitioner's prayers with respect to the acts of the 2nd respondent in that regard are redundant. Thus counsel did not address the Court on why the 2nd respondent could not be added as a party to the Petition. Counsel for the Petitioners, too, never addressed the Court on that point in the written submissions filed for the petitioners.

Being a point of law, however, I have considered the relevant legislation in order to arrive at an appropriate decision on the point. The 1st respondent, the Uganda National Examinations Board (UNEB) was set up by Parliament when it enacted the Uganda National Examinations Board Act, Cap. 137. By **Section 4 (1) (a)** of that Act, and relevant to this Petition, UNEB is given the mandate to conduct primary, secondary, technical and such other examinations within Uganda as it may consider desirable in the public

interest. **Section 12 (3)** of the **UNEB Act** provides that the Secretary to the Board shall be its Chief Executive. Therefore, the Secretary is responsible for the day to day running of UNEB, including, the doing of such things as deciding on which days examinations will be conducted and preparing the relevant timetables. Furthermore, UNEB has legal personality, and legal action may be instituted against it. **Section 2 (2)** of the **UNEB Act** provides as follows:

> **"The board shall be a body corporate with perpetual succession and a common seal, and may sue or be sued in its corporate name, and may purchase, hold, manage and dispose of any property, and enter into such contracts or other transactions, as may be necessary or expedient for the discharge of its functions under this Act."**

In view of the above provision, it is my opinion, that since UNEB was acting in discharge of its functions under the law when, in 2013, it allegedly scheduled examinations in certain subjects for Uganda Certificate of Education candidates on Idd Adhua day, as it had legal capacity to sue and be sued, it was enough to sue UNEB in this Petition. Any remedies the petitioners would be entitled to would be implemented by UNEB.

I further note that the UNEB Act insulates employees or officers of UNEB from civil liability for acts done in their official capacity. **Section 13 (2) of the UNEB Act** provides as follows:

> **"No matter or thing done by an officer or employee of the board shall, if it is done bona fide for the purposes of executing any provision of this Act, subject the officer, employee or any other person acting under his or her direction to any civil liability."**

In view of the above analysis, I hold that the 2nd respondent, was wrongly added to the Petition for acts allegedly done in his capacity as Chairman of UNEB at the material time. The 2nd respondent is hereby struck off the Petition.

Is the Petition frivolous, vexatious, misconceived, speculative and hypothetical?

Counsel for the respondents further submitted that the Petition is frivolous, vexatious, misconceived, speculative and hypothetical. In resolving this point

of law, I note that **Article 137 of the 1995 Constitution** establishes the Constitutional Court, and so far as is relevant to constitutional petitions, provides as follows:

> **"137. Questions as to the interpretation of the Constitution.**
>
> **(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**
>
> **(2) When sitting as a constitutional court, the Court of Appeal shall consist of a bench of five members of that court.**
>
> **(3) A person who alleges that—**
>
> **(a) ...**
>
> **(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**
>
> **(4) Where upon determination of the petition under clause (3) of this article the constitutional court considers that there is need for redress in addition to the declaration sought, the constitutional court may—**
>
> **(a) grant an order of redress; or**
>
> **(b) refer the matter to the High Court to investigate and determine the appropriate redress.**
>
> **(5) ...**
>
> **(6) ...**
>
> **(7) ..."**

In view of the above Article, it becomes clear that before delving into the merits of any Petition, this Court must first be satisfied that two things exist: 1) its jurisdiction to hear the Petition; and 2) the Petition disclosing a cause of action. With regards to the existence of a cause of action, **Wambuzi C.J** making reference to **Mulla on the Code of Civil Procedure, Volume 1, 14th Edition at page 206** stated as follows in **Attorney General vs. Tinyefuza, Constitutional Appeal No. 1 of 1997:**

> **"A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken**

with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue."

In Constitutional Petitions, the bundle of facts must be related to interpretation of the Constitution, and must concern an act and/or omission of the respondent. According to the Black's law dictionary 8th Edition an act means "something done or performed". Thus an "act" on which a petition may be founded does not extend to hypothetical or speculative acts, that have not occurred. Those would be unripe for the Court's determination. I note that at common law, it was a tradition for Courts to decline to entertain what they deemed to be hypothetical questions. The Courts justified this practice because they considered that the Courts had finite resources which would best be employed in handling real controversies; as well as the fact that decisions not based on real facts would be have no binding effect and would constitute merely advisory opinions. In **R vs. Secretary of State Home Department ex parte Wynne [1993] 1 ALLER 574, Lord Goff** stated:

"It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter dicta, expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future."

Discussing this common law practice, Sir John Halls, one-time Judge of the English High Court, Queen's Bench Division stated as follows in an extra-judicial Article in the **Modern Law Review Limited 1994 (MLR 57:2 March) at page 213 titled "Judicial Remedies and the Constitution:**

"There has been a strong tradition in the law that the courts will only decide questions on which a live dispute turns; they will not entertain issues which they perceive as merely hypothetical or academic."

Sir John Halls further stated as follows at page 214:

"We should understand an academic question to be one which does not need to be answered for any visible practical purpose at all...A hypothetical question is quite different: it is a question which may need to be answered for real practical purposes; it connotes only a situation

in which the events have not yet happened which will clothe the answer to the question with immediate practical effects."

In **Attorney General vs. Tinyefuza (supra),** Kanyeihamba, JSC stated that:

> **"...a Court must avoid premature adjudication and entanglement in abstract or speculative disagreements between potential litigants. In gauging the fitness of the case for judicial resolution, a Court should not get involved in uncertain or contingent future which may or may never occur at all."**

The High Court of Australia has also adopted a practice of declining to grant declaratory relief founded on hypothetical or speculative questions. In **CGU Insurance vs. Blakeley [2016] HCA 2**, the Court stated:

> **"Relief will not be granted if the question is "purely hypothetical" in the sense that it is "claimed in relation to circumstances that [have] not occurred and might never happen."**

In the United States, its Supreme Court has established a doctrine of ripeness, where matters founded on an act that has not happened at the time of adjudication will as a general rule not be entertained. In the **Texas vs. United States 523 US 296 (per Justice Scalia)** it was stated:

> **"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."**

I note that a claim will be found to be speculative if it rests on events that have not happened and may never happen; or in the terms of the **Texas vs. USA case (supra),** if the claim is such that it is unripe for judicial determination because it rests upon contingent future events that may not occur as anticipated or indeed at all.

In the present case, counsel for the respondents contends that the petition rests on allegations concerning acts that did not occur in 2013 and may never occur again. Counsel for the respondents submitted that the petitioners have not demonstrated that there were examinations conducted on 15th October, 2013 which coincided with Idd Adhua day in that year. I note that while it is true that the respondents did not organize examinations in 2013, the

petitioners' allegations are concerned not only with the events of 2013 but also those from earlier years in which the 1st respondent organized for examinations to be written on days which coincided with the relevant Muslim religious holidays.

At paragraph 8 of the Petition, the petitioners allege that in 2003, 2004, 2005, 2006 and 2012, the respondents conducted examinations on days which coincided with the Idd-el Fitr or the Idd Adhua Muslim religious holidays. The case for the petitioners, as I understand it, is that the practice of the respondents, when organizing examination time tables, is that examinations can be conducted on the relevant Muslim religious holidays. The said practice has never been abandoned by the 1st respondent and continues to this day. At the hearing of the Petition, this Court did not receive any evidence as to whether the 1st respondent has in the years since 2013 conducted examinations on the relevant Muslim religious holidays. However, that notwithstanding, in my view, the fact that no formal renunciation has been made by the 1st respondent of its practice of conducting examinations on the relevant Muslim religious holidays means that its act of implementing such practices, as was done in the years highlighted by the petitioners and which may continue in future, amounts to an "act" in the terms of Article 137 (b) of the 1995 Constitution. The impugned acts are not speculative or moot and presents a real controversy ripe for this Court's determination. Accordingly, I would hold that contained in the Petition are allegations of acts of the 1st respondent stated to be inconsistent with certain provisions of the 1995 Constitution. The said allegations raise questions for constitutional interpretation and therefore this Court has jurisdiction to entertain the Petition. I would overrule the objection raised by the respondents on this point.

The merits of the Petition

In my view, besides the remedies which this Court may grant, underlying the present petition is one major question for constitutional interpretation, namely: whether the 1st respondent's practice of conducting examinations on the relevant Muslim religious holidays infringes the rights of Muslim students to freedom of religion and/or their equality rights. The Petition

alleges that the practice which permits the 1st respondent to organize examinations to be written on the relevant Muslim religious holidays infringes the petitioners' right to practice their religion and manifest such practice guaranteed under Article 29 (1) (c) of the 1995 Constitution. The provision is reproduced below:

> **"29. Protection of freedom of conscience, expression, movement, religion, assembly and association.**
>
> **(1) Every person shall have the right to—**
>
> **(a) ...**
>
> **(b) ...**
>
> **(c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;**
>
> **(d) ...**
>
> **(e) ...**

The right to freedom of religion is rooted in UN international law. The Universal Declaration of Human Rights provides in Article 18 that:

> **"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."**

The International Covenant on Civil and Political Rights, a UN treaty, which has been ratified by Uganda also contains a similar provision on the right to freedom of religion. Article 18(1) of the ICCPR provides as follows:

> **"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."**

The provisions of the UDHR and the ICCPR inspired the framers of Article 29 (1) (b) and (c) of the Uganda Constitution. I also observe that regional

instruments such as the European Convention on Human rights and the African Human rights treaty all contain provisions on the right to freedom of religion. Thus, in this judgment, and generally for the explication of the extent of the right to freedom of religion, it is necessary to refer to publications relating to the above instruments or cases decided thereunder. The UN Human Rights Committee has in it interpretation of Article 18 of the ICCPR stated that the right to freedom of religion includes the right to manifest one's religion; and that this encompasses a broad range of acts which include, among others, the observance of religious holidays and days of rest. Thus, it must be stated that where a religion sets aside holidays, it is an integral part of the freedom to practice that religion that its adherents are allowed to partake in the holidays and the rituals that are carried out on those days.

In his affidavit, the 2nd petitioner gives evidence as to the significance of the relevant Muslim religious holidays. At paragraph 3 of the affidavit, he states that Idd Adhua is regarded as a sacred day for all that profess the Muslim faith and is celebrated in honour of Prophet Ibrahim for his willingness to sacrifice his son Ismail and the son's acceptance to be sacrificed as an act of submission to Allah's command to do so. At paragraph 4 of his affidavit, the 2nd petitioner states that Idd El Fitr is a Muslim religious holiday which is celebrated to mark the end of the Muslim fasting period of Ramadhan. According to the 2nd petitioner, this holiday is significant because it "shows other well off Muslims the life and hunger the poor and disadvantaged ones endure throughout the year." Attached to the affidavit of the 2nd petitioner is a Newspaper article containing the comments of a leader in the Muslim community who expressed the view that conducting examinations on the relevant Muslim religious holidays showed the 1st respondent's insensitivity as it was indifferent towards the Muslim students who would miss out on celebrating with the rest of the Muslim community, as required by the Muslim religion.

Having considered the allegations and evidence adduced by the petitioners, I would find that in organizing examinations to be conducted on the relevant Muslim religious holidays of Idd Adhua and Idd el Fitr, the 1st respondent

infringed upon the religious freedom rights of Muslims to manifest their religion through observance of those religious holidays. This is because the Muslims consider their religious holidays to be sacred days on which they are supposed to partake only in faith related activities.

I note, however, that the right to freedom of religion is not absolute. Thus it is necessary to determine whether the interference with the petitioners' rights by the 1st respondent, as found above is permissible under Article 43 of the 1995 Constitution. Article 43 of the 1995 Constitution provides as follows:

> **"43. General limitation on fundamental and other human rights and freedoms**
>
> **1. In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.**
>
> **2. Public interest under this article shall not permit**
>
> **a. political persecution;**
>
> **b. detention without trial;**
>
> **c. any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."**

The import of Article 43 has been considered by the Supreme Court in the decision of **Charles Onyango Obbo and Another vs. Attorney General, Supreme Court Constitutional Appeal No. 2 of 2002**. In that case Mulenga, JSC held that Article 43 places prohibitions on the enjoyment of rights prescribed under the 1995 Constitution if such enjoyment prejudices rights of others or the public interest. His Lordship further observed that:

> **"This [Article 43] translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a) where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where**

such exercise "prejudices" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society."

In the present case, it was not suggested by the respondents that interference with the petitioners' religious freedom rights was done to protect the rights of other students who did not belong to the Muslim denomination. Such a suggestion could not reasonably be made because of the importance of the right to freedom of religion itself and its role in promoting the respect for plurality and diversity in society. As was stated by the European Court of Human Rights in the case of **Francesco Sessa vs. Italy, Application No. 28790/08**, the right to freedom of religion is one of the most vital elements which go to make up the identity of believers and their conception of life; as well as a precious asset for atheists, agnostics, sceptics and the unconcerned. Respect for freedom of religion is also a marker of a free society. The significance of the right to freedom of religion was also emphasized by the Canada Supreme Court in its decision in the case of **R vs. Big M Drug Mart Ltd [1985] 1 R.C.S 295**, where it was observed that:

> **"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person."**

Speaking on the importance of freedom of religion, the Court further stated as follows:

> **"The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that."**

The Court then added as follows:

> **"Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."**

I have further considered the case law of the European Court of Human Rights. In the **Sessa vs. Italy case (supra)**, in their dissent (but not on this point), the minority held that in cases where the Court has to determine whether or not an infringement on the right of freedom of religion was justified, it will consider whether the infringement represents the least intrusive means of interfering with the right, possible. The least intrusive

measures are those which encourage the reasonable accommodation of those whose rights have to be interfered with. The minority stated that:

> **"...seeking a reasonable accommodation of the situation in issue may, in some circumstances, constitute a less restrictive means of achieving the aim pursued."**

In the present case, the petitioners are asking this Court to make a declaration to promote the rights of Muslims not to be coerced into or constrained to write examinations on the relevant Muslim religious holidays. The respondents' case as set out at paragraph 5 (v) of their Answer is that "in drawing timetables for National Examinations, they do not consider any religious preferences but simply do so in exercise of their mandate under the law." In view of the **R vs. Big M Drug Mart Ltd case** and the **Sessa vs Italy cases (supra)**, I form the considered opinion that promotion of the right to freedom of religion requires that public entities such as the 1st respondent, reasonably accommodate religious freedom rights, in this case the rights of students of the Muslim denomination to manifest their practice of religion through observance of the relevant Muslim religious holidays. This reasonable accommodation requires that the 1st respondent refrains from organizing examinations to be carried out on the relevant Muslim religious holidays.

Where the date of any particular relevant Muslim religious holiday cannot be determined in advance, and it later turns out that examinations are scheduled to fall on that date, the 1st respondent should make sure to reschedule the examinations and postpone the same to a later date. In the year 2013, the 1st respondent in fact amended the examination timetable and postponed examinations that had been scheduled to be conducted on a relevant Muslim religious holiday to a later date. This strengthens my conviction that reasonable accommodation of the rights of Muslim students can be achieved through postponement as has been stated in this judgment.

I would therefore declare that the practice of the 1st respondent in organizing for examinations for students under its mandate, to be written on days coinciding with any of the relevant Muslim religious holidays is inconsistent with and in contravention of the right to freedom of religion of Muslim

students, in particular the right to manifest their practice of religion through observance of the relevant Muslim religious holidays as guaranteed under the 1995 Constitution. I must also state that the impugned practice cannot constitute a derogation permissible under Article 43 of the 1995 Constitution.

The other point advanced by the petitioners is that the practice of conducting examinations on the relevant Muslim religious holidays infringes on the equality rights of citizens of the Muslim denomination. This, the petitioners assert, is because while Muslim students can be constrained into taking examinations on those religious holidays, students of the Christian or other religions could never be subjected to the same treatment. Counsel for the petitioners submitted that students of other religious denominations, especially the majority Christian students, could never be coerced into sitting their examinations on their religious holidays. The 1st respondent's case is that in drawing timetables for National examinations, they do not consider any religious preferences but simply do so in exercise of their mandate under the law. If the 1st respondent's case were to be believed, it would imply that the 1st respondent may organize examinations on Christian religious holidays too.

I observe that the petitioners did not adduce evidence to bring to this Court's attention an incident when an examination which had been scheduled by the 1st respondent on a Christian religious holiday was postponed on the account that it was such a holiday. Therefore, the petitioners' assertions and submissions on this point are matters of conjecture. Accordingly, for lack of evidence, I would refrain from finding in this case that in organizing for examinations to be conducted on a Muslim religious holiday, the 1st respondent was motivated by a desire to treat Muslims as inferior to Christians.

The other point which was taken by the petitioners is that in organizing for examinations to be conducted on the relevant Muslim religious holidays, and the Government's non-interference with such practice of the 1st respondent, the Government is deemed to have adopted a State religion contrary to **Article 7** of the **1995 Constitution** which provides that Uganda shall not adopt a State religion. In my view, Government may only be deemed to have

adopted a State religion if it makes a formal declaration that it has done so. To the best of this Court's knowledge, this has never been done. The fact that the 1st respondent has impinged on the rights of students of the Muslim religious denomination cannot reasonably be understood as implying that the Government has adopted a State religion, it means only that the 1st respondent has infringed upon Muslim students' rights of religious freedom, as found earlier in this judgment. Therefore, the point on adoption of State religion taken by the petitioners is misconceived.

Having found in this Judgment that the religious freedom rights of Muslim students were infringed upon by acts of the 1st respondent, I have to determine the remedies available in the circumstances. A summary of the declarations made will be made later. I note, however, that the petitioners claim that they are entitled to general and exemplary damages owing to the infringement of their Constitutional rights. No evidence was however adduced by the petitioners as justifying an award of damages in the present case.

I further note that the present Petition is said to have been brought in the public interest. According to the **Black's Law Dictionary, 8th Edition,** public interest is defined as follows:

> **"public interest. 1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation."**

The description of public interest as something in which the public as a whole has an interest is adopted for purposes of the present case. Therefore, a public interest matter, like the present Petition, is one in which the entire public has an interest. It may be said that the adjudication of the present matter affects the entire public, and this comes with a recognition that other Muslims students suffered inconvenience, too. In my view, the petitioners may only be awarded damages, if they can demonstrate that they suffered unique inconvenience over and above other students of the Muslim denomination whose rights, too, were infringed upon. Upon consideration of the evidence adduced for the petitioners, I am not satisfied that the petitioners suffered any unique inconvenience, and therefore, this being a

public interest matter, I would exercise my discretion in favour of not awarding damages to the petitioners.

As to costs, I would grant the costs of the petition to the petitioners. In conclusion, I would allow this Petition, and make the following declarations and orders:

a) I would make a declaration that the practice of the 1st respondent in organizing for examinations for students under its mandate, to be written on any day coinciding with any of the relevant Muslim religious holiday, to wit Idd Adhua and Idd el-Fitr, is inconsistent with and in contravention of the right to freedom of religion of Muslim students, in particular the right to manifest their practice of religion through observance of those religious holidays as guaranteed under the 1995 Constitution.

b) I would issue a permanent injunction to order the 1st respondent to refrain from conducting examinations on any day coinciding with any of the relevant Muslim religious holiday, to wit Idd Adhua or Idd el-Fitr. However, if in its schedules made before ascertaining the exact date of any the relevant Muslim religious holiday, the 1st respondent inadvertently arranges for examinations to be written on any of the relevant Muslim religious holiday, the examination so arranged shall be postponed to a later date.

c) The petitioners shall be paid the costs of the petition.

I would so order.

Dated at Kampala this ....11th.... day of.....May.....2021.

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Elizabeth Musoke

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 0058 OF 2013

1. KAKAIRE SADIKI

2. SULEIMAN ISOTAH MAGUMBA::::::::::::::::::::::::::::::PETITIONERS

VERSUS

1. UGANDA NATIONAL EXAMINATIONS BOARD (UNEB)

2. FAGIL MANDY::RESPONDENTS

CORAM: HON. MR. JUSTICE FREDRICK EGONDA NTENDE, JCC
HON. LADY JUSTICE ELIZABETH MUSOKE, JCC
HON. MR. JUSTICE CHEBORION BARISHAKI, JCC
HON. MR. JUSTICE MUZAMIRU KIBEEDI, JCC
HON. LADY JUSTICE IRENE MULYAGONJA, JCC

JUDGMENT OF CHEBORION BARISHAKI, JCC

I have had the benefit of reading in draft the judgment prepared by my learned sister Musoke, JCC in this matter. I agree that this Petition should be allowed for the reasons that she has given; with the declarations and orders she has made.

Dated at Kampala this .....11th..... day of.....May.....2021.

.....

Cheborion Barishaki

Justice of the Constitutional Court

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

[*Coram: Egonda-Ntende, Elizabeth Musoke, Cheborion Barishaki, Muzamiru M. Kibeedi, & Irene Mulyagonja, JJA/JJCC*]

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JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JCC

I have had the advantage of reading in draft the Judgment prepared by Hon. Lady Justice Elizabeth Musoke, JCC. I concur with her reasoning and findings.

The action of the 1st respondent in organizing and conducting national examinations on the days of Idd Adhua and Idd El-Fitr is an infringement of the constitutionally guaranteed religious freedom of Muslim students, which includes their right to observe and perform their religious rituals exclusively reserved for the Idd Adhua and Idd El-Fitr days.

Needless to add, Idd el Fitr day and Idd Adhua day (aka "Idd -ul-Zuho" day) have already been declared by Section 2 of the Public Holidays Act, Cap. 255 to be kept and observed as public holidays throughout Uganda. As such, the 1st respondent has no lawful justification whatsoever for not honoring the two important days on the Muslim Calendar. As a government agency, the 1st respondent is expected to consult with the stakeholders, especially the Muslim Community leadership, in order to take into account the said days when drawing its Examinations Timetable.

I also agree with the Orders proposed by Hon. Lady Justice Elizabeth Musoke, JCC.

Dated at Kampala this 11th day of May 2021

Muzamiru Mutangula Kibeedi

JUSTICE OF THE CONSTITUTIONAL COURT

THE REPUBLIC OF UGANDA

IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA

Coram: Egonda-Ntende, Musoke, Barishaki, Mutangula-Kibeedi & Mulyagonja, JJCC

CONSTITUTIONAL PETITION NO. 0058 OF 2013

1. **KAKAIRE SADIKI**
2. **SULEIMAN ISOTAH MAGUMBA::::::::::::::::::::::PETITIONERS**

VERSUS

1. **UGANDA NATIONAL EXAMINATIONS BOARD**
2. **FAGIL MANDY ::RESPONDENTS**

JUDGMENT OF IRENE MULYAGONJA, JCC

I have had the benefit of reading in draft the judgment of my sister, Justice Elizabeth Musoke, JA/JCC.

I agree that this petition should succeed for the reasons that she has given with the orders that she has proposed.

11-5-2024

Irene Mulyagonja

JUSTICE OF THE CONSTITUTIONAL COURT