

# **THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CONSTITUTIONAL PETITION NO. 25 OF 2012**

**1. HASSAN LWABAYI MUDIBA**

**2. UGANDA LOCAL GOVERNMENT**

**WORKERS UNION ::::::::::::::::::::::::::::::::::: PETITIONERS**

**VERSUS**

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

**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA/ JCC**

**HON. JUSTICE HELLEN OBURA, JA/JCC**

**HON. MR. JUSTICE STEPHEN MUSOTA, JA/JCC**

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

**HON. MR. JUSTICE REMMY KASULE, AG. JA/JCC**

**JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA/ JCC**

I have had the benefit of reading in draft the judgment of my brother Justice Remmy Kasule, Ag. JA. He has already set out the background to this petition, the issues and declarations sought by the petitioners. I will not reproduce the same here.

The issues raised for determination are three, namely:-

1. Whether the constitutional petition raises issues for constitutional interpretation.
2. Whether the decision of Government to pay differently employees employed in Government, statutory corporation and local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution.
3. Whether the Government refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40(2) (b) and 41 of the Constitution.

10 I respectfully do not agree that this constitutional petition raises issues for constitutional interpretation. I agree with the judgment of my brother Madrama JA/JCC.

The 1<sup>st</sup> issue is premised on the provisions of Article 137 of the Constitution.

15 Article 137 provides that:

*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.*

20 *(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) an Act of Parliament or any other law or anything in or done under the authority of any law; or*

*(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.*

5      *(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*

10      *(b) refer the matter to the High Court to investigate and determine the appropriate redress.*

*(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than a field court martial, the court—*

15      *(a) may, if it is of the opinion that the question involves a substantial question of law; and*

*(b) shall, if any party to the proceedings requests it to do so, refer the question to the constitutional court for decision in accordance with clause (1) of this article.*

20      Although the word interpretation is not defined, Article 137 (3) gives a clear indication of what the word means. It states;

*(3) A person who alleges that—*

*(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or*

*(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.*

In the instant petition, the petitioners allege that the fact that the main stream public servants employed by the Uganda Government doing the same work including those in Local Governments earn different salaries lower than those who are employed in State Statutory bodies and corporations, yet all their salaries are drawn from the consolidated fund appropriated by parliament, is unconstitutional and contravenes Article 20(2), 21(1) and 40(2) (b) of the Constitution.

The petitioners also allege that the government of Uganda refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40 (2) (b) and 41 of the Constitution. Further, that the government of Uganda action of purporting to change the terms of employment of its employees without appropriate consultation with the labor unions is inconsistent and contravenes Article 40(2) (b) of the Constitution.

As rightly pointed out by my brother Justice Madrama, JA/JCC, the question in issue 1 of the petition does not precisely reflect the controversy that this court is called upon to resolve, which is whether the Constitutional Court has the jurisdiction to handle the issues

raised in the petition. In determining whether the constitutional court has jurisdiction, it is imperative for this court to analyze whether the issues raised in the petition disclose any question or questions as to interpretation of the Constitution. In doing this, the controversy should not be focused on Article 137(1) of the Constitution which is only an Article concerned with the jurisdiction of the Constitutional Court.

Whereas Article 137(1) confers the jurisdiction on the Constitutional Court, Article 137(3) of the Constitution sets out the elements of a cause of action. For a petition to disclose a cause of action, it must show that the Constitutional Court has jurisdiction in the matter in terms of Article 137(1) and also, that the petition itself discloses a cause of action in terms of Article 137 (3) of the Constitution. The criteria set out in the above Articles must be fulfilled in order to confer exclusive jurisdiction on the Constitutional Court to determine any questions as to the interpretation of the Constitution. Article 137(3) of the Constitution requires averment of the inconsistency of the act or omission or law with a provision of the Constitution.

Clearly, paragraph (a) of Article 137(3) of the Constitution deals with a challenge to an Act of parliament or any other law or anything in or done under the authority of any law. Paragraph (b) deals with any act or omission by any person or authority which is alleged to be inconsistent with or in contravention of a provision of the Constitution. See **Ismail Serugo Vs KCC and Attorney S.C**

**Constitutional Appeal No. 2 of 1998; Hon. Sekikubo Theodore and 10 others Vs NRM Constitutional Petition No. 09 of 2019.**

What the above law and case authorities envisage is that there is a dispute or controversy as to interpretation of the Constitution. Where  
5 there is no dispute as to the meaning of statutory words used in the Constitution itself, then there is no question or controversy as to interpretation of the Constitution. This means that the matter would call for enforcement only and the High Court has jurisdiction to interpret the Constitution to ascertain the meaning of statutory  
10 words and enforce them. As rightly pointed out by my learned brother Justice Madrama, JA/JCC, and I agree, the Constitutional Court is a special Court with exclusive jurisdiction to determine any controversy as to the interpretation of the Constitution. The controversy or question for interpretation must be stated and  
15 evidence attached by affidavit. It is not enough to allege that there is an act or omission of any person or authority that contravenes or is inconsistent with a provision of the Constitution.

In the instant petition, the petitioner alleges that there is an act or omission by an authority, which is inconsistent with or in  
20 contravention of the provision of the Constitution.

However, the petition does not disclose whether there is any dispute or controversy as to interpretation of the Constitution in terms of Article 137(1) of the Constitution. I agree with my brother Justice Madrama, JA/JCC that the jurisdiction to determine this petition has

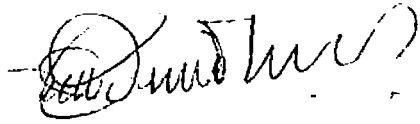
not been satisfied. On that account, the petition lacks merit and ought to be struck out on that basis.

**Issue 2** revolves around enforcement of Human rights. This can be done under Article 52 through the Human Rights Commission. The  
5 allegations against government about salary structures and inequality should be a concern of the Human Rights Commission. Alternatively, an action can be filed for enforcement of fundamental or other rights guaranteed by the Constitution under Article 50 before a court of competent jurisdiction.

10 **Issue 3** is on access to information under Article 41 of the Constitution. There is no evidence that the petitioner tried to get the information under Section 31(b) of the Access to Information Act which is the relevant law. There is also no indication that any steps were taken to obtain the required information. This grievance  
15 therefore falls under the ambit of enforcement of Access to information Act. In this case, no issue falls in the category of a matter requiring interpretation of the Constitution. The petition alleging infringement of Article 41 is incompetent.

It is my considered view that the petition lacks merit and ought to be  
20 dismissed with each party bearing its own costs.

Dated this 14<sup>th</sup> day of Feb 2021



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5 **Stephen Musota**

**JUSTICE OF APPEAL/Constitutional Court**



**1. HASSAN LWABAYI MUDIBA**  
**2. UGANDA LOCAL GOVERNMENT WORKERS UNION :::PETITIONERS**

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

**CORAM: HON. MR. JUSTICE KENNETH KAKURU, JA.**

**HON. LADY JUSTICE HELLEN OBURA, JA**

**HON. MR JUSTICE STEPHEN MUSOTA, JA.**

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

**HON. MR JUSTICE REMMY KASULE, Ag. JA.**

**JUDGMENT OF MR. JUSTICE REMMY KASULE, AG JA**

This petition is brought under Article 137 (3) (b) of the Constitution and the Constitutional Court (Petitions and References) Rules 2005 seeking for declarations as that: -

- a) The Government policy or action whereby persons doing equal work in its various departments and statutory corporations are not remunerated in the same way is inconsistent with and contravenes Articles 20(2), 21(1) and 40(2)(b) of the Constitution.

- b) The Government refusal to provide information for effective bargaining is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution.
- c) The Government action of purporting to change terms of employment of its employees without appropriate consultation with the labour union is inconsistent and contravenes Article 40(2) (b) of the Constitution.

The facts giving rise to the petition are: -

- a) That main stream public servants including those in Local Government earn different salaries than those who are employed in statutory bodies and corporations.
- b) That the salaries of mainstream public servants are drawn from the Consolidated Fund and the salaries for employees in statutory corporations are drawn from money appropriated by Parliament.
- c) That in many instances, the employees in mainstream public service and employees in statutory bodies and corporations do equal work.

The petition is supported by an affidavit sworn by Hassan Lwabayi Mudiba, dated 4<sup>th</sup> June 2012. The respondent filed a reply to the petition, which is supported by an affidavit sworn by Peruth Nshemereirwe, a State Attorney, dated 9<sup>th</sup> July 2012.

### **Representation**

At the hearing of the petition, the petitioners were represented by learned counsel Joseph Luswata, while learned State Attorney Maureen Ijang was for the respondent.

### **Agreed issues.**

1. Whether the constitutional petition raises issues for constitutional interpretation.
2. Whether the decision of Government to pay differently employees employed in Government, statutory corporation and local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution.
3. Whether the Government refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40(2) (b) and 41 of the Constitution.

### **Submissions for the petitioners.**

On the first issue, whether the constitutional petition raises issues for constitutional interpretation, Counsel for the petitioners submitted that the petition raised issues for constitutional interpretation and referred court to the case of **Satya v Attorney General; Court of Appeal Constitution Petition No.36 of 2012**, where it was held that; ***“to move this Court under Article 137, the petitioner must allege that the matters put before the Constitutional Court require interpretation of the Constitution and must specify the articles of the Constitution violated or threatened to be violated. In the process, the Court may grant the redress as may be appropriate. Once those requirements are satisfied, the court has jurisdiction to entertain the matter presented before it by the petitioner, irrespective of***

***whether or not he or she may eventually succeed at the conclusion of the court's consideration of the petition".***

Counsel contended that in the instant petition, the act of the Government of Uganda remunerating employees of Government, statutory corporation and local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution. Further, that the refusal by the Government of Uganda to provide information for effective bargaining is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution. Therefore the said acts violate the provisions of the Constitution thus justifying the Constitutional interpretation by the Constitutional Court.

On the second issue, whether the decision of the Government of Uganda to pay differently employees employed in Government, Statutory Corporation and Local Governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution, Petitioners' Counsel submitted that such paying differently was inconsistent with Article 21 of the Constitution of Uganda. The Article is to the effect that all persons are equal before and under the law in all spheres of political, economic, social, cultural life and in every other respect and shall enjoy equal protection of the law. Learned Counsel further contended that Article 40(1)(b) obliges the Government of Uganda to enact laws that ensure equal payment for equal work without discrimination but this was not the case as demonstrated by the evidence of different people doing the same work being paid differently.

On the third issue as to whether the Uganda Government's refusal to provide information for effective bargaining, is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution, learned Counsel contended that under Article 40(2) (b) of the Constitution, every worker has a right to collective bargaining and representation through his or her union and hence the need to have information relating to the conditional grants and other related matters by the Uganda Government. Therefore the withholding of such information by the Uganda Government upon lawful request by any citizen employee amounted to violation of Article 40(2)(b) of the Constitution.

Learned Counsel for the petitioners thus prayed this Court to grant the prayers stated in the petition and also award costs to the petitioners.

#### **Submissions for the respondent.**

On the first issue, learned Counsel for the respondent submitted that the petition raised no issues for constitutional interpretation and as such it ought to be struck out. Counsel referred this Court to the case of **Attorney General Vs Major General Tinyefunza, Constitutional Appeal No.1 of 1997**; where Justice Kanyeihamba JSC held that;

*".....there is a big difference between applying and enforcing the provision of the constitution and interpreting it. Whereas any court of law and tribunal with competent jurisdiction may be moved by litigants in ordinary suits, applications or motions to hear laws, under Article 137 only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the constitution with a right of appeal to this court as the*

*Appellate Court of last resort*” as the basis of his submission on the first issue.

On the second issue, Counsel for the respondent contended that the guiding principles in determining public officers’ salaries must conform with Article 21(2) of the Constitution. The considerations when determining the public officers’ salaries must be competence and requisite qualifications as well as experience, equitable treatment and pay not influenced by gender, sex, tribe, race, creed, religion, economic standing or personal circumstances of officers.

Learned Counsel also reasoned that the salary payable to the public officer is contractual to the extent that the terms of service, including the salary, is set out by the employer for a specific job description and prospective employee, who duly accepts the terms as set out in the appointment letter and the contract between them is legally binding. Counsel further maintained that the Constitution and the law governing Government institutions and statutory bodies provides for their autonomy or semi autonomy and mandate to independently determine their remuneration in compliance with **Article 163** of Constitution that require such bodies not to be under the direction or control of any person or authority.

On the third issue as to whether the Uganda Government’s refusal to provide information for effective bargaining is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution, learned respondent’s Counsel contended that this was not an issue of constitutional interpretation but for enforcement of a right. The

enforcement procedure of such a right is provided for under **Section 16(3) (c)** of the **Access to Information Act, 2005** that provides that; a person may lodge an internal appeal or an application with the court as the case may be against the refusal of the request to access the requested for information. The competent Court for such an application is the Magistrate's Court with a right of appeal to the High Court pursuant to **Sections 37 and 38** of the **Access to Information Act, 2005**.

Learned Counsel for the respondent prayed that this honourable court finds that the petitioners are not entitled to any declarations sought and as such the petition has to be dismissed with costs.

## **Decision**

### **Issue One**

The first issue is whether the petition raises any questions for constitutional interpretation under Article 137 of the Constitution.

Article 137 provides that;

(1) **Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**

(2) ...

(3) **A person who alleges that-**

**(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**

**(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**

**(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).....”**

It is now a well settled position of the law that not every violation of a right provided for in the Constitution requires constitutional interpretation. For a petitioner to move this Court under Article 137, such a petitioner must allege that the matters put before the Constitutional Court require interpretation of the Constitution and must specify the articles of the Constitution violated or threatened to be violated. In the process of carrying out the interpretation of the Constitution, the court may, grant redress as may be appropriate; once those requirements are satisfied. The Constitutional Court has



jurisdiction to entertain the matter presented before it by such a petitioner, irrespective of whether or not he/she eventually succeeds at the conclusion of the Court's consideration of the Petition.

In **Phillip Karugaba vs. the Attorney General; Court of Appeal Constitutional Petition No. 11 of 2002**, this court held, inter alia:, -

*"...It is necessary to internalize the jurisdiction of this court under Article 137 of the Constitution in order to decide whether Rule 15 is unconstitutional as alleged".*

And in **Satya Peter Chapa Vs. The Attorney General; Court of Appeal Constitutional Petition No. 0036 of 2012**, this Court re-affirmed its own earlier decision in **Joyce Nakachwa Vs. The Attorney General and Two Others; Court of Appeal Constitutional Petition No. 2 of 2001** as to its jurisdiction under Article 137 to interpret the Constitution by stating that;

*"First we deal with the issue of jurisdiction. This Court has recently pronounced itself on this matter in the case of Alenyo Vs. The Attorney General and 2 others (supra) in which we followed the Supreme Court decisions in Serugo (supra) (Ismael Serugo vs Kampala City Council Constitutional Appeal No. 2 of 1998) and David Tinyefuza (supra) (A.G VS David Tinyefuza; Constitutional Appeal No. 1 of 1998). Which stated: -*

*"Article 137 (1) provides: Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.*

*The Constitution does not define the word “interpretation” However, Article 137 (3) gives a clear indication of what the word means. It states:*

*137. Questions as to the interpretation of the Constitution.*

*(3) A person who alleges that: -*

*(a) an Act of Parliament or any other law or anything in or done under the authority of any law, or*

*(b) any Act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.*

*We hold the view that the allegations made to the Constitutional Court, if they are in conformity with article 137(3), give rise to the interpretation of the Constitution and the Court has the jurisdiction to entertain them.*

*In the instant petition, the petitioner alleges that the Law Council is guilty of commissions and omissions, which are inconsistent with or in contravention of the Constitution. He has petitioned this court for a declaration to that effect. In our judgment these are the type of actions envisaged by Article 137 (3) (b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his right guaranteed by specified provisions of the Constitution and this*

*court should so declare. In order to do that the Court must determine meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of the exercise by the court is an interpretation of the Constitution. It is not an enforcement of rights and freedoms. The Court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is not relevant to the issue of jurisdiction. It is what the court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either, that there is a remedy available to the petition somewhere else. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by Article 137'.*

In the instant petition, the petitioners allege that the fact that the main stream of public servants employed by the Uganda Government doing the same work including those in Local governments earn different salaries lower than those who are employed in State statutory bodies and Corporations, yet all their salaries are drawn from the Consolidated Fund appropriated by Parliament, is unconstitutional and they pray this court to grant the following declarations: -

- a) The Uganda Government policy or action whereby persons doing equal work in its various Government departments and those

employed in state statutory bodies and/or corporations are not remunerated in the same way is inconsistent with and contravenes Articles 20(2), 21(1) and 40(2)(b) of the Constitution.

- b) The Uganda Government refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40(2) (b) and 41 of the Constitution.
- c) The Uganda Government action of purporting to change terms of employment of its employees without appropriate consultation with the labour unions is inconsistent and contravenes Article 40(2) (b) of the Constitution.

In light of the position of the law as i have set it out herein above and the matters raised by the petitioners in the petition, I conclude that the matters in the petition amount to acts requiring this Court to interpret the Constitution. This court is not merely asked to enforce rights. I therefore hold that the petitioners' petition at hand raises questions for constitutional interpretation as envisaged under Article 137(3) (b) of the Constitution and this Court as the Constitutional Court has jurisdiction to entertain the same. I accordingly so resolve issue one of the petition in the affirmative.

## **Issue Two**

On issue two, whether the decision of the Uganda Government to pay differently employees employed in Government, state statutory bodies and corporations as well as those by local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of

the Constitution, i have carefully considered the above cited Articles of the Constitution together with all the cited cases referred this Court.

I note that the petition did not address this Court on the other factors that are relevant and are normally considered in determining employees' salaries, such as level of qualification, seniority, quality of work as well as the actual level of salaries being paid to the different categories of employees in the Uganda Government various Departments, and those, in the state statutory bodies and/or corporations as well as the Local governments. The petition does not also address this Court on whether those other factors were uniform across the different employees employed in the Uganda Government, statutory bodies and/or corporations and Local governments doing the same work.

From the petitioners' submissions it is quite clear that the petitioners did not evaluate the employee's general competences as a whole but rather focused on the uniformity of the job description in the different Uganda Government, Local governments, statutory bodies and/or corporations, agencies and statutory bodies to infer discrimination.

In **Caroline Turyatemba and Others vs Attorney General and Others; Court of Appeal Constitutional petition No.15 of 2006**, Constitutional Court held, inter alia, that: -

***“To discriminate for purpose of Article 21 is to give different treatment to different persons attributable only or mainly to their respective description by sex, race, color, ethnic origin, tribe, creed***

***or birth, religion, social or economic standing, political opinion or disability”.***

This court was never addressed by the petitioner on whether the alleged discriminative salary payments in the Uganda Government institutions was based on any of the attributes as set out in Article 21 of the Constitution of the Republic of Uganda. This test on discrimination was also enunciated in a persuasive case of **Pioneer Food (Pty) Ltd vs Workers Against regression and Others (Case No.C687/15, 19 April 2016)**, where the labour law Court held that; *“Where discrimination is not made on the grounds e.g. race and gender etc., the claimant bears the burden of proof on the balance of probabilities that the conduct is not rational, amounts to unfair discrimination and is unfair”.*

In this petition, no evidence was adduced to prove that the Uganda Government employees paid different lower salaries to those, employees who possessed the same qualifications and competences to be entitled to an equal payment with the rest of the employees with higher salaries in state statutory bodies and/or corporations and/or Local governments and that the failure to accord them equal payment would qualify the conduct to be irrational and unfair discrimination.

To appreciate the fact that a difference in salaries of people doing the same work may not necessarily be born out of discrimination, i have carefully reviewed and considered the decision in the case of **Sun International Limited vs Commercial and Allied Workers Union (SACCAWU) and others (J1408/18) [2018] ZALCJHB 286(11)**. In this case the Court addressed the issue of unequal remuneration of

employees at the same level, who also occupy the same position in the same organization. ***The Court held that remuneration exists where there is the same work or work of equal value, the difference may be fair and justified based on the individual's respective seniority, length of service, their respective qualification, ability, competence or potential above the minimum acceptance level required for the performance of the job. Court accordingly found that although there was difference in remuneration, this was not due to race or gender and was justified by the market-related premium attached to the other employee's better experience and qualifications.***

Similarly, in **Enderby vs Frenchay Authority and Secretary of State for Health (27 October 1993) EOR52A**, the European Court of Justice held that the difference in pay for employees was okay as long as they showed that such difference was based on an objectively justified factor.

It has to be appreciated and emphasized that some of these Uganda Government agencies are either autonomous or semi-autonomous in status as a result of Acts of Parliament. Parliament in exercise of the power vested in it by Article 79 of the Constitution gives mandate to the Uganda Government to determine the remuneration of the Government employees as they relate to the departments and other Government bodies and entities. I therefore agree with the submission of Counsel for the respondent that some Uganda Government agencies are mandated by the law that establish them to independently determine their remuneration.

I therefore answer issue 2 in the negative.

### **Issue Three**

On the third issue, whether the Uganda Government's refusal to provide information for effective bargaining is inconsistent with and contravenes Articles 40(3) (b) and 41 of the Constitution, the right of access to information enshrined under Article 41 of the Constitution is among the fundamental human rights protected under Chapter Four of the Constitution. However, this Right is not among the absolute rights that are non derogable under Article 44 of the Constitution. In the case of **Akankwasa Damian v Uganda; Court of Appeal Constitutional Petition No.5 Of 2011**, this Court stated that some of these rights are absolute while others are subject to some limitation and qualifications. In my considered view, the right of Access to Information under Article 41 is not absolute and is subject to some limitations and qualifications.

I am also alive to the fact that the Access to Information Act, 2005, provides avenues for redress in case of denial of access. Thus Parliament enacted laws to give effect to this Article 41 and also established external mechanisms to enforce and encourage compliance on the part of the Uganda Government through Sections 16 (3) (c) and 18 of the Access to Information Act, 2005. Section 16 (3) (c) of the Access to Information Act, 2005 provides that;

**"The person may lodge an internal appeal or application with the court, as the case may be, against the refusal of the request and**



the procedure, including the period, for lodging the internal application or appeal as the case may be.”

Where there is total failure of issuance of a decision on request, Section 18 of the Access to Information Act, 2005 provides that;

“Where an information officer fails to give the decision on a request for access to the person concerned within the period contemplated under section 16, the information officer is, for the purpose of this Act, regarded as having refused the request”.

Section 37 of the Access to Information Act, 2005 becomes operational.

“A person may lodge a complaint with the Chief magistrate, against the decision of an information officer-

(a) To refuse a request for access; or

(b) Taken under section 17(1) or 20 (3), in relation to that person.”

Furthermore, where there is dissatisfaction with the decision of the Chief Magistrate, an appeal maybe lodged to the High Court under Section 38 of The **Access to Information Act, 2005**. From the facts leading to this petition as asserted by the petitioners, it is obvious that these external mechanisms established by law were never exhausted by the petitioner while the existence of such mechanisms per se is the bar to the petitioners from seeking from this Court an interpretation of a provision of the Constitutional affecting the Access to Information Act, 2005. I find, on the facts and the law presented, that the petitioners are not entitled to the prayer they are seeking.

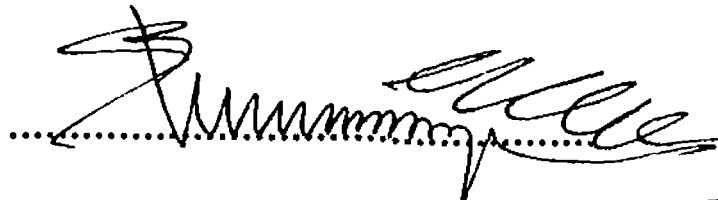
I therefore find issue 3 in the negative.

Accordingly, I decline to make any declarations and orders of redress prayed for by the petitioners. This Petition stands dismissed.

On the matter of costs of the petition, i have deemed this petition to be one of public interest, and in exercise of discretion, i find it appropriate to order that each party bears their own costs.

We so order.

**Dated at Kampala this.....<sup>4<sup>th</sup></sup>..... day of.....<sup>Feb</sup>.....2020**

A handwritten signature in black ink, appearing to read 'Remmy Kasule', written over a dotted line.

**HON. MR JUSTICE REMMY KASULE, Ag, JA**

**1. HASSAN LWABAYI MUDIBA**

**2. UGANDA LOCAL GOVERNMENT WORKERS UNION :::PETITIONERS**

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

**HON. MR JUSTICE REMMY KASULE, Ag. JA.**

## 1

- b) The Government refusal to provide information for effective bargaining is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution.
- c) The Government action of purporting to change terms of employment of its employees without appropriate consultation with the labour union is inconsistent and contravenes Article 40(2) (b) of the Constitution.

The facts giving rise to the petition are: -

- a) That main stream public servants including those in Local Government earn different salaries than those who are employed in statutory bodies and corporations.
- b) That the salaries of mainstream public servants are drawn from the Consolidated Fund and the salaries for employees in statutory corporations are drawn from money appropriated by Parliament.
- c) That in many instances, the employees in mainstream public service and employees in statutory bodies and corporations do equal work.

The petition is supported by an affidavit sworn by Hassan Lwabayi Mudiba, dated 4<sup>th</sup> June 2012. The respondent filed a reply to the petition, which is supported by an affidavit sworn by Peruth Nshemereirwe, a State Attorney, dated 9<sup>th</sup> July 2012.

### **Representation**

At the hearing of the petition, the petitioners were represented by learned counsel Joseph Luswata, while learned State Attorney Maureen Ijang was for the respondent.

### **Agreed issues.**

1. Whether the constitutional petition raises issues for constitutional interpretation.
2. Whether the decision of Government to pay differently employees employed in Government, statutory corporation and local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution.
3. Whether the Government refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40(2) (b) and 41 of the Constitution.

### **Submissions for the petitioners.**

On the first issue, whether the constitutional petition raises issues for constitutional interpretation, Counsel for the petitioners submitted that the petition raised issues for constitutional interpretation and referred court to the case of **Satya v Attorney General; Court of Appeal Constitution Petition No.36 of 2012**, where it was held that; ***“to move this Court under Article 137, the petitioner must allege that the matters put before the Constitutional Court require interpretation of the Constitution and must specify the articles of the Constitution violated or threatened to be violated. In the process, the Court may grant the redress as may be appropriate. Once those requirements are satisfied, the court has jurisdiction to entertain the matter presented before it by the petitioner, irrespective of***

***whether or not he or she may eventually succeed at the conclusion of the court's consideration of the petition".***

Counsel contended that in the instant petition, the act of the Government of Uganda remunerating employees of Government, statutory corporation and local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution. Further, that the refusal by the Government of Uganda to provide information for effective bargaining is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution. Therefore the said acts violate the provisions of the Constitution thus justifying the Constitutional interpretation by the Constitutional Court.

On the second issue, whether the decision of the Government of Uganda to pay differently employees employed in Government, Statutory Corporation and Local Governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of the Constitution, Petitioners' Counsel submitted that such paying differently was inconsistent with Article 21 of the Constitution of Uganda. The Article is to the effect that all persons are equal before and under the law in all spheres of political, economic, social, cultural life and in every other respect and shall enjoy equal protection of the law. Learned Counsel further contended that Article 40(1)(b) obliges the Government of Uganda to enact laws that ensure equal payment for equal work without discrimination but this was not the case as demonstrated by the evidence of different people doing the same work being paid differently.

On the third issue as to whether the Uganda Government's refusal to provide information for effective bargaining, is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution, learned Counsel contended that under Article 40(2) (b) of the Constitution, every worker has a right to collective bargaining and representation through his or her union and hence the need to have information relating to the conditional grants and other related matters by the Uganda Government. Therefore the withholding of such information by the Uganda Government upon lawful request by any citizen employee amounted to violation of Article 40(2)(b) of the Constitution.

Learned Counsel for the petitioners thus prayed this Court to grant the prayers stated in the petition and also award costs to the petitioners.

#### **Submissions for the respondent.**

On the first issue, learned Counsel for the respondent submitted that the petition raised no issues for constitutional interpretation and as such it ought to be struck out. Counsel referred this Court to the case of **Attorney General Vs Major General Tinyefunza, Constitutional Appeal No.1 of 1997**; where Justice Kanyeihamba JSC held that;

*".....there is a big difference between applying and enforcing the provision of the constitution and interpreting it. Whereas any court of law and tribunal with competent jurisdiction may be moved by litigants in ordinary suits, applications or motions to hear laws, under Article 137 only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the constitution with a right of appeal to this court as the*

*Appellate Court of last resort*” as the basis of his submission on the first issue.

On the second issue, Counsel for the respondent contended that the guiding principles in determining public officers’ salaries must conform with Article 21(2) of the Constitution. The considerations when determining the public officers’ salaries must be competence and requisite qualifications as well as experience, equitable treatment and pay not influenced by gender, sex, tribe, race, creed, religion, economic standing or personal circumstances of officers.

Learned Counsel also reasoned that the salary payable to the public officer is contractual to the extent that the terms of service, including the salary, is set out by the employer for a specific job description and prospective employee, who duly accepts the terms as set out in the appointment letter and the contract between them is legally binding. Counsel further maintained that the Constitution and the law governing Government institutions and statutory bodies provides for their autonomy or semi autonomy and mandate to independently determine their remuneration in compliance with **Article 163** of Constitution that require such bodies not to be under the direction or control of any person or authority.

On the third issue as to whether the Uganda Government’s refusal to provide information for effective bargaining is inconsistent with and contravenes Articles 40(2) (b) and 41 of the Constitution, learned respondent’s Counsel contended that this was not an issue of constitutional interpretation but for enforcement of a right. The



enforcement procedure of such a right is provided for under **Section 16(3) (c)** of the **Access to Information Act, 2005** that provides that; a person may lodge an internal appeal or an application with the court as the case may be against the refusal of the request to access the requested for information. The competent Court for such an application is the Magistrate's Court with a right of appeal to the High Court pursuant to **Sections 37 and 38** of the **Access to Information Act, 2005**.

Learned Counsel for the respondent prayed that this honourable court finds that the petitioners are not entitled to any declarations sought and as such the petition has to be dismissed with costs.

## **Decision**

### **Issue One**

The first issue is whether the petition raises any questions for constitutional interpretation under Article 137 of the Constitution.

Article 137 provides that;

(1) **Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court.**

(2) ...

(3) **A person who alleges that-**

**(a) An Act of Parliament or any other law or anything in or done under the authority of any law; or**

**(b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the constitutional court for a declaration to that effect, and for redress where appropriate.**

**(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).....”**

It is now a well settled position of the law that not every violation of a right provided for in the Constitution requires constitutional interpretation. For a petitioner to move this Court under Article 137, such a petitioner must allege that the matters put before the Constitutional Court require interpretation of the Constitution and must specify the articles of the Constitution violated or threatened to be violated. In the process of carrying out the interpretation of the Constitution, the court may, grant redress as may be appropriate; once those requirements are satisfied. The Constitutional Court has

jurisdiction to entertain the matter presented before it by such a petitioner, irrespective of whether or not he/she eventually succeeds at the conclusion of the Court's consideration of the Petition.

In **Phillip Karugaba vs. the Attorney General; Court of Appeal Constitutional Petition No. 11 of 2002**, this court held, inter alia:, -

"...It is necessary to internalize the jurisdiction of this court under Article 137 of the Constitution in order to decide whether Rule 15 is unconstitutional as alleged".

And in **Satya Peter Chapa Vs. The Attorney General; Court of Appeal Constitutional Petition No. 0036 of 2012**, this Court re-affirmed its own earlier decision in **Joyce Nakachwa Vs. The Attorney General and Two Others; Court of Appeal Constitutional Petition No. 2 of 2001** as to its jurisdiction under Article 137 to interpret the Constitution by stating that;

*"First we deal with the issue of jurisdiction. This Court has recently pronounced itself on this matter in the case of Alenyo Vs. The Attorney General and 2 others (supra) in which we followed the Supreme Court decisions in Serugo (supra) (Ismael Serugo vs Kampala City Council Constitutional Appeal No. 2 of 1998) and David Tinyefuza (supra) (A.G VS David Tinyefuza; Constitutional Appeal No. 1 of 1998). Which stated: -*

*"Article 137 (1) provides: Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.*

*The Constitution does not define the word “interpretation” However, Article 137 (3) gives a clear indication of what the word means. It states:*

*137. Questions as to the interpretation of the Constitution.*

*(3) A person who alleges that: -*

*(a) an Act of Parliament or any other law or anything in or done under the authority of any law, or*

*(b) any Act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.*

*We hold the view that the allegations made to the Constitutional Court, if they are in conformity with article 137(3), give rise to the interpretation of the Constitution and the Court has the jurisdiction to entertain them.*

*In the instant petition, the petitioner alleges that the Law Council is guilty of commissions and omissions, which are inconsistent with or in contravention of the Constitution. He has petitioned this court for a declaration to that effect. In our judgment these are the type of actions envisaged by Article 137 (3) (b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his right guaranteed by specified provisions of the Constitution and this*

*court should so declare. In order to do that the Court must determine meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of the exercise by the court is an interpretation of the Constitution. It is not an enforcement of rights and freedoms. The Court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is not relevant to the issue of jurisdiction. It is what the court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either, that there is a remedy available to the petition somewhere else. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by Article 137".*

In the instant petition, the petitioners allege that the fact that the main stream of public servants employed by the Uganda Government doing the same work including those in Local governments earn different salaries lower than those who are employed in State statutory bodies and Corporations, yet all their salaries are drawn from the Consolidated Fund appropriated by Parliament, is unconstitutional and they pray this court to grant the following declarations: -

- a) The Uganda Government policy or action whereby persons doing equal work in its various Government departments and those

employed in state statutory bodies and/or corporations are not remunerated in the same way is inconsistent with and contravenes Articles 20(2), 21(1) and 40(2)(b) of the Constitution.

- b) The Uganda Government refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40(2) (b) and 41 of the Constitution.
- c) The Uganda Government action of purporting to change terms of employment of its employees without appropriate consultation with the labour unions is inconsistent and contravenes Article 40(2) (b) of the Constitution.

In light of the position of the law as i have set it out herein above and the matters raised by the petitioners in the petition, I conclude that the matters in the petition amount to acts requiring this Court to interpret the Constitution. This court is not merely asked to enforce rights. I therefore hold that the petitioners' petition at hand raises questions for constitutional interpretation as envisaged under Article 137(3) (b) of the Constitution and this Court as the Constitutional Court has jurisdiction to entertain the same. I accordingly so resolve issue one of the petition in the affirmative.

## **Issue Two**

On issue two, whether the decision of the Uganda Government to pay differently employees employed in Government, state statutory bodies and corporations as well as those by local governments who are doing the same work is inconsistent with Articles 20(2), 21(1) and 40(1) (b) of

the Constitution, i have carefully considered the above cited Articles of the Constitution together with all the cited cases referred this Court.

I note that the petition did not address this Court on the other factors that are relevant and are normally considered in determining employees' salaries, such as level of qualification, seniority, quality of work as well as the actual level of salaries being paid to the different categories of employees in the Uganda Government various Departments, and those, in the state statutory bodies and/or corporations as well as the Local governments. The petition does not also address this Court on whether those other factors were uniform across the different employees employed in the Uganda Government, statutory bodies and/or corporations and Local governments doing the same work.

From the petitioners' submissions it is quite clear that the petitioners did not evaluate the employee's general competences as a whole but rather focused on the uniformity of the job description in the different Uganda Government, Local governments, statutory bodies and/or corporations, agencies and statutory bodies to infer discrimination.

In **Caroline Turyatemba and Others vs Attorney General and Others; Court of Appeal Constitutional petition No.15 of 2006**, Constitutional Court held, inter alia, that: -

***“To discriminate for purpose of Article 21 is to give different treatment to different persons attributable only or mainly to their respective description by sex, race, color, ethnic origin, tribe, creed***

***or birth, religion, social or economic standing, political opinion or disability”.***

This court was never addressed by the petitioner on whether the alleged discriminative salary payments in the Uganda Government institutions was based on any of the attributes as set out in Article 21 of the Constitution of the Republic of Uganda. This test on discrimination was also enunciated in a persuasive case of **Pioneer Food (Pty) Ltd vs Workers Against regression and Others (Case No.C687/15, 19 April 2016)**, where the labour law Court held that; *“Where discrimination is not made on the grounds e.g. race and gender etc., the claimant bears the burden of proof on the balance of probabilities that the conduct is not rational, amounts to unfair discrimination and is unfair”.*

In this petition, no evidence was adduced to prove that the Uganda Government employees paid different lower salaries to those, employees who possessed the same qualifications and competences to be entitled to an equal payment with the rest of the employees with higher salaries in state statutory bodies and/or corporations and/or Local governments and that the failure to accord them equal payment would qualify the conduct to be irrational and unfair discrimination.

To appreciate the fact that a difference in salaries of people doing the same work may not necessarily be born out of discrimination, i have carefully reviewed and considered the decision in the case of **Sun International Limited vs Commercial and Allied Workers Union (SACCAWU) and others (J1408/18) [2018] ZALCJHB 286(11)**. In this case the Court addressed the issue of unequal remuneration of



employees at the same level, who also occupy the same position in the same organization. ***The Court held that remuneration exists where there is the same work or work of equal value, the difference may be fair and justified based on the individual's respective seniority, length of service, their respective qualification, ability, competence or potential above the minimum acceptance level required for the performance of the job. Court accordingly found that although there was difference in remuneration, this was not due to race or gender and was justified by the market-related premium attached to the other employee's better experience and qualifications.***

Similarly, in **Enderby vs Frenchay Authority and Secretary of State for Health (27 October 1993) EOR52A**, the European Court of Justice held that the difference in pay for employees was okay as long as they showed that such difference was based on an objectively justified factor.

It has to be appreciated and emphasized that some of these Uganda Government agencies are either autonomous or semi-autonomous in status as a result of Acts of Parliament. Parliament in exercise of the power vested in it by Article 79 of the Constitution gives mandate to the Uganda Government to determine the remuneration of the Government employees as they relate to the departments and other Government bodies and entities. I therefore agree with the submission of Counsel for the respondent that some Uganda Government agencies are mandated by the law that establish them to independently determine their remuneration.

I therefore answer issue 2 in the negative.

### **Issue Three**

On the third issue, whether the Uganda Government's refusal to provide information for effective bargaining is inconsistent with and contravenes Articles 40(3) (b) and 41 of the Constitution, the right of access to information enshrined under Article 41 of the Constitution is among the fundamental human rights protected under Chapter Four of the Constitution. However, this Right is not among the absolute rights that are non derogable under Article 44 of the Constitution. In the case of **Akankwasa Damian v Uganda; Court of Appeal Constitutional Petition No.5 Of 2011**, this Court stated that some of these rights are absolute while others are subject to some limitation and qualifications. In my considered view, the right of Access to Information under Article 41 is not absolute and is subject to some limitations and qualifications.

I am also alive to the fact that the Access to Information Act, 2005, provides avenues for redress in case of denial of access. Thus Parliament enacted laws to give effect to this Article 41 and also established external mechanisms to enforce and encourage compliance on the part of the Uganda Government through Sections 16 (3) (c) and 18 of the Access to Information Act, 2005. Section 16 (3) (c) of the Access to Information Act, 2005 provides that;

**"The person may lodge an internal appeal or application with the court, as the case may be, against the refusal of the request and**

the procedure, including the period, for lodging the internal application or appeal as the case may be.”

Where there is total failure of issuance of a decision on request, Section 18 of the Access to Information Act, 2005 provides that;

“Where an information officer fails to give the decision on a request for access to the person concerned within the period contemplated under section 16, the information officer is, for the purpose of this Act, regarded as having refused the request”.

Section 37 of the Access to Information Act, 2005 becomes operational.

“A person may lodge a complaint with the Chief magistrate, against the decision of an information officer-

(a) To refuse a request for access; or

(b) Taken under section 17(1) or 20 (3), in relation to that person.”

Furthermore, where there is dissatisfaction with the decision of the Chief Magistrate, an appeal maybe lodged to the High Court under Section 38 of The **Access to Information Act, 2005**. From the facts leading to this petition as asserted by the petitioners, it is obvious that these external mechanisms established by law were never exhausted by the petitioner while the existence of such mechanisms per se is the bar to the petitioners from seeking from this Court an interpretation of a provision of the Constitutional affecting the Access to Information Act, 2005. I find, on the facts and the law presented, that the petitioners are not entitled to the prayer they are seeking.

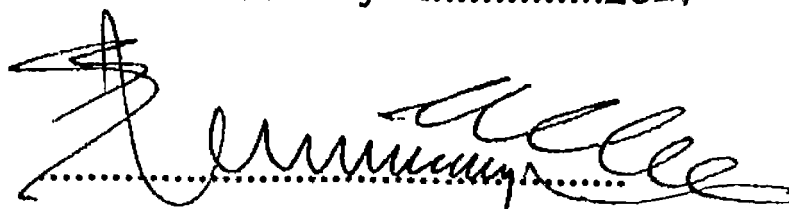
I therefore find issue 3 in the negative.

Accordingly, I decline to make any declarations and orders of redress prayed for by the petitioners. This Petition stands dismissed.

On the matter of costs of the petition, i have deemed this petition to be one of public interest, and in exercise of discretion, i find it appropriate to order that each party bears their own costs.

We so order.

**Dated at Kampala this.....<sup>11<sup>th</sup></sup>..... day of.....<sup>Feb</sup>.....2020**

A handwritten signature in black ink, appearing to read 'Remmy Kasule', written over a horizontal dotted line.

**HON. MR JUSTICE REMMY KASULE, Ag, JA**

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**  
**CONSTITUTIONAL PETITION NO. 25 OF 2012**

- 1. HASSAN LWABAYI MUDIBA**
- 2. UGANDA LOCAL GOVERNMENT WORKERS UNION.....PETITIONERS**

**VERSUS**

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

**CORAM: Hon. Mr. Justice Kenneth Kakuru, JA/JCC**

**Hon. Lady Justice Hellen Obura, JA/ JCC**

**Hon. Mr. Justice Stephen Musota, JA/JCC**

**➡ Hon. Mr. Justice Christopher Madrama, JA/JCC**

**Hon. Mr. Justice Remmy Kasule, Ag. JA/JCC**

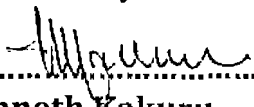
**JUDGMENT OF JUSTICE KENNETH KAKURU, JA/JCC**

I have had the benefit of reading in draft the Judgment of my learned brother Hon. Justice Remmy Kasule.

I agree with him that this petition ought to fail for the reasons he has ably set out in his Judgment.

I also agree with the orders he has proposed. As the majority of the members of the Court also agree, this petition stands dismissed with no order as to costs.

**Dated at Kampala** this .....<sup>4<sup>th</sup></sup>.....day of .....<sup>Feb</sup>..... 2020.

..........  
**Kenneth Kakuru**  
**JUSTICE OF APPEAL/CONSTITUTIONAL COURT**

**THE REPUBLIC OF UGANDA**  
**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

(Coram: Kakuru, Obura, Musota, Madrama & Kasule, JJCC)

**CONSTITUTIONAL PETITION NO. 25 OF 2012**

**1. HASSAN LWABAYI MUDIBA }  
2. UGANDA LOCAL GOVERNMENT WORKERS UNION}.....:PETITIONERS**

**VERSUS**

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

**JUDGMENT OF HELLEN OBURA, JA/JCC**

I have had the benefit of reading in draft the judgment of my learned brother, Hon. Justice Remmy Kasule in the above petition and that of my learned brother Hon. Justice Christopher Madrama, JA/JCC where he dissents on the 1<sup>st</sup> issue and concurs on the 2<sup>nd</sup> and 3<sup>rd</sup> issues.

As regards the 1<sup>st</sup> issue, I respectfully do not agree with the conclusion of my learned brother Hon. Justice Kasule that this Court has jurisdiction to entertain this petition. Rather, I entirely agree with the analysis and conclusion of my learned brother Hon. Justice Madrama, JA/JCC that this Court lacks jurisdiction to entertain this petition. This is because the petition does not show, on the face of it, that interpretation of a provision of the Constitution is required. It merely alleges in general terms that some Constitutional provisions have been violated but does not point out any question as to the interpretation of the Constitution as required under Article 137 (1) of the Constitution. For that reason, I would find this petition lacking and strike it out without necessarily considering the other two issues.

Be that as it may, since my learned brother has considered them, I feel obliged to give my position on them. I agree with Hon. Justice Kasule's analysis of the facts, findings and

conclusions on the 2<sup>nd</sup> and 3<sup>rd</sup> issues. I can only add for emphasis purpose that as regards the 2<sup>nd</sup> issue, the petitioner did not provide enough evidence upon which this Court could base its decision if it had jurisdiction to entertain the petition. The allegation of discrimination in salary payments were made in general terms without giving any basis of the alleged discrimination in relation to the Articles of the Constitution which was alleged to have been violated.

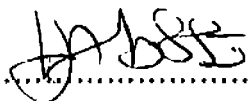
On the 3<sup>rd</sup> issue, it is clear that these are matters of enforcement of the rights alleged to have been violated and they do not raise any question as to the interpretation of the Constitution. In ***Ismail Serugo vs Kampala City Council & Attorney General Constitutional Appeal No. 2 of 1998*** which was an appeal against the decision of this Court that it did not have jurisdiction in the matter as the question of interpretation of the Constitution did not arise, the Supreme Court, upheld the decision of this Court. Wambuzi, CJ (as he then was) observed as follows;

*"Here the appellant alleges his rights were violated and claims compensation. One cannot rule out malicious prosecution, wrongful detention or false imprisonment. These are matters dealt with by specific laws. They can be enforced by a competent court and should a question of interpretation of a provision of the Constitution arise, the question can always be referred to the Constitutional Court."*

In the instant petition, the steps that one needs to take to access information and the procedure to be followed in the event that information is not provided are clearly spelt out under the Access to information Act, 2005 and as such, there was no need to bring this petition.

On the whole, I agree that this petition must fail with the proposed order as to costs.

Dated at Kampala this.....<sup>24<sup>th</sup></sup> day of.....<sup>Feb</sup>.....2021

..........

Hellen Obura

**JUSTICE OF APPEAL/CONSTITUTIONAL COURT**

5

**THE REPUBLIC OF UGANDA,**

**IN THE CONSTITUTIONAL COURT OF UGANDA AT KAMPALA**

**CONSTITUTIONAL PETITION NO 25 OF 2012**

**(CORAM: KAKURU, OBURA, MUSOTA, MADRAMA, KASULE, JJA)**

**1. HASSAN LWABAYI MUDIBA}**

10

**2. UGANDA LOCAL GOVERNMENT**

**WORKERS UNION} .....PETITIONERS**

**VERSUS**

**ATTORNEY GENERAL} .....RESPONDENT**

**JUDGMENT OF MADRAMA CHRISTOPHER, JCC/JA**

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I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Remmy Kasule, JCC/JA and I agree with his analysis of the facts and partly the resolution of the issue 2. I. with due respect, do not agree that the petition discloses a question as to interpretation of the Constitution in terms of Article 137 (1) of the <sup>Constitution</sup> petition and I also with due respect dissent

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from the finding that this court has jurisdiction where there are allegations that fulfil the requirements of Article 137 (3) of the Constitution. In the premises, I would give my reasons on the issue of jurisdiction and add a few words of my own on the second and third issue as hereunder.

**Issue 1:**

25

**Whether the Petition raises issues for Constitutional interpretation?**

The above question does not precisely reflect the controversy that this court is called on to resolve which is whether the Constitutional Court has the jurisdiction to handle the issues raised in the petition. The question of jurisdiction calls for analysis of whether the issues raised in the petition

30

disclose any question or questions as to interpretation of the Constitution. In



5 my judgment, where the court discusses whether there are any issues for  
"Constitutional interpretation", the controversy is not focused on Article 137  
(1) of the Constitution which is the only Article that is concerned with the  
jurisdiction of the Constitutional Court. I have held so before in **Hon.**  
**Ssekikubo Theodore (NRM) MP – Lwemiyaga County} and 10 Others v**  
10 **National Resistance Movement; Constitutional Petition No 09 of 2019,**  
and I have no basis for departing from that decision of the Court.

I will start with the averment in the petition itself and the agreed issues. My  
learned brother Hon. Justice Remmy Kasule JCC\JA set out the declarations  
sought by the Petitioner's in this petition as follows:

- 15 (a) The Government policy/action whereby persons doing equal work in  
its various departments and statutory Corporations are not  
remunerated in the same way is inconsistent with and contravenes  
Articles 20 (2), 21 (1) and 40 (2) (b) of the Constitution.
- (b) That Government refusal to provide information for effective  
20 bargaining is inconsistent with and contravenes Article 40 (2) (b) and  
41 of the Constitution.
- (c) The Government action of purporting to change terms of employment  
of its employees without appropriate consultation with the Labour  
unions is inconsistent and contravenes Article 40 (2) (b).

25 On the first issue as to whether there are any questions for Constitutional  
interpretation, my learned brother held that the Petitioner's petition at hand  
raises questions for Constitutional interpretation as envisaged under Article  
137 (3) (b) of the Constitution and this court has jurisdiction to entertain the  
same. I respectfully dissent from that conclusion on the ground that the  
30 jurisdiction of the Constitutional Court is conferred by Article 137 (1) of the  
Constitution while Article 137 (3) of the Constitution sets out the elements of  
a cause of action. It has been held that to have a competent petition, it must

5 have both elements namely, it must show that the Constitutional Court has jurisdiction in the matter and this is in terms of Article 137 (1) of the Constitution and secondly, that the petition itself discloses a cause of action and this is in terms of Article 137 (3) of the Constitution.

10 A petition brought by virtue of Article 137 of the Constitution must fulfil the criteria set up under the two clauses thereof namely, Article 137 (1) of the Constitution which confers exclusive jurisdiction on the Constitutional Court to determine "any questions as to interpretation of the Constitution" and that under Article 137 (3) of the Constitution which requires the petition to aver the inconsistency of the act or omission or law with a provision of the  
15 Constitution. Article 137 (1) of the Constitution confers exclusive jurisdiction on the Court of Appeal sitting as the Constitutional Court to determine any question as to interpretation of the Constitution. It provides that:

(1) Any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

20 Further, Article 137 (3) provides that:

(3) A person who alleges that –

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

25 (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.

Paragraph (a) deals with a challenge to an Act of Parliament or any other law or anything in or done under the authority of any law. Paragraph (b) deals with any act of omission by any person or authority which is alleged to be  
30 inconsistent with or in contravention of a provision of the Constitution.

In **Ismail Serugo v Kampala City Council & Attorney General; Constitutional Appeal No. 2 of 1998**, Prof. Kanyeihamba JSC held that the

5 issue of whether the Constitutional Court has jurisdiction should be distinguished from that of whether the petition discloses a cause of action. Prof Kanyeihamba JSC stated that:

10 However, I am constrained to comment very briefly on some other issues raised by the pleadings in this appeal. In my opinion, the question of cause of action must be distinguished from the matter of jurisdiction. A court may have jurisdiction while the plaintiff lacks a cause or a reasonable cause of action and vice –versa. In other words, a Plaintiff may have a perfectly legitimate and reasonable cause but the court before which the plaintiff is filed lack jurisdiction, just as the court may have jurisdiction but the litigant before it lack a cause of action.

15 Further, Wambuzi CJ stated that it is not sufficient to allege inconsistency of a law, act or omission with a provision of the Constitution. The petition must further show that there is a question as to interpretation of the Constitution. Wambuzi CJ held that:

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

25 This court followed the above decision in **Hon. Ssekikubo Theodore (NRM) MP – Lwemiyaga County} and 10 Others v National Resistance Movement; Constitutional Petition No 09 of 2019**; where it applied the definition of the word *interpretation* from **Black’s Law Dictionary 8<sup>th</sup> Edition** and set out the phrase in Article 137 (1) of the Constitution “*any question as to the interpretation of this Constitution*” and resolved what it means. It was held *inter alia* that:

30 The word *question* in Article 137 (1) means the existence of a doubt about the meaning, scope, purpose, ambit etc. or a dispute or controversy about the meaning of an Article or Articles or their application in terms of scope, ambit etc. in short it means *a controversy as to interpretation*.

5 The **Black's Law Dictionary 8<sup>th</sup> Edition** *inter alia* states what the word interpretation means in defining "construction" that:

The act or process of interpreting or explaining the sense or intention of a writing; the ascertainment of a document's meaning in accordance with judicial standards...

10 Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws 1 (1896)

"Some authors have attempted to introduce a distinction between 'interpretation' and 'construction.' Etymologically there is, perhaps, such a distinction; but it has not been accepted by the profession. For practical  
15 purposes, any such distinction may be ignored, in view of the real object of both interpretation and construction, which is merely to ascertain the meaning and will of the lawmaking body, in order that it may be enforced."  
William M Life et al Brief Making and the Use of Law Books 337 (3d ed. 1914)

20 "... There is no explanation of the distinction between interpretation and construction [in Blackstone's], nor can it be inferred from the matters dealt away under each head. The distinction is drawn in some modern works, but it is not taken in this book because it lacks an agreed basis. Some writers treat interpretation as something which is only called for when there is a dispute about the meaning of statutory words, while speaking of  
25 construction as a process to which all statutes, like all other writings, are necessarily subject when read by anyone. Others treat interpretation as something which is mainly concerned with the meaning of statutory words, while regarding construction as a process which mainly relates to the ascertainment of the intention of legislature." Rupert Cross, Statutory  
30 Interpretation 18 (1976).

In my determination the phrase "*any question as to interpretation of this Constitution*" means that there is a dispute or controversy as to interpretation of the Constitution. Where there is no dispute as to the meaning of the statutory words or expressions used in the Constitution itself,  
35 there is no question or controversy as to interpretation of the Constitution.

5 In which case the matter would call for enforcement only and the High Court has jurisdiction to interpret the Constitution to ascertain the meaning of statutory words and enforce them. It is only where there is a question as to the interpretation of the Constitution that the matter is referred to the Constitutional Court to resolve the dispute or question or controversy as to interpretation. The Constitutional Court is a special court with exclusive jurisdiction to determine any controversy as to interpretation of the Constitution. That question or controversy as to interpretation of the Constitution must be stated. It is therefore not enough to allege that there is an act or omission of any person or authority that contravenes or is inconsistent with a provision of the Constitution. It must in addition be shown that there is a substantial question or dispute as to interpretation of the Constitution.

I further find the use of the phrase *a question for Constitutional interpretation* does not wholly represent the intention of legislature in enacting Article 137 (1) of the Constitution. Article 137 (1) of the Constitution is clear that there has to be "*any question as to the interpretation of the Constitution*" the words "*any question*" should be interpreted to mean any issue, controversy or dispute as to the interpretation of the Constitution. Where there is no dispute as to the interpretation of the Constitution or any question or controversy as to interpretation of the Constitution, the Constitutional Court lacks jurisdiction and the matter should go for enforcement of the Constitution by the High Court or any other competent court or tribunal.

A Constitutional petition comprises of a petition that is supported by affidavit evidence and therefore the question of whether there is any dispute as to interpretation of the Constitution does not have to be determined upon a perusal of the petition only but can be determined upon perusal of the petition as well as the supporting evidence. However, the question of

5 whether there is a cause of action can be determined upon perusal of the  
petition in terms of Article 137 (3) which requires the petition to allege  
whether an Act of Parliament or any other law or anything in or done under  
the authority of any law or whether any act or omission of any person or  
authority, is inconsistent with or in contravention of a provision of the  
10 Constitution. In this petition, the Petitioner alleges that there is an act or  
omission by any person or authority which is inconsistent with or in  
contravention of a provision of the Constitution. The fact that the Petitioner  
has alleged certain acts or omission of the Government as being inconsistent  
with any provision of the Constitution is not in dispute and therefore there is  
15 a cause of action which has been disclosed. What is not disclosed is whether  
there is any dispute or controversy as to interpretation of the Constitution in  
terms of Article 137 (1) of the Constitution. In the premises, one of the  
essential elements for this court to determine the petition on the merits,  
namely the element of jurisdiction, has not been satisfied and therefore the  
20 petition lacks merit and I would hold that it may be struck out on that basis  
or the issue of jurisdiction determined after considering the merits and the  
petition dismissed on the ground that it is not maintainable.

**Issue 2: Whether the decision of Government to pay differently  
employees employed in Government or statutory corporations and local  
25 governments who are doing the same work is inconsistent with Article  
20 (2), 21 (1) and (40 (1) (b) of the Constitution.**

Notwithstanding the issue of jurisdiction, I would add a few words on the  
resolution of the second issue while in agreement with my learned brother  
Hon. Justice Remmy Kasule, JCC\JA that there are insufficient facts for the  
30 court to determine the second issue.

I wish to state generally that Article 20 (2) provides that the rights and  
freedoms of individuals and groups enshrined in chapter four of the  
Constitution shall be respected, upheld and promoted by all organs and

5 agencies of government and by all persons. Where the rights have not been  
upheld or respected, then it is incumbent upon the Petitioners to specify  
which rights have not been upheld, respected or promoted. Any person  
aggrieved thereby has a right to apply to the Human Rights Commission  
under Article 52 to investigate the violation of human rights or failure to  
10 uphold the rights and freedoms enshrined in the Constitution. The Human  
Rights Commission has the right and capacity to investigate whether any  
agencies of government are not upholding or protecting human rights and  
freedoms enshrined in the Constitution. This would enable the Petitioners  
obtain the relevant material facts. Is it government policy? Who were the  
15 decision-makers etc. who acted or omitted to act, should be stated instead  
of filing an extraordinarily general petition which does not specify material  
facts and circumstances. Article 52 of the Constitution provides that;

52. Functions of the Human Rights Commission.

(1) The commission shall have the following functions—

- 20 (a) to investigate, at its own initiative or on a complaint made by any person or  
group of persons against the violation of any human right;
- (b) to visit jails, prisons, and places of detention or related facilities with a view to  
assessing and inspecting conditions of the inmates and make recommendations;
- 25 (c) to establish a continuing programme of research, education and information to  
enhance respect of human rights;
- (d) to recommend to Parliament effective measures to promote human rights,  
including provision of compensation to victims of violations of human rights or  
their families;
- 30 (e) to create and sustain within society the awareness of the provisions of this  
Constitution as the fundamental law of the people of Uganda;
- (f) to educate and encourage the public to defend this Constitution at all times  
against all forms of abuse and violation;

- 5 (g) to formulate, implement and oversee programmes intended to inculcate in the citizens of Uganda awareness of their civic responsibilities and an appreciation of their rights and obligations as free people;
- (h) to monitor the Government's compliance with international treaty and convention obligations on human rights; and
- 10 (i) to perform such other functions as may be provided by law.
- (2) The Uganda Human Rights Commission shall publish periodic reports on its findings and submit annual reports to Parliament on the state of human rights and freedoms in the country.
- 15 (3) In the performance of its functions, the Uganda Human Rights Commission shall—
- (a) establish its operational guidelines and rules of procedure;
- (b) request the assistance of any department, bureau, office, agency or person in the performance of its functions; and
- (c) observe the rules of natural justice.
- 20 I would highlight the fact that under Article 52 (1) (a), the Human Rights Commission may investigate specific violations of human rights. Secondly, under Article 52 (1) (d), the Human Rights Commission may recommend to Parliament effective measures to promote human rights. In other words, the Human Rights Commission is best placed to recommend to Parliament
- 5 effective measures for the upholding and protecting of human rights and freedoms as stipulated in Article 20 (2) of the Constitution. Further, Article 52 (2) makes it an obligation on the Human Rights Commission to submit to Parliament periodic reports on the state of human rights and freedoms in the country. The mammoth allegations in the petition about salary structures and
- 30 inequality are matters that should be of concern to the Human Rights Commission.



5 In any case, an action can be filed for the enforcement of a fundamental or  
other rights guaranteed in the Constitution under Article 50 before a court  
of competent jurisdiction. Article 20 (2) of the Constitution creates an  
obligation on all organs and agencies of government and all persons to  
respect, uphold and promote the rights and freedoms of the individual and  
10 groups enshrined in the Bill of rights found in chapter 4 of the Constitution.  
It does not on its own stipulate what those rights and freedoms are. It is  
similar to Article 2 of the Constitution which provides for the supremacy of  
the Constitution and stipulates that any law or custom which is inconsistent  
with any of the provisions of this Constitution is inconsistent to the extent of  
15 the inconsistency. All rights are enforceable and do not per se, where they  
have not been upheld by any organs of the government, lead to or disclose  
a question or dispute as to interpretation of the Constitution and which  
question can only be resolved by the Constitutional Court. It is sufficient to  
sue for the enforcement of the alleged right or freedom which has been  
20 threatened or infringed by a court or tribunal of competent jurisdiction.

On the question of inconsistency with Article 21 (1) of the Constitution in  
terms of the different remuneration packages of different employers, I note  
that there is an omnibus allegation against the Government as represented  
by the Attorney General which seems to be bundled together with  
25 allegations against local government. However, the second Petitioner by  
definition and description is the Uganda Local Government Workers Union  
and presumably represents only workers employed by the local  
governments. Secondly, the first Petitioner is the General Secretary of the  
second Petitioner and a member of the Central Executive Committee of the  
30 Central Organisations of Free Trade Unions. The latter organisation is made  
of 23 labour unions including 4 which represent workers from the public  
service such as the second Petitioner, the Uganda Medical Workers Union,  
the Uganda Scientists and Researchers and Allied Workers Union and the  
Uganda Nurses, Midwives and Allied Workers Union. It is stated to be a

5 registered entity but has not filed an action and only a member of the executive committee thereof did it in his capacity. In this petition we cannot determine whether he has authority to commence such an action on behalf of all government employees in the Public Service, and Local Government civil service. Paragraph 1 of the petition alleges that:

- 10 (a) The discrimination in remuneration of Employees doing the same work where the remuneration package is drawn from the Consolidated Fund and from monies directly appropriated by Parliament contravenes and is inconsistent with Articles 20 (2), 21 (1) and 40 (1) (b) of the Constitution.
- (b) The refusal by Government to provide information necessary for effective collective bargaining is inconsistent with and contravenes Article 40 (2) (b) of the Constitution.
- (c) The decision by Government to change terms of employment for its workers without consultation with the responsible labour unions is  
20 inconsistent and contravenes Article 40 (2) (b) of the Constitution.

In the facts in support of the petition, the Petitioner alleges that the mainstream public servants including those in local government earn different salaries than those who are employed in statutory bodies and corporations. Secondly, that the salaries of mainstream public servants are  
25 drawn from the Consolidated Fund and the salaries for employees in statutory corporations is drawn from money appropriated by Parliament. Thirdly, that in many instances, the employees in mainstream public service and employees in Statutory bodies and corporations do equal work as demonstrated in a tabulated form in the petition. The Petitioner sets out the  
30 different offices showing disparity in remuneration of various categories of employees. These include employees who are employed by; the Uganda Government, the Inspector General of Government, the Bank of Uganda, the

5 office of the Auditor General, the EALA. (EALA) was abbreviated but the full names of the institution or entity was not stated. Is it the East African Legislative Authority?

As noted above I agree that there are insufficient facts to determine anything in terms of unequal remuneration in violation of the above cited Articles of the Constitution. First of all, local government Administration is not treated  
10 the same way as the central government administration due to the decentralisation policy enshrined in the Constitution. Suffice it to note that Article 257 of the Constitution in paragraph (l) defines "Government" to mean the Government of Uganda. On the other hand, it defines "local  
15 government Council" in Article 257 (r) to mean a council referred to in Article 180 of the Constitution. Article 180 in turn sets up local governments which shall be based on a Council which is the highest political authority within the area of jurisdiction with legislative and executive powers to be exercised in accordance with the Constitution. Article 176 of the Constitution establishes  
20 the local government system and provides that local governments shall be based on the district as a unit under which shall be the local governments and administrative units as Parliament may by law provide. It further decentralises functions, powers and responsibilities formerly in the central government to local government units. Particularly Article 176 (2) (f) provides  
25 that persons in the service of local governments shall be employed by the local governments.

Further Article 198 of the Constitution establishes the District Service Commissions which are responsible *inter alia* under Article 200 (2) to determine the terms and conditions of service of local government staff and  
30 to confirm those prescribed by the public service commission for the public service generally. They also exercise disciplinary control. Terms and conditions of service for local government are governed by guidelines to be followed as prescribed by Parliament under Article 204 of the Constitution.

5 The petition itself alleges that it is brought under Article 137 (3) (a) of the  
Constitution and challenges an act or omission of Government. It is not clear  
whether it is the act or omission of the central government or a local  
government. Secondly, it has not specified or attached any guidelines or  
policies. It is not clear whether there is a single act of an organ or agent of  
10 the government or a person employed by the local government or by the  
central government. If remuneration is based on a discriminatory law, that  
law has to be set out. Secondly, there is a clear distinction between the  
central government and local government.

When it comes to the Inspectorate of Government, Article 227 of the  
15 Constitution provides that the Inspectorate of Government shall be  
independent in the performance of its functions and shall not be subject to  
the direction or control of any person or authority and shall only be  
responsible to Parliament. Further Article 229 (1) of the Constitution provides  
that the Inspectorate of Government shall have an independent budget  
20 appropriated by Parliament and controlled by the Inspectorate. Secondly, in  
Article 229 (2) it is the duty of the State to facilitate the employment by the  
Inspectorate of such adequate and qualified staff as are needed to enable  
the Inspectorate to perform its functions effectively and efficiently.  
Parliament is required to enact a law to give effect to the powers and  
25 functions of the Inspectorate of Government under Article 232 of the  
Constitution. Being an independent agency, it is entitled to determine the  
kind of staff and remuneration that staff would have.

Similarly, the Central Bank or Bank of Uganda is a Corporation under Article  
161 of the Constitution and the authority of the bank vests in the board which  
30 shall consist of the governor, the deputy governor and not more than 5  
members. Article 162 (2) of the Constitution provides that in performing its  
functions, the bank of Uganda shall conform to the Constitution and shall  
not be subject to the direction or control of any person or authority.

5 As far as the Auditor General is concerned, Article 163 (6) of the Constitution provides that in the performance of his or her functions, the Auditor General shall not be under the direction or control of any person or authority. In Article 163 (8) it is provided that the salary and allowances payable to the Auditor General shall be charged on the Consolidated Fund. Article 163 (17)  
10 provides that Parliament shall make laws to regulate and facilitate the performance of the functions of the Auditor General. No such law has been mentioned in this petition.

Before taking leave of the matter, Article 21 (1) of the Constitution provides that all persons are equal before and under the law in all spheres of political,  
15 economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

Article 21 (1) of the Constitution is concerned with equality before and under the law. In the absence of evidence or a citation of the policy or the law which does not treat persons equally before and under the law in their  
20 remuneration, the petition does not disclose the necessary facts. Moreover, Article 21 (2) forbids discrimination on grounds of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability. Where is the Act that discriminates against anybody on the grounds of their sex, race, colour, ethnic origin, tribe, birth, creed or  
25 religion, social or economic standing, political opinion or disability? Moreover, the envisaged discrimination should be in a law or policy. Which law has Parliament prescribed for instance for the remuneration of the Auditor General? Which law has Parliament enacted for the remuneration of the Inspector General of Government? What of the guidelines for local  
30 governments? As said above such a mammoth allegation cannot be considered without the particulars. It is not sufficient to state the amount of money a particular person gets for a particular office and compare it to that of another person in another sector of employment in the public service

5 without considering the legal framework to enable the court determine whether there is any inequality before or under the law.

In any case, discrimination is a very relative concept and the context of that discrimination is material for purposes of considering violation of Article 21. Moreover, Article 21 (4) provides that the prohibition in article 21 shall not  
10 prevent Parliament from enacting 'discriminatory' laws that are necessary in terms of Article 21 (4) if it is authorised to be made under the Constitution or what is acceptable and demonstrably justified in a free and Democratic society.

I considered in more detail precedents on equality before and under the law  
in **Hon. Issa Kikungwe and Ken Lukyamuzi v Attorney General; Constitutional Petition No. 30 of 2006** and do not have to repeat them here. Suffice it to summarize relevant principles applicable to a claim of infringement of Article 21 of the Constitution that is material to the current petition.

20 Article 21 of the Constitution as indicated in the head note to the Article is about "Equality and freedom from discrimination." It provides that:

**21. Equality and freedom from discrimination.**

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

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

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

5 (4) Nothing in this Article shall prevent Parliament from enacting laws that are necessary for—

(a) implementing policies and programmes aimed at redressing social, economic, educational or other imbalance in society; or

10 (b) making such provision as is required or authorised to be made under this Constitution; or

(c) providing for any matter acceptable and demonstrably justified in a free and democratic society.

(5) Nothing shall be taken to be inconsistent with this Article which is allowed to be done under any provision of this Constitution.

15 Article 21 (1) declares that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law. What is equal protection of law? The second element concerns freedom from discrimination. All persons are supposed to be treated equally by the law in all spheres of  
20 political, economic, social and cultural life and in every other respect and it is a material factor to make reference to the law alleged to treat people unequally. In this petition there is no such focus or averment of the law or policy that is being challenged for inconsistency.

To enjoy equal protection of the law, there has to be a law other than Article  
25 21 which confers on persons' equal treatment or benefit. Secondly, Article 21 (2) of the Constitution forbids discrimination against any person on the ground of sex, race, colour, ethnic origin, birth, creed or religion, social or economic standings, political opinion or disability. The question is whether the petition discloses that any person or identifiable category of persons has  
30 or have been discriminated against on the enumerated grounds above. In this petition there is no allegation or evidence whatsoever that any person or identifiable group of persons has or have been discriminated against in remuneration on the grounds of sex, race, colour, ethnic origin, birth, creed

5 or religion, social or economic standings, political opinion or disability. There  
is no issue on what "*social or economic standing*" means. For instance, an  
action alleging discrimination on the enumerated or analogous grounds  
would state that for instance, they are receiving lower pay than another  
comparable category on the grounds of sex, race, colour, ethnic origin, birth,  
10 creed or religion, social or economic standings, political opinion or disability  
or any analogous grounds. In the absence of such averments, there is no  
basis for stating that an Article 21 (2) freedom from discrimination rights,  
rights or benefits under the law have been infringed. In fact, the petition does  
not fulfil the requirement for disclosure of a cause of action under Article 137  
15 (3) of the Constitution which I set out at the beginning of this judgment.

Last but not least on the issue of Article 21, the Constitution conveniently  
defines the term discriminate and provides in Article 21 (3) of the  
Constitution that the expression "discriminate" means to give different  
treatment to different persons *attributable only or mainly* to their respective  
20 descriptions by sex, race, colour, ethnic origin, crime, birth, creed or religion,  
social or economic standings, political opinion or disability. The different  
treatment or discriminatory practice has to be attributable only or mainly to  
the defined classification or analogous grounds. In this petition there is no  
averment that different payment for the same kind of work was a  
25 discrimination attributable only or mainly to the respective descriptions of  
the persons represented by the Petitioner in terms of their sex, race, colour,  
ethnic origin, crime, birth, creed or religion, social or economic standings,  
political opinion or disability.

### **Article 40 rights**

30 Article 40 (1) provides that Parliament shall enact laws – (a) to provide for the  
right of persons to work under satisfactory, safe and healthy conditions. And  
(b) to ensure equal payment for equal work without discrimination and  
thirdly in (c) to ensure that every worker is accorded rest and reasonable



5 working hours and periods of holidays with pay, as well as remuneration for public holidays.

Article 40 deals with economic rights and imposes a duty on Parliament to enact laws to provide for those rights. The Petitioners are not alleging that Parliament has not enacted a law to ensure rights to equal payment for equal  
10 work without discrimination. There is presumably a legal framework for payments of employees of the Bank of Uganda, Inspectorate of Government, Local Government, Auditor General and Public Service. The implementation of the law itself is not the concern of Article 40. Article 40 commands Parliament to enact laws to provide for equal pay for equal work without  
15 discrimination. It is not indicated in the petition anywhere that Parliament has not fulfilled its duties.

**Issue 3: Whether the Government refusal to provide information for effective bargaining is inconsistent with and contravenes Article 40 (2) (b) and 41 of the Constitution.**

20 The last aspect of the petition concerns the right of access to information in the hands of the State. In terms of Article 41 of the Constitution, it is provided that every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state  
25 or interfere with the right to the privacy of any other person. Particularly Article 41 (2) provides that Parliament shall make laws prescribing the classes of information referred to in the Article and the procedure for obtaining access to that information.

In the facts and circumstances of this petition, the Petitioner had used a letter  
30 addressed to the Permanent Secretary/Secretary to the Treasury seeking information on wages and nonwage recurrent expenditure for government ministries and district local governments for the period 2006/2007,

5 2007/2008 and 2008/2009. For ease of reference, I will quote the letter as hereunder:

"The National Union of Local Government Workers (Nalugo) is a registered National Trade Union Organisation representing and organising workers in local governments among other organisations in Uganda.

10 This Union is undertaking a research study on whether the workers' remuneration and incentive packages could be a factor among others that affect performance adversely. The findings, opinions and recommendations to be forwarded to the government for appropriate action and will also form a basis for negotiations between the Union and the Government to start shortly.

15 The purpose of writing to you is to request you for information regarding the breakdown of wages both for conditional and unconditional grants together with the number of workers per each category and nonwage recurrent expenditures i.e. training, allowances, travel expenses, entertainment, etc. and also salary and pension arrears for the districts and government ministries/departments for the  
20 period 2006/2007, 2007/2008 and 2008/2009.

Looking forward to enjoying your cooperation

Most Obligated

Lwabayi Mudiba Hassan

GENERAL SECRETARY."

25 The letter was received by the office of the Permanent Secretary on 11<sup>th</sup> of July, 2008. This petition was filed in this court on 8<sup>th</sup> June, 2012 about 4 years later and it seeks *inter alia* a declaration that the government refusal to provide information for effective collective bargaining is inconsistent with and contravenes Article 40 (2) (b) and Article 41 of the Constitution. There is  
30 no indication whatsoever whether the Petitioners ever tried to get information under the Access to Information Act 2005. This is the relevant law enacted by Parliament under Article 41 (1) of the Constitution. Particularly, section 3 (b) of the Access to Information Act, 2005 provides that

5 the purpose of the Act, is to give effect to Article 41 of the Constitution.  
Secondly, section 11 provides for the form of the request for information in  
the hands of the state. Further section 37 of the Act provides for applications  
which may be made to the court upon refusal to provide the information and  
the Act further provides for rights of appeal against the decision of the trial  
10 court.

The Petitioners have not demonstrated that they have taken all steps under  
the Access to Information Act 2005 to obtain the required information. In any  
case, the Petitioners grievance falls merely under a matter of enforcement of  
the Access to Information Act and not in the category of matters involving  
15 any question as to interpretation of the Constitution. In the premises, even  
the part of the petition alleging infringement of Article 41 of the Constitution  
is incompetent.

In the premises, I concur with the conclusion of my learned brother Hon.  
Justice Remmy Kasule, JCC/JA that the Petitioners petition lacks merit. I  
20 would however order that the petition be dismissed for want of jurisdiction  
of the Constitutional Court.

In the final analysis, I agree that the petition fails with the orders as to costs  
proposed by my learned brother and I have nothing more to add.

Dated at Kampala the \_\_\_\_\_ day of December 2020

25   
**Christopher Madrama**

**Justice of Constitutional Court/Court of Appeal**